CHAPTER 11

THE ARBITRATION PROCESS

I. OBJECTIONS AT THE HEARING

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In approaching a topic like this, the temptation is to make it a thinly veiled discussion of evidence. It is the rules of evidence, after all, that give rise to most (although not all) objections at the hearing. While I will present a few scenarios for your consideration, I also want to discuss a very important aspect of the topic, involving the question of how to handle the objections.

Many years ago at a dinner with one of the past presidents of this Academy, Russell Smith, he dismayed me by saying that he thought all the work, craftsmanship, and artistry he had attempted to put into his opinions were probably of minor impact in terms of overall acceptability. It was the answer, he said, that really meant something. He did not think the parties paid much attention to the opinion itself. I was distressed and, I should tell you now, I think Russ was wrong. I suspect he had just come from a day such as all of us have, where, in an executive session perhaps, someone had simply flipped to the last page. I am not convinced that the answer alone, in the long run, is what counts as opposed to careful, thoughtful drafting.

However, in terms of outright acceptability as an arbitrator, I am sure that there are elements beyond the opinion that are important for acceptability. Conduct of the hearing is ultimately very meaningful and, as an aspect of that, I would say that the single most important factor is the handling of objections. The attorneys, the representatives, the advocates are, after all, on the line when they register an objection. They are testing their knowledge or intuition against that of their opponents and the arbitrator. How we respond has a lot to say about the ultimate fairness of the hearing and about our acceptability as neutrals.

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In my remarks today, I want to discuss both procedure and substance of objections. Let me turn to the procedure, or perhaps a better heading—the process.

We begin by looking at what is probably the most important part of handling objections (aside from getting the answer right), the tone of the arbitrator. The most effective objectors are those who raise their gripes in a quiet, restrained manner. One of the most effective courtroom advocates I ever saw rarely objected, but when he did, he did so almost apologetically: "I hate like hell to disrupt the proceedings, but I wonder if there isn't something we ought to discuss, your honor. I seek your guidance." Styles differ, of course, and we all spend many difficult days tussling with very aggressive advocates. But the response of the arbitrator can set an important tone and help to defuse what might otherwise be an explosive situation. What counts, I suggest, is the ability to let the advocates know you are taking them seriously. Perhaps that's why I am so opposed in general to the blanket "let it in for what it's worth" response. I think the parties are owed more. Code words are helpful in this regard—"inquire, discuss, explain."

Inquiry

It comes as a shock to some advocates that simply registering an objection is not always sufficient to solicit an immediate ruling. When, having registered a boisterous "objection," to which the arbitrator responds, "On what grounds?" a vigorous advocate is often reduced to a moment of stunned silence. The eyes glaze over, the jaw drops, and there is generally a far-away gaze, reflecting the beleaguered advocate's thoughts. "I don't know what grounds, but there has to be something somewhere."

Inquiring is a critical and altogether appropriate function. The arbitrator is perfectly in order in requiring a clear statement as to the precise basis for the objection. I reiterate that I am not speaking of a technical recitation of hornbook law. To inquire, that is, to solicit the nature of the advocate's concern, however unartfully stated, serves not to heighten the notions of an overly legalistic process, but to dispel them. It is the "fleshing out and discussion" of the objections that supports the ultimate problem-solving approach to arbitration.

Obviously, there comes a time when the basis is clear enough, particularly if it has been raised numerous times throughout the

hearing, and the arbitrator can simply respond. But as a general matter, it makes good sense to ensure that everyone in the process knows what the issue is. This is particularly important to avoid what may otherwise seem an unduly structured and legalistic hearing in the eyes of rank and file people. Issuing the blanket admission without discussion does not contribute to the informality of the hearing. Rather, it raises eyebrows and doubts as to closed-door deliberations over arcane rules beyond the scope of the uninitiated.

Discussion

Once the inquiry has been made, it is an appropriate time to discuss the matter. There is no need for split-second, rapid-fire responses in this process. Often the objections are sufficiently puzzling to require a bit of thought. I have checked carefully and find that the Academy's Code of Professional Responsibility does not prohibit thinking during a hearing. It is entirely appropriate to discuss the objection with counsel and get their respective views, perhaps in an extended colloquy. This serves a variety of functions. During this process the arbitrator learns more precisely the nature of the parties' objections and can respond to them more fully and accurately.

