

CHAPTER VI

POLICY AND PRACTICE OF AMERICAN ARBITRATION ASSOCIATION

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I approach this talk with some trepidation for it means submitting some information and some opinions to a group used to listening to distinguished advocates—advocates who advance sound and unassailable arguments only to find, when they read your opinions, that those arguments were without avail and have been disposed of in a logical and scholarly fashion. Therefore, I ask that you listen to me with charity and please do not write an opinion, short or lengthy, when I have concluded.

When your President, that premier arbitrator and my old and good friend, Aaron Horvitz, conveyed your invitation to me, I inquired as to what you might want me to cover in my remarks. I also consulted with some other almost equally distinguished members of the Academy and received a number of suggestions for which I was deeply grateful.

I was asked to comment on the policy and practice of the Association in the selection of names for the list to be submitted to the parties when an arbitrator is initiated.

We have three different situations.

1. Arbitration under the American Arbitration Association rules.
2. Arbitrations where the Association is only required to submit names.
3. Arbitrations where the Association is required to make an appointment practically forthwith and without submitting any list.

The last two represent a very small percentage of our cases.

When either party to a collective bargaining agreement which includes an arbitration clause files a copy of a demand or request for arbitration with the Association, the original of which has been delivered to the other party, the demand is checked as to the arbitration clause and the authority delegated to the Association, the nature of the claim or dispute, and the remedy sought. Where the authority is clear, the Association proceeds immediately to initiate the arbitration.

The files of any previous cases administered for the same parties and the files of any cases in which the same counsel or union has participated are checked to learn our previous experience with these parties and their indication as to the acceptability of arbitrators submitted. Then the panel of arbitrators is checked as to the previous experience of arbitrators and their previous service records; also as to whether they are now serving in a case or cases and their general availability to serve at this time.

Based upon this information, a list of nine names is prepared and submitted to the parties. If the parties have indicated they would prefer arbitrators from other than the territory in which the dispute has arisen, central office files are checked, and the wishes of the parties are complied with.

The same process of selecting arbitrators from the panels is followed in the other two situations with the exception that in the third group, those where the Association is required to make an immediate appointment without the submission of lists, the names are referred to the committee of the Association and that committee selects the arbitrator to be appointed.

We would much prefer that the parties select the arbitrator, but, in some contracts and where the parties have failed to agree upon an arbitrator from a submitted list, the Association must act. Even in these situations, so far as possible, the names selected by our internal committee are referred by telephone to the parties in order that the Association will not appoint an arbitrator who may be objectionable to them. I am glad to report that in the last few years the Association has been re-

quired to make appointments in only three percent of the cases submitted.

When the parties do not agree upon an arbitrator from the first list, the Association will gladly submit as many additional lists as the parties wish. The sending of additional lists, however, must be by agreement of the parties.

In preparing lists of arbitrators for the average case, we endeavor to include in every list one, two, or three new arbitrators. We do this in order that the parties may become acquainted with other members of the panel and that there may be a continuing supply of acceptable and available arbitrators.

It was also suggested to me that you would like to know how new names are added to our national panel. In the main, these come from suggestions, made by arbitrators and parties, of persons they believe are qualified to act as arbitrators. When a nomination is made, we request the person nominated to submit his qualifications on a form with which I believe all of you are familiar. We also request the names of references; next we carefully check references and make inquiries of persons in the area upon whose judgment we believe we can rely; and then our panel committee determines whether the information thus received warrants the appointment of the nominee on the national panel. Our panel committee includes representatives of management, labor, and attorneys in the field.

Incidentally, it may be interesting for you to learn that, of the 85 new arbitrators who were added to the panel in the last few years and have served, only four were indicated by reports following their service to be unsatisfactory.

Complaints

It was also suggested to me that you would be interested in some of the complaints received by the Association. The complaints may be quickly listed as follows:

1. Lengthy opinions.
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2. Excessive time taken in studying the record and preparing the decision.

