CHAPTER VIII

PROBLEMS OF THE AD HOC ARBITRATOR*

I. LIMITS TO ACCOMMODATION

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I would like to discuss a general problem of *ad hoc* arbitrators which cuts across procedural, practical, substantive, and ethical lines. What I have in mind occurs when the parties are doing what you prefer they not do in a situation where you have a choice either to stop them or to permit them to continue. I have called this problem "Limits to Accommodation" and perhaps the easiest example of what I am talking about is that you do not accommodate to disorder. No one, not even the parties who are at the time being disorderly, will argue that you do not have the right to demand proper decorum.

May I say preliminarily that this matter of accommodation has two main aspects, two aspects which are interrelated and function side by side in varying degrees: First, there is the role of the arbitrator vis-a-vis what the parties are doing within the context of the arbitration itself. This first aspect involves relatively objective considerations. Second, there is the arbitrator's personal role and his needs as an arbitrator and as a person, and what is going on in the arbitration as such is secondary to that role. This second aspect, with which I will deal briefly later on, obviously involves more subjective considerations.

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Ad Hoc Arbitrator's Relation to Parties

When we focus on the arbitration itself rather than on the arbitrator as such, we have two absolutes as the two outside limits. On one extreme there is the absolutely "non-accommodating" arbitrator who does not permit any deviation from his own system in conducting a hearing as compared to the so-called absolutely "passive" arbitrator who never interferes with his parties, never asks a question, and is never through with the hearing until the parties themselves decide they are finished. The focus here today is not on these two absolutes but rather on some of the questions which can be asked when we look at the alternatives between these two extremes.

We know, for example, that sometimes one counsel is an extremely talented fellow while the other is less than mediocre. One view, and a perfectly workable view in many if not most situations, is to regard this difference in skill as simply one of "the conditions which prevail" and that the arbitrator should take the "conditions as they are." But then what happens (to take an extreme case for purposes of illustration) is that we come upon the situation where our talented counsel is seriously confounding a witness, let us say, on his interpretation of contract language, and the witness is giving testimony exactly opposite to that which he would give were he not so confused. And let us say that these distortions are being reproduced in the record without objection from his adversary, a man of relatively little talent.

Under these circumstances should the arbitrator take the "conditions as they are," or should he step in to clear up the confusion? If he does so, upon what basis does he then reconcile that approach with the objective reality that he is not some kind of superprotector in an otherwise adult world, and with the general and working proposition that the parties have the right to try the case as they see fit.

We have all seen witnesses unrelentingly badgered by extremely dogged counsel but where nothing improper has taken place from a technical standpoint; or we have had a witness whose vocabulary is so limited that his answers hardly seem to reflect his understanding. Should the arbitrator justify his intervention on the basis that he is the one who is ultimately responsible for a

complete, fair, and accurate record, and if so, does he thereby commit himself to balancing out the skills of the parties or that of their witnesses so long as a difference in talent occurs? And yet one of the greatest fears of the disputants, particularly the losing party, is that the arbitrator will turn out to be a bull in a china shop. Whether it is in the conduct of the hearing or in the decision itself, an arbitrator who does not have sensitive antennae about the area of mutual expectancies of the parties, even if these expectancies are irreconcilable, will probably be led to deal mechanically with matters of accommodation. If this is the case, the chance of his coming up with the "right" answer, a result to which the parties are certainly entitled, is considerably reduced. Moreover, when we say "right" answer, do we mean the answer that the parties in fact expect or do we mean the answer that they should reasonably expect? In terms of accommodation, obviously it makes a great difference into which framework we put this goal of the "right" answer.

Problem of the "Unwritten" Record

Then, of course, there is the problem which I would identify as that of the "unwritten record," the "non-record." Alongside the evidence which is being produced, we all have had the experience of being very conscious of what is not being testified to or not being argued or not being introduced into the record. Sometimes that unwritten record is the most significant part of the "record" in the case. For example, counsel is cross-examining a hostile witness and stops short of his final thrust; one or both of the parties choose to base their case on what seems to the arbitrator to be an ancillary basis and not on what is obviously the main fount of the situation; large gaping holes are left open when certain witnesses, who are available and who could have filled these holes, are not called upon to testify and no explanation is given of why they were not produced. All of this is certainly significant.

Should the arbitrator open up this uncovered or hidden area by inquiring as to why those witnesses were not produced? Should he go further and require that they be produced? Or should he remain silent? Later in evaluating the case and coming to his decision, does he in any degree merge the written with the unwritten record? Perhaps the approach to take is to decide what kind of

a hidden record it is, that is to say, is the record truly hidden and are the parties hiding it or is it rather that they do not have sense enough to bring the complete record out into the open? Or is it perhaps that a distinction ought to be made between those situations where credibility is in issue or where the dispute involves a discharge as contrasted to a dispute involving contract interpretation? Or should the arbitrator say to himself that the parties have a right to have him decide their case only in the form and only on the basis that it has been put before him and that anything they have chosen not to put before him should play no part in his determination?

