CHAPTER 7

AMERICAN ARBITRATION ASSOCIATION

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The title for this program "Quo Vadis—Appointing Agencies" or whither thou goest, prompts one to recall the wonderful exchange between Alice and the cat in *Alice in Wonderland* when Alice says "Would you tell me, please, which way I ought to go from here?" "That depends a good deal on where you want to get to," said the cat. "I don't care much where," said Alice. "Then it doesn't matter which way you go," said the cat.

Now, while we might muse over that exchange, we at the American Arbitration Association (AAA) truly do not identify ourselves with it. We *do* care a *great* deal about where we are going, and in fact *who* we go with. And to give you the headline up front of the essence of the thoughts to be expressed here, our Association vision, developed over the past 2 years and soon to be rolled out, includes a commitment to "the highest standards of client service achievable in every undertaking." And the other part of that headline is that we would like to get to that destination with a great deal more collaboration and interaction with the National Academy of Arbitrators (NAA).

In looking at where we are going as an "appointing agency" I will begin from the general and then move to the specific, and indicate that we see our role much more broadly than as an appointing agency only. Thus, I will reference the many pieces that make up the AAA and which we see in a sense all tied together, including the development of the law of arbitration, technology, research, the role of publications, and education and training.

First, looking down on these subjects from about 30,000 feet, we see in the future our entire field of endeavor making significantly greater use of technology. We are already experiencing the auto-

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matic transfer of cases in mass claims settlements through the complete use of technology without hard copy files and with dispositions being handled largely through the computer. In fact, in a mass claims caseload that we are presently working on out of New Jersey, we are receiving some 4,000 cases a week in an automated fashion. More such caseloads will follow.

As many of you know, we have linkages between our respective Web sites, so that when people enter the AAA site and are pursuing labor queries, they can also click into the National Academy's Web site. The "technology" future, of course, holds many other opportunities, including the placement of our alternative dispute resolution (ADR) library's entire indexing catalogue online before the end of this year. Early next year we will have all AAA materials online, including back issues of the *Arbitration Journal*, *ADR Currents*, and other publications. Moreover, all the labor awards we publish will be online before the end of the year 2000. The online collection will likely go back some 10 to 15 years in our archives. Those opinions will be tied to a keyword search index, so that arbitrators and others will be able to research and build on the body of arbitral thought.

This latter application of technology segues into a second general point, namely, that we see greater scrutiny by the courts and by public policy legislative bodies, from city councils to state legislatures to the Congress, questioning many things that all along we have taken for granted about the arbitral process. We view this as a positive development toward providing clarity and certainty, yet at the same time it places a responsibility on all of us to seize the high ground and avoid changes that might "throw the baby out with the bath water." All of you here are aware of a role that the Association has played at least in one instance with the Academy, and in all instances with Academy members, whereby we stepped into the public policy breach to formulate due process protocols for employment disputes, consumer disputes, and most recently, health care disputes. In each area, important public policy statements were developed collaboratively, and each has served well the concerns of the public and, I believe, the integrity of the dispute resolution process.

Do recall that in the employment Due Process Protocol, which benefited from strong Academy leadership and direction—particularly from one of its former president's Arnold Zack—we concluded at the end of the day that if the parties who utilized employment programs were unwilling to follow the Due Process

Protocol, then we would refuse to administer their cases. This was the first time in our almost 75-year history that we put everyone on notice we would not handle cases that failed to meet such a standard. The result of that decision, which initially alarmed some, has enabled us to give feedback to organizations who come to us with faulty plans and who have benefited from our encouraging them to "do the right thing." We trust their employees have benefited as well.

In continuing our overview of issues that will affect our future direction, we see every evidence of a continued proliferation of ADR providers including individuals, regional entities, and national organizations. We sometimes say at the Association that we have done a marvelous job of helping the ADR field grow, coincidentally along the way helping create a great deal of competition for ourselves.

It is, of course, inevitable that enterprising individuals and organizations will look at what is happening and attempt to apply Business School 101 measures to it—ergo, a national consolidation of the field. I would tell you conservatively that we turn away approximately one venture capitalist a month who has the high ambition of consolidating all of the major entities in the field of arbitration and mediation. We do not seriously consider such approaches, and I cannot imagine that we ever would. It is neither who we are nor what we stand for. Nonetheless, I do believe that there are a number of entities that might see a benefit to joining in a mega-national effort. And if indeed that comes to pass, it will have significant implications for all others.

I would also note with some concern that the mercurial growth, about which we are speaking, across the field and not related to labor and employment matters exclusively, suggests that there will be more ethical issues confronting the field. That in and of itself has very serious implications. After all, it is the integrity of the neutrals and appointing agencies that make this entire system work. Once a number of parties are publicly criticized for ethical lapses, whether it is in the field of labor management or employment or some other field, we will all have to deal with and be subject to the negative spin-off. Thus, we should work together to forestall that day.