3. Excessive hearing days—that is, a belief by the party that the arbitrator had protracted the hearings.

4. Delays in rendering the award.

5. Attempted mediation by the arbitrator.

In our investigation of complaints, there appear to be some grounds on a number of these items. From time to time we have found justification in the complaint that the arbitrator had appeared to have copied lengthy exhibits and portions of the record (where there has been a record) and prepared a long and drawn-out opinion, for which he charged a number of additional days, thereby increasing his fee.

The number of study days, in many instances, were found to have been increased in recent years over the time that had been used by the same arbitrator in years past. We are all aware that there has been a great deal of discussion regarding the need for increasing the per diem rate of arbitrators.

If there is just cause for increasing the per diem rate, then I would respectfully suggest an increase in the per diem rate and not in the number of days charged for study and preparation of an opinion. Many of you have told me that you have never had a complaint regarding your fees in a tone which indicated that you were somewhat skeptical of our Association's statement that such complaints were filed. I have a number of letters with me and I would like to quote from one or two without, of course, mentioning names or parties or arbitrators. One of the leading CIO unions and a leading user of arbitration writes:

We cannot understand why there should have been nine and one-half days required to make a decision when the arbitrator only spent about six hours of that time at the hearing. We have submitted many cases in the past which were much more difficult, many more briefs filed and much more time involved, and I can't remember a bill being submitted as in this case.

Here's another one from a different union:

It is my understanding that the arbitrator agreed to accept \$100 for each day of service rendered, by him, in connection with this case. The hearing consumed approximately one day. The decision was a brief and undocumented statement and no one in his right mind could conceive of the necessity of his consuming more than one day, if that much, in reaching or expressing it. The daily rate is, in our judgment a rather substantial one. If any arbitrator is dissatisfied with that amount per day, we would be very happy to consider a different rate. We think, however, that it is not fair or reasonable to obtain additional compensation through a charge for the consumption of time which cannot be justified under any circumstance.

In connection with expenses, we have received a number of complaints.

One of the largest corporations in this country complained that an arbitrator had elected to travel by car and "over an indirect route. Stayed at a hotel in a city about fifty miles from the place of hearing and drove between the two communities on two days. The decision was announced at the close of the hearing."

The company then goes on to say that it does not claim that it has a right to direct the arbitrator how he shall travel or where he shall stay, but, it adds: "There is some question in our minds as to the propriety of a professional arbitrator charging for traveling expenses which were incurred only because of his personal wishes."

The company then goes on to challenge the charge of \$100 per day for each day of travel in addition to charging for mileage and all other expense of such travel.

In another letter, a complaint is made that, in a hearing that consumed only two days for the hearing, it seemed unreasonable to charge for eight additional days for the study of the case and writing a decision,

One of the great advantages of arbitration is providing what we like to term "a speedy way of disposing of a dispute in order that ill will will not grow out of the unsettled controversy." The Association, as you well know, has a rule that a decision should be rendered within thirty days after the conclusion of the hearing. May I suggest that only in difficult and protracted cases should it be necessary to take even that length of time and thus delay the settlement of a dispute. When an arbitrator cannot arrange to hear and render his decision promptly, may I respectfully suggest he is doing a disservice to the cause of industrial peace. It would be better to refuse the case and have it referred to some other arbitrator less busy rather than hold up an award and ask for extension of time.

I am glad to report that there is much less attempting to mediate disputes than there was several years ago. The Code of Ethics which was published five years ago this month definitely provides that the arbitrator should not mediate against the wishes of either party. It is also well established that, when an arbitrator attempts to mediate and the mediation is unsuccessful, it is doubtful if he can, or should render an award.

Arbitrators' Problems

Arbitrators, too, have their complaints and problems.

Yesterday morning I listened to an excellent paper by one of your colleagues, Jules Justin, in which he attempted to clarify some of the misunderstandings of the function of arbitrators and their powers, duties, and responsibilities. Mr. Justin directed attention in a number of instances to the standards and requirements of arbitration law.