It is realistic to ask if it is truly possible to keep the two records separate, even if one should want to do so, particularly where the decision is an extremely important one to the parties and a very close one to boot. Does the fact that though the union or the company could have called a witness and did not, influence the arbitrator in evaluating the credibility of the totality of testimony which they actually produced or in assessing whether the burden of proof was satisfactorily met? Is he conforming to the "conditions which prevail" when he gives any value to the "unwritten record" as well as the "written record"? And if he does so, can it not be justified on the basis that the arbitrator is obliged not to ignore the truth since in effect he has specifically been given the job of deciding what the truth is?

Area of Due Process

In the area of "due process" the arbitrator has great flexibility and great scope for exercising his personal preferences. We all know the situation where the grievant wants to tell his story in his own way. If the witness were in a courtroom he would not be permitted to do so because his testimony would be subject to valid objection. Yet if the arbitrator permits the grievant to testify in his own way and refuses to recognize proper objections, is he not on this occasion tearing up the rules of evidence? And is not the observance of the rules of evidence in itself a guarantee of due process? Should the arbitrator insist upon confining such testimony only to the area which falls within the rules of evidence even where the parties themselves would be glad to forego that protection? Perhaps due process in discharge and discipline cases

is endorsed by not straitjacketing the grievant and, at the very same time by requiring a more rigid adherence to evidentiary rules for the company's case against him. Perhaps in contract interpretation cases a more strict application of the rules of evidence is called for in order to achieve a viable due process.

Or is it essentially a matter of which premise you feel more at home with and not a question of philosophical due process at all? If the arbitrator works from the basic premise that everyone called to testify has the right to tell his own story *once* (I emphasize *once*), and that a witness may not be able to get his story out if he is held to court practice, it logically follows that the arbitrator should subordinate strict rules of evidence to this premise and to the goal which the premise subsumes—that is to say, that the paramount consideration is the story itself and not how it is told. Moreover, in terms of premises, does the particular arbitrator see himself more as a participant in the cross currents of the arena or does he see himself functioning more within the distilled ritual of the courtroom?

Next we come to an old topic of discussion both inside and outside this Academy. I refer to the question of whether "to mediate or not to mediate." In this form, the question of whether to intervene independent of any invitation of the parties, in my opinion, seeks mainly for a mechanical answer. This topic, I believe, can be more fruitfully explored if placed within the larger question of whether "to accommodate or not to accommodate," which in turn will depend on a combination of such considerations as: whether the arbitrator has served many times with the same parties in an *ad hoc* capacity or whether it is his first experience with them; what the arbitrator understands about himself vis-a-vis the parties and their particular situation; whether the arbitrator is experienced at mediation and truly understands the role and techniques of the mediator as a line of communication between the parties; whether the arbitrator is equipped, in the event of a failure in his mediation efforts, to compartmentalize what he learned as mediator from what he has to do as arbitrator; and what is in the best interests of the parties balanced against whether the arbitrator is realistically in a position in the particular situation to step outside his role of arbitrator to be mediator.

Moreover, a knowledge, both instinctual and historical, of why the matter was brought to arbitration, a familiarity with the particular collective bargaining environment, and an understanding in depth of such matters as the fact that one of the basic truths about trade unions is that they are essentially political institutions (as a lesser degree is the case with multi-employer units), will give the arbitrator some general ease on what to do when such specific problems in accommodation arise. For example, here in San Francisco, the extent of active rank and file participation in negotiations and contract administration is second to none anywhere in the country. The San Francisco area also commands a degree of institutional discipline unmatched in the nation. It is an area that is characterized by very developed multi-employer bargaining relationships. The two central labor councils in the San Francisco-Oakland area play an unusual role in labor mediation. Management acknowledges that labor unions in this area are permanent and stable organizations and respectability and prestige status describe the standing of labor officials in this community. The southern part of this State is characterized by such decentralization that one can be a hero at 608 South Hill and a villain at 610 South Hill and nobody knows or cares. But here in Northern California, everyone has a history in a goldfish bowl and one can either be a beneficiary of that history or its victim. Though all know that San Francisco is sophisticated, it is probably more important to know that it is equally, if not more, parochial, and to know the details of that parochialism.

All I aim to suggest here is that, to the degree that one is conversant in depth and detail with one's particular milieu, will turn out, more often than not, to be relatively more important than any abstract rules on whether or not to mediate and when other choices in accommodation arise.

Trial by Boredom

Finally, we come to what is perhaps the most trying part of being an arbitrator. These are the "four times around" situations—those times when the parties insist upon repetitively putting on evidence or expanding the length of the proceeding with miscellany of many kinds and flavors. The way it happens most of the time is that one of the parties starts out on a line of attack that

cannot be covered by stipulation between them. This condition leads to an over-protection of flanks with rebuttals and surrebuttals, etc. Since the parties are afraid to let go, they become dedicated prisoners of their own insecurity, disputants joined at the hip, lost in a desert of fragments. For the arbitrator, these are the times when the mind wanders, the eyelids lose their vitality, the doodling becomes more elaborate, the legs under the table search but never find a comfortable position, and oftentimes the arbitrator feels like Tony Last in Evelyn Waugh's *A Handful of Dust,* who ends up a prisoner in the Amazon jungle, his survival contingent upon reading forever out loud on the same river bank the same one book by Dickens to his jailor, a tribal chief. As one's disputants miscellaneously drone on, those are the times when the arbitrator feels he had indeed been captured by pygmies.