From the overview perspective, we see the continued growth of mediation generally (particularly employment mediation). With respect to the growth of mediation alone in the last calendar year, AAA-administered mediations grew by 16 percent over the previ-

ous year. We also see no abatement in the growth of arbitration (the executive branch agencies of the federal government like it). Also, expect greater use of dispute avoidance measures that are occurring presently in the construction industry. Partnering and dispute review boards are two examples. We believe that over time there will be more concerted and pervasive efforts across all fields to move dispute resolution processes and newer methodologies closer to the sources of potential disputes, thus enabling parties to address conflict prior to the arbitration and mediation stage.

Speaking of expected, continued growth in discrete areas, including employment disputes which in the course of the last year grew by 20 percent in one calendar year, our international caseload likewise grew by 20 percent. At the same time we see increased evidence of a future trend that will find our Association receiving more court referrals, more mass claims cases, and more health care disputes, among other subjects. Where are we with respect to labor disputes that utilize the AAA? Well, the numbers have been up and down over the course of the last 10 years with a high of 16,800 cases in 1989 and a low of 14,623 cases in 1998. But more about those numbers a little bit later as I move from the general to the specific. Lastly, in the general overview category I would note that we see a number of very significant emerging opportunities for expanded education in labor-related fields. I will have more to say about that shortly. Let me now turn to a few specific, recent initiatives that illustrate where we are headed with respect to the labor and employment field and our relationship with the National Academy.

First, about a year and a half ago we created the first-ever Senior Vice President position for labor. We felt this is a subject of such importance that it should have a senior vice president dedicated to it exclusively. No other subject matter in the American Arbitration Association has its own senior vice president. Our current senior vice president for labor is the very able Rick Reilly, a person well known to all of you. Then this past fall we created a National Labor/Management Task Force to address issues facing unions and employers now and in the future. It is designed to seek ways to improve our systems, in partnership with those who use them, and to establish a vehicle to provide valuable feedback about the Association's rules and procedures, education and training programs, and outreach efforts with the labor and management communities. The Task Force is composed of 33 members: 11 neutrals, 11 union representatives, and 11 management represen-

tatives. I think it noteworthy that all 11 arbitrator members are members of this great institution, the National Academy.

A third recent action involves the work of Christine Newhall, our highly successful regional vice president in Boston. Within the past year we have asked Christine to assume administrative oversight of all case administration being done in the Northeast, from New York northward. As a part of her new duties she has met with Academy regions in the Greater New York area and New England. She has heard and reported a number of very gratifying things to me. I understand from Christine's meetings with those Academy Regions that Academy members want to be involved with the work of the AAA and are willing to provide feedback about our services. She also informed me that arbitrators want to be informed about *pending*—not adopted—changes in the Association and wish to have an opportunity for input so that we can make better-informed decisions. I accept and applaud that approach.

I believe both the AAA and the NAA are saying that our longstanding relationship needs to be nurtured—not taken for granted. It needs to be revitalized and focused on pro-active initiatives, not on reactive lament about lost opportunities. The American Arbitration Association needs the Academy, and we desire stronger and more frequent interaction and communication. We believe, for example, that there is value in our going out together to talk to both unions and employers about the arbital process. Together we should hear from others about their concerns, their preferences, and their suggestions. There is a great deal of "mutuality" and shared benefits in our working together.

So how does this relate to the AAA's vision for the future? Again, if we are to be effective and successful in the 21st century in the labor / management field, we can only do so with a shared and strong relationship with the NAA and its regions. The Academy is the only sustained intellectual continuum in the field, and its members have their pulse on the players and on the efficacy of the process. Quite frankly, we need your observations and feedback; to that end I would like to invite the Academy President to meet at least annually with me, the AAA Board, and / or our Senior Management Team to underscore our shared resolve to improve the process and strengthen our individual and institutional relationship. Mr. President, I hope that you might look positively on such a practice and, if so, that you might join us in the fall of this year.

To continue the theme of professional entities with high standards working together, I propose another specific challenge and

solution. I believe that we need to work together, share, and collectively analyze all available case data in the labor field. It is amazing to realize that after all the years labor/management contracts have contained arbitration provisions, none of us can articulate with confidence (or for that matter without confidence) any case trends across the field. We have no reliable data about the total number of hearings, the kinds of hearings, or the number of hearings by individuals, special panels, and all institutions. Yes, it is true that the NAA plumbs important related substantive issues quite unlike anyone else, and occasionally does its own case research. However, I am here considering baseline data on case types, trends, numbers, hearing versus no hearing, and so on, across the field and including both individuals and agencies.

To address what I perceive to be a debilitating void of data, I propose the creation of a shared labor case data bank for all labor disputes to track case types, trends, hearings, etc., all of which would lead to a clearer understanding of successes and failures and areas in need of attention. We could also look candidly at issues related to cost and fees. I know that these matters are terribly important to the unions we serve. Accordingly, we have not raised our administrative fees in the labor area since September 1, 1993. I will not, of course, ask the impertinent question of whether any neutrals in the room still charge the same fees that they charged for their services in 1993. But again, we know so little in a collective and pervasive way about case number trends. We know individually that our caseload for the first 6 months of 1999 is down from that of the comparable period in 1998. What we do not know is whether cases are being picked up by other institutions, whether arbitrators are handling them by direct appointment without the involvement of any institution, or whether special standing panels are being established. It may well be that there are fewer disputes, a trend about which we would all have mixed feelings. But seriously, it would be worthwhile for us to see the big picture and identify the trends. I would hope very much that we might proceed in a collegial and collaborative way to get to some of these answers.