Of course, I am well aware of the belief expressed by some of you regarding the need for any consideration of arbitration law in connection with the arbitration of labor-management disputes. But may I suggest that, whether you favor or oppose an arbitration statute, arbitration is controlled in all states except Louisiana by common law, and, in Louisiana, there is a labor arbitration statute, as Mr. Justin stated.

Accordingly, your conduct of a hearing and your award should meet the requirements of the common law at least.

In the discussion which followed the presentation of Mr. Justin's paper, there was clearly a considerable amount of doubt expressed as to what is the appropriate procedure to follow in various situations. I believe all of the questions could have been easily resolved by a reference to arbitration law and a checkup on what the courts have held over years as the proper procedure to follow. May I, therefore, suggest that it would be most desirable to pay attention to the standards that have been established over several hundred years by the courts of England and the United States for the conduct of arbitration.

May I also direct attention to the fact that the Federal courts, some fourteen now in various sections of the country, are now enforcing arbitration agreements and arbitration awards under Section 301 of the Taft-Hartley Act. The leading decision, and the only appeal decision, comes from this area of the country, the sixth Circuit Court of Appeals (*Milk & Ice Cream Drivers & Dairy Employees Union, Local No. 98 v Gillespie Milk Products Corp.*, 203 F. 2d 650 (1953) [31 LRRM 2586]).

When the courts are called upon to enforce an award, the proceeding that brought about the award may be challenged and the courts will apply the standards of common law arbitration in deciding whether or not the award should be confirmed.

Last August the Commissioners on Uniform State laws adopted a new Uniform Arbitration law which was unanimously approved the following week by the American Bar Association. The bill was a result of almost five years of study by a special committee of the Commissioners, headed by Dean Pirsig of the University of Minnesota Law School, the membership of which represented various sections of the country. The committee took pains over the period of its study to secure the comment and suggestion of representatives of both labor and management and submitted several drafts of the bill over the years for such consideration.

I heard a number of comments regarding the Uniform Act and the alarm sounded concerning the setting forth in the bill of the grounds upon which an award may be questioned. There are a number of new and interesting provisions included in the act on which no comment has been made. As to the section which sets forth the grounds upon which an award may be questioned, may I suggest that it does little more, if anything, than recite the grounds for questioning an award which is now in effect under common law.

The only substantial change in arbitration law included in the Commissioners' Act is the provision for the enforcement of clauses providing for the arbitration of future disputes. That is already included in fifteen state statutes. The Commissioners hope to make it uniform. That provision would revoke the ancient doctrine of the early seventeenth century in which some English courts held that an agreement to arbitrate a future dispute was revocable.

Another problem that has arisen concerns the criticism of the practice of the American Arbitration Association in placing alongside the names submitted on our lists the per diem rate of the arbitrator. We find, however, that this is one of the outstanding services which the Association can render the parties. Most people like to know the cost before they enter into any agreement, and the system was devised and placed in operation only after most serious consideration and consulting with the users of arbitration throughout the country.

It has also been suggested that in certain sections of the country arbitrators charge lower fees than are currently charged elsewhere. That, of course, is a matter of personal consideration and the Association lists *whatever fee the arbitrator has indicated he desires*.

Publication of Awards and Opinions

The publication of awards and opinions is another question that frequently arises. It is the policy of the Association that

awards and opinions will only be submitted for publication where both parties so agree. We have canvassed the users of the Association's facilities on a number of occasions, and the large majority on each of the surveys have opposed the publication of awards and opinions. We are now re-examining that question. A special committee of our directors has been appointed, together with representatives of unions and management, to examine and report. That report will be duly published in either the "Arbitration Journal" or the "Arbitration News," probably late in the spring.

Increasing Use of Arbitration

Both the Federal Mediation Service and the American Arbitration Association find there is an increasing use of arbitration. That increase, according to our records, is founded on new users rather than increasing use by former users. Our records show that many new companies are using arbitration for the first time. There also seems to be an increasing acceptability of arbitrators.