There are considerable side benefits to this dialogue. Once the objection is understood, the responding side may be able to cure the problem. If, for example, there is a hearsay objection to a document, the opposing counsel can present the first-hand witness instead, or can explain for everyone to hear that the document is not submitted to prove the truth of the matter asserted. The discussion adds greatly to the therapeutic (or perhaps the cathartic) aspect of arbitration.

Response

The third aspect of the procedure is the response, and here the arbitrator can do substantial justice, in every sense of the word, to the process. During my relatively short and generally unremarkable career as a litigator, I appeared a number of times before a federal district judge, Lawrence Gubow, in Detroit. He was a remarkable man. I think it fair to say that with left tenure, he was unconcerned with issues of acceptability. Nevertheless, he was the most acceptable neutral I have ever seen. Win or lose,

I came away assured that the judge had listened to me and that he understood my case. In all respects he employed what Jack Dunsford referred to so aptly some years ago as "mandarin courtesy." His response to an objection exemplified that approach. What follows is fictitious, to illustrate my point, but, while the substance may differ, the style is pure Gubow:

> Mr. Bloch, I understand your objection. Your concern, as I hear you, is that admission of this particular document to the record will be prejudicial in a number of respects. First, you contend it is hearsay inasmuch as you are unable to cross-examine the writer of the document. Additionally, you object to the document as unfairly inflammatory and potentially prejudicial. Finally, you have questioned its overall relevance in this proceeding.
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> As to the first contention, I think you are correct as I understand the hearsay rule, and therefore I am going to admit it only as evidence that a particular letter was written and not as proof of the statements made in the letter. With respect to your concerns about prejudicial impact, let me suggest that this is not a jury trial, and I have been through a number of cases such as this. Let me set your mind at rest in terms of my ability to distinguish between wheat and chaff.
>
> Finally, while you say it is irrelevant to the case, it is a little early for me to determine that. I think the best way to handle this is for me to admit the document and evaluate the overall relevance in the course of my ultimate deliberations. I'll let you know.

This was the type of answer one would receive to an objection. I found it substantially more satisfying than "overruled" or "I let it in for what it's worth," although, as you may note, that's close to what he did, at least in terms of relevance.

I am not suggesting that all answers must be drafted with judicial precision, although nothing prohibits nonlawyers from learning the rules of evidence. I am saying that the overall goal of an evidentiary system is to test the reliability of a proffered piece of evidence. It can only help to know that the neutral has the goal of reliability in mind and that, however expressed, he or she is holding up a proffered piece of evidence to that standard.

We have spoken thus far of the tone and temper of raising and responding to objections. Let me turn now to the question of who raises the objections or, more specifically, is it appropriate for the arbitrator to do so? In general I am content to leave raising of objections to the advocates, even in the case of two relatively inexperienced people. I am normally content to sit back and, absent objections, accept most documents and testi-

mony, asking a few questions myself, if necessary, to clear up issues concerning the reliability of the materials.

I admit to one consistent exception, however. If there is a critical witness testifying to a point that goes to the heart of the case, I will interrupt an attorney or advocate who is leading too much, even without an objection by the other side. At that point I will indicate that I prefer to have the witness simply testify from his or her own recollection and request that the advocate refrain from the type of questions that go so far down the intended path.

The reason behind this is obvious. While I believe I am capable of sifting evidence and evaluating it on any number of bases, I am wholly unable to give objective scrutiny to testimony that has come from the lawyer's mouth rather than the witness'. At the point where this type of excess begins to impede my ability to do the job, I step in.

So much for the "process." Let me turn to the "substance" by way of some examples. There is always that moment (may we call it excitement?) at the beginning of a hearing, when one wonders whether, and to what extent, it will be necessary to ride herd on objections and on the advocates.