Should the arbitrator intervene to cut down the length of the proceeding, the amount of testimony, the questioning which is imprecise, the words upon words upon words? Does he step in to insist finally "Stop, I have had enough" when he sees the testimony is surplusage and tangential (or, as the objection was recently put in a case of mine, that it was "tangenital")? Should the arbitrator accommodate to the parties in these ways or should he insist, over their protests that they are not being permitted to put on their full case, that he is nonetheless bringing the proceeding to a close. All of us know that each case generally has a main thrust. Yet do the parties have the unlimited right to fashion their case as they see fit with words upon words which in no way contribute to the main thrust of the case? If one is looking for less than a final solution to this problem, the arbitrator can perhaps let the parties know at some point that he considers what has been going on to be of less than little value to him, and if, despite such advance notice of how he will ultimately devaluate such evidence, they want to go on anyway, to let them do so. Obviously this approach is at best only a half-way answer since probably at least half the disputants will prefer to go on *ad nauseum* and one still ends up with no final escape from the captured-by-pygmies dilemma.

Personal Role of Ad Hoc Arbitrator

I would like now to touch briefly upon that second aspect to which I previously referred, the aspect dealing with the arbitrator's

personal role and his needs as an arbitrator and as a person. As I said earlier, this aspect obviously involves more subjective considerations. In this connection, I do not believe that "limits to accommodation" would arise in the way they do, if the arbitrator were not what might be called a "hybrid" judge. Since the arbitrator has the authority of a judge but only, so to speak, "at the pleasure of the parties he keeps," we know that the relationships he has to satisfy and the way in which he satisfies them are indeed different from that of a "real" judge as it is popularly understood. Moreover, because the arbitrator has a wide spectrum of choice on how to conduct an arbitration, and because he is both judge and jury and his hearing room both the trial and appellate forum for the disputants, the arbitrator is obviously much more susceptible than a "real" judge to the scrutiny and evaluation of the parties.

On this aspect of the arbitrator qua arbitrator, I believe that whether or not he is the kind of arbitrator who generally sets limits will substantially depend upon how successful and secure an arbitrator he is. The man who has one eye on the parties, even though he does not know he has, will tend to be much more passive when he thinks the parties want him passive and much more authoritarian when he thinks the parties want him authoritarian, irrespective of his personal preferences and irrespective of the objective requirements of the situation. The man with one eye on the parties, even though he does not know he has, will be much more involved with what the parties think of him, instead of being involved with the problem at hand on its own merits. The less self-conscious the arbitrator is in relation to the parties, the more alternatives he will have from which to choose a course of conduct.

The phrase "ad hoc" arbitrator compared to "permanent arbitrator" in itself suggests insecurity. A taste of insecurity is there in the split decision where one party gets the opinion and the other gets the award; or where the arbitrator gives too profuse explanations of his ruling on an objection, e.g., "I'm holding against you but you see, I'm sorry I have to do it"; or where he showers the losing counsel in the opinion with compliments, like Confederate money, of a job well done; or where the mental scorecard of recent losses or wins of a particular party passes through the arbitrator's mind as he sits down objectively to evaluate the

evidence. But if insecurity precedes the *ad hoc* arbitrator like Cyrano's nose by a quarter of a mile and if his anxieties take over, obviously he cannot be either an effective or a competent arbitrator and his approach to matters of accommodation is likely to be disproportionate. Perhaps all one can really say about this factor of insecurity for purposes of this paper is for each arbitrator to raise to some objective level of recognition the degree to which it exists in him. That may not solve the problem but it certainly cannot hurt.

II. PROCEDURAL PROBLEMS IN AD HOC ARBITRATION

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It is sometimes said of disputes settlement under collective agreements that, unlike many other types of disputes, the parties must continue to live together after the supposed settlement. I guess that whoever suggested that we should discuss the problems of *ad hoc* arbitration had in mind that there must be problems differing from those of the permanently designated arbitrator. Such differences must arise from the fact that the *ad hoc* arbitrator and his clients, perhaps to the good fortune of the parties if not the arbitrator, need *not* continue to live together. I must say, however, that as an arbitrator I have had some blind dates whose acquaintance I had no interest in pursuing.

My assignment of choice was to discuss some of the procedural problems that may be unique to *ad hoc* arbitration. In thinking about it, I became less sure that many such *unique* problems exist. I shall be brief, and try to raise selected, general, and probably disconnected issues in the hope that they will stimulate some discussion.

Demand for Consolidation

Perhaps the most fundamental procedural issue that may come before the *ad hoc* arbitrator is the demand of one party or another for consolidation of cases. Like many procedural issues, it shades into the substantive in the sense that it often requires an award construing the agreement. The situation may be that both parties

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