Of course, we get letters and complaints regarding what are termed "outrageous decisions" and "miscarriage of justice" from time to time, but many less than we experienced several years ago.

I also believe there is a great reduction in what was termed the use of a "blacklist" by various groups in both labor and management. Of course, there is still considerable exchange of information concerning experiences with various arbitrators.

There is also a considerable amount of research continually going on in the larger law firms of arbitrators' opinions in order to ascertain what is termed the "philosophy of the arbitrator." But complaints have dropped considerably, as I stated before, in the last few years, and I congratulate you all on that.

American Arbitration Association

May I take just a few additional minutes to say a word about the Association's other activities. It is a membership, nonprofit-

making organization devoted to the development and extension of the use of arbitration for the settlement of disputes in all fields of human endeavor. As you know, many of the standard contracts in use in both domestic and international trade include provisions for the arbitration of disputes arising out of those agreements.

Commercial arbitration is increasing every year in all fields. Commercial cases include everything from partnership, corporation disputes through patents, purchase and sale agreements in almost all fields, and also domestic relations.

It may not have come to your attention that, when the 100 stock insurance companies doing business in New York granted an extension of their policies to pay personal injury damages to their insured caused by an uninsured driver, the rider which was attached to those policies, with the approval of the superintendent of insurance of New York State, included a provision that, where the company and the insured could not agree on the question of contributory negligence or the amount of damages, such dispute should be submitted to arbitration under the rules of the Association.

In the international field, our Department of State has included provisions in all recent treaties for the reciprocal enforcement of agreements to arbitrate included in foreign trade contracts and for the enforcement of arbitration awards. Our treaties with Denmark, Greece, Haiti, Iran, Ireland, Israel, Italy, Japan, and West Germany all include such provisions.

The educational work of the Association through its various publications and through the conferences which it promoted and co-sponsored with 33 different universities in the last few years, I believe, are well known to you. These conferences, attended by representatives of labor and management, and the numerous practice arbitrations and addresses presented to labor and management groups throughout the country, we believe, have done much to bring about a better understanding and wider use of the arbitration process.

You may have seen the column entitled "You be the Arbitrator" appearing in "Factory Management," published by McGraw Hill, and a similar column made available to union newspapers headed "What would you do?" in which are presented statements of cases actually submitted in the tribunals of the Association. They now have a circulation of about five million.

The Code of Ethics which you and we prepared from the previous codes and suggestions for the guidance of arbitrators published by the Association commencing in 1926 has been distributed throughout the country and, as you know, was adopted, before printing, by the Federal Mediation Service and since by the Mediation Boards of:

California	Minnesota
Connecticut	New Jersey
Louisiana	North Carolina
Massachusetts	Oklahoma
Michigan	South Carolina

I think that is an achievement in which we all may take pride.

I do wish that every one of you might take an active part in the educational work of the Association. I do wish you might all receive the "Arbitration Journal," published quarterly, and the "Arbitration News," which appears monthly except for the summer months, so that you might be well informed on the great progress being made with arbitration here and throughout the world. Membership in the Association is open to you, and I trust before long the matter may be presented for your individual consideration.

In closing may I pay tribute to you for having aided in accomplishing one of the most important achievements in American history. Just two decades ago a revolution took place. The people of the United States, through their duly elected representatives, enacted a law requiring management to bargain with unions. At that time there was much wailing and gnashing of teeth. We seemed to be in for a long period of industrial warfare. Sit-down strikes, fighting and death on the picket line

appeared to be inevitable, but the American businessman and the American unionist found a way, and the principal highway that they found was arbitration. Your decisions, your opinions, your conduct of hearings, your patience, and the educational work you did in the hearings and meetings with the parties and in your opinions brought about an understanding of which you may well be proud. Many of the companies and unions that were frequently embattled now, not only have ceased battling, but even have stopped resorting to the use of arbitration. You have helped promote an understanding of labor relations and provided, in many instances, the standards upon which disputes are settled by the parties themselves, which we all recognize as the best possible way to settle a dispute, and, therefore, I salute you.