Let me relate a true story from a recent case. Upon entering, I was pleased to find two very amiable chaps who agreed to stipulate to just about everything. Here was a list of joint exhibits; here was a list of stipulations on the facts. Attorney A agreed to admit the depositions of attorney B's doctors; attorney B agreed with all the proffers with respect to attorney A's witnesses: "If called to testify, so and so would say . . . ." There were merely a few minor details to be cleared up, and this could be done more quickly by testimony than by stipulation. So it was agreed. Attorney A called his first witness: "Now then, your name is Joseph Smith?" "Objection, leading," cried the other attorney, with a smile.

Other objections have been more of a problem. Recently I heard a case involving a discharge for manufacturing drugs off duty and in the grievant's home. The grievant had pleaded guilty to the offense in court. At arbitration, however, he denied the charges. That much is not so unusual. Accordingly, the company set about its proofs.

As it began to inquire in some detail into the grievant's activities on the night of his arrest, the union objected. Grievant Jones, noted the union, had entered a guilty plea in the court of

appropriate jurisdiction, specifically so he would not have to go into the trauma of the trial and the recitation of the details, which involved his family. "But what, then," I inquired (with mandarin courtesy), "am I to make of the fact that the grievant is here claiming innocence?" The union responded (and here is a nice twist) that the plea entered by the grievant was an Alford plea, wherein the grievant was acknowledging that the state might have enough evidence to convict, nevertheless maintaining his innocence, all the while pleading guilty. Therefore, said the union, I must accept the grievant's contention in arbitration that he is innocent and at the same time foreclose the company from plunging headlong into the details that were so discomforting as to force the grievant to plead guilty, "although he was not," and to accept a substantial penalty. That was punishment enough.

I have read the *Alford* case, and, while I suppose I understand how the Supreme Court could sanction the acceptance of a guilty plea that coincided with protestations of innocence, I could not be led to sustain the union's objection in this case, which I found both highly imaginative and fully unpersuasive.

Some years ago I encountered the following colloquy involving a union advocate who was both inexperienced and highly religious. Cross-examining a management witness, the advocate resorted to an unusual technique (and this is a quote from the transcript):

> WITNESS: There was no discussion at any time during negotiations on Section 26.3.
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> UNION ADVOCATE: Are you sure of what you just said?
>
> WITNESS: Absolutely.
>
> UNION ADVOCATE: Do you swear to the Lord Jesus Christ that you are not perjuring yourself in His eyes?
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> COMPANY ADVOCATE: Objection!
>
> ARBITRATOR: On what grounds?
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> COMPANY ADVOCATE: Christ, I don't know. There must be something that says you can't cross-examine like that.
>
> ARBITRATOR: Mr. [union advocate] do you wish to respond?
>
> UNION ADVOCATE: God almighty knows when someone's lying.
>
> COMPANY ADVOCATE: Objection! Objection!
>
> ARBITRATOR: Mr. [union advocate] I am going to sustain the objection. It occurs to me you might be searching for a neutral with considerably higher qualifications than my own, but in the interim, I am going to request that you confine yourself to a more secular approach.

At some point parties may recognize that a certain objection by them will gain a predictable response from you. This predictability can help to expedite the hearing. Permit me to read a brief portion from a sports case I heard recently:

> ATTORNEY: I was just about to object on the grounds of hearsay, but I'm sure if I did, you would say this was a business records exception and allow it in anyway. I will keep quiet for the moment about this document and handle it on cross-examination and rebuttal.
>
> ARBITRATOR: The record will reflect that counsel has raised, discussed, and overruled his own objection.

Let me close with a list of the hardest, or at least most frequently troubling, evidentiary questions I know, in terms of their generating disputes and disagreement at the hearing among practitioners, including the arbitrators:

1. Objection is based on introduction of a transcript of court proceedings in which a judge or jury found the grievant guilty of the same offense for which he has been fired. (I'm not speaking now of a guilty *plea.*) Arbitrators split on this issue. Some say that the findings of an external body, such as a court, an administrative agency, or a workers' compensation board, are entirely inadmissible and that the case must be proven before the arbitrator. Others say that a court finding may come in "for what it's worth." In a close case there may be some weight placed on the finding of a judge or jury. Those are the arguments in any case. However, I distinguish between a finding by another body and a guilty plea or admission by the grievant. In this case the objection should be overruled and the evidence of the plea admitted.

2. Objection is made to the introduction of a document that is relevant, germane, and very damaging, but that apparently has been stolen or removed without authorization from the opposing side's files. Not surprisingly, there is a split of authority here, too. Some arbitrators conclude that to admit such a document invites further pilfering and rifling of file cabinets and that, therefore, as a matter of policy, it should be excluded. Others admit it, recognizing that there may be another arbitration case for theft that ought to be heard as a separate matter.

3. Objection is made to calling grievant as management's witness. This is so often the source of acrimony that it is surprising it is not better documented. The essential question is: Will the arbitrator allow management to call the grievant as the first

witness? The answer cannot be uncovered without the additional inquiry: If called and the witness declines to testify, what is the appropriate response from the arbitrator? My bottom line answer is: I will allow the grievant to be called first, but I will not impose sanctions for a refusal to testify. There is nothing inherently improper about calling the grievant, or anyone else, as a management witness. Similarly, the union may wish to call management personnel as its witness. That is not to say that the witness will necessarily cooperate. The remedy for this is not, as more than one employer has suggested, refusing to allow the grievant to testify at all or compelling the grievant to testify or lose the case. Nor have I been able to discover any state law giving the arbitrator the right to impose contempt sanctions. Management is confined to the necessity of seeking a subpoena through the courts or simply waiting until the grievant does testify on his or her own behalf, if at all.

4. Objection is made to introducing a prior settlement arranged on a nonprecedential, noncitable basis. Most arbitrators will sustain this. After all, it does say, "Not citable for subsequent disputes." Recently, however, I encountered the following scenario (management was cross-examining the grievant):

> MANAGEMENT: Isn't it true, Sir, that you have been previously disciplined for precisely this same offense? (Being away from his work station.)
>
> GRIEVANT: No, I have not been.
>
> MANAGEMENT: I would introduce for the record a copy of a settlement between the Company and the Union whereby Mr. C was reinstated from discharge, with a six-month suspension for being away from his work station.
>
> UNION: Objection. That settlement was a nonprecedential, nonreferrable basis, in subsequent proceedings.
>
> MANAGEMENT: First, that language is there to protect the Company. We have always discharged for this offense and we didn't want this settlement to be waved around by the Union in later cases. Second, we're not doing this as grounds for the discipline—it's purely for testing Mr. C's credibility. The settlement doesn't give him the right to sit here and lie under oath.

I allowed the settlement document in on the credibility ground raised by the company. (I was not much impressed by the "protection of the company" argument.) But on reflection, I think the ruling is subject to considerable question. The better answer is that the intent of the drafters was clear—"nonreferra-

ble"—and that, even without an objection by the union to the initial question, the question by the company was improper, and I should have sustained the later objection. Even though there was no objection at the time to the question, the company should not have been permitted to test credibility in that manner, thereby opening up all the doors that the parties by express agreement had agreed would remain shut.

There is a lesson in that, and it makes an appropriate closing note:

1. Hindsight is always better. That is why professors are always smarter than practitioners. (My wife, the professor, wrote that part.)
2. Never eat at a place called Mom's, play cards with a guy named Pops, or arbitrate with a fellow named Zack.
3. There will always be plenty of work for other arbitrators as long as there are plenty of people like me willing to keep on making mistakes.

II. ARBITRAL CRAFTSMANSHIP AND COMPETENCE

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Introduction

The labor arbitrator's primary responsibility is to serve the parties by resolving their dispute.[1] They want the arbitrator to produce an award that is final and binding. Most arbitrators successfully accomplish that duty. Only a few awards are brought to court for review, and only a small portion of those are set aside. Many more awards fail to end the dispute. Instead of litigation they produce requests for clarification, further grievances and arbitrations, or ill feelings between the employer and the union.

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**Member, National Academy of Arbitrators; Professor of Law, George Washington University, Washington, D.C. This article is a substantially abridged version of the original presentation. The complete paper will be published as a law review article in 1989.

[1]*See generally* Kaden, *Judges and Arbitrators: Observations on the Scope of Judicial Review*, 80 Col. L. Rev. 267 (1980); Abrams, *The Integrity of the Arbitral Process*, 76 Mich. L. Rev. 231 (1977); St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 Mich. L. Rev. 1137 (1977).