Accordingly, on behalf of the AAA I offer to host any necessary planning sessions so that we might consider how to proceed. Of course, the Academy, the Federal Mediation and Conciliation Service, the Association of Labor Relations Agencies, pertinent academics, and others would be involved. We, the shared "we" here, need to get our collective arms around what is going on across the field so that we might address it in an informed and

constructive way, with an eye toward improving our shared services to those who need them. After this meeting I intend to pursue personally whether interest exists for such an undertaking. If it does we at the American Arbitration Association are prepared to go forward.

Now, in terms of "whither we goest," I have just a very few additional observations. First, as I said from a general perspective, we see growing needs in the field of education. Specifically, we see the need and opportunity for more specially designed education programs for unions, for neutrals, and for employees, including negotiation skills for human resource and legal departments, as well as advocacy training. Happily for us, Tom Colosi, a national continuing education leader, who is officially retiring from the Association this summer, will continue to assist us in offering a number of new labor education initiatives.

Second, I alluded earlier to my general belief that the body of law in our shared field will grow in state and federal courts—if not as a result of increased numbers of cases, then as a result of arbitration processes, contracts, and programs being court tested at a growing rate. I want to assure you that we, the American Arbitration Association, will be there through our legal department in the courts across the country, as in fact we are every week, defending the arbitral process. I also believe that we will likely be in the courts more pro-actively in the submission of amicus curiae positions. I would note parenthetically here that amicus curiae briefs before either the highest state court or the Supreme Court of the United States, would seem to me once again to be very likely opportunities for National Academy and AAA collaboration.

I also believe that as U.S. companies and foreign corporations increasingly merge, the Academy, the AAA, and others should think together about the transnationalization of labor/management dispute resolution contracts and the delivery of arbital services to unions and companies across borders. We have not pondered that subject very deeply, but I think that we should. We could best do so in a collegial environment with other interested parties.

Finally, I said from my general perspective at 30,000 feet that I saw an increased demand for and interest in the publication of arbitration awards and information about the arbital process. Indeed, in the fourth quarter of this year we will commence the publication of an employment letter that will address awards in employment cases—something that we agreed to do as a part of

carrying out the spirit of the employment Due Process Protocol. I will mention also that we intend by next year to have all of our published labor awards on our Web site and accessible to parties and neutrals. This and related interests in the field cause me to raise anew the idea of having an entire issue of the *Dispute Resolution Journal* dedicated to labor and employment subjects. I would welcome any interest from the Academy in helping us develop such a dedicated issue, and indeed perhaps to have it as an AAA/NAA collaborative undertaking.

We know there is great interest concerning the consolidation of certain AAA administrative services into regional case management centers, as contrasted to having those services delivered in our regional offices. While it is the hot topic of the day, I have not wanted it to assume an inordinate position in the broad range of thoughts that I have expressed up to this point. I believe I could best do justice to the subject by saying what I said recently to the members of our National Labor/Management Task Force; namely, that we consider this to be an ongoing and a collaborative process. Indeed, at an upcoming meeting of the National Labor/Management Task Force this subject will be discussed at some length. But for purposes of background I would summarize by saying that the rationale for the decision to establish case management centers—an approach that began 3 years ago as a pilot in Dallas—was to address a national ongoing problem for the AAA. We found that case administration simply had not been and could not be well done from 38 different locations. The idea was to have a case management center serve in an administrative support role to a number of regional offices. Such a model enables us to have in one place a critical mass of staff, that is, depth of personnel and appropriate levels of supervision. The process was never about closing any office of the AAA. Indeed, we have not closed a single office during the course of this process. While case administration support is now done in well over half of our offices from either Dallas or Atlanta, all regional offices remain in place. Thus, parties may still file cases locally, the cases are still heard locally in our local hearing rooms, each office still has local staff on-site, and the local regional vice president still has oversight of the local panel of arbitrators and mediators.

Again, this undertaking was never about cost-savings or downsizing or closing any office. Since we cannot train and retrain staff and supervise them at competent levels across 38 sites, we anticipate the establishment of four case management centers to

do case administration at the highest and most consistent qualitative levels. I reiterate, because it was important in our thinking, that parties still file cases locally, the panel of neutrals is still the responsibility of the local regional vice president, the case is still heard locally, and there is local staff on-site for interaction with parties and neutrals. Well, you may ask, has it worked in Dallas and Atlanta? The answer is that by and large it has worked very well. Have there been glitches and some resistance to change? Of course, but quality improvement work continues. At the end of the day, we know that staff are better trained, better supervised, and that parties by and large give the process a "thumbs up."

We consider this a collaborative process. Thus, while we recently determined that the commercial cases in our two Ohio offices would receive administrative support from our Dallas office, we did not do so with respect to our labor cases, pending further discussion with our Labor / Management Task Force. We will conduct our own internal deliberations over the coming weeks as well.

There is truly much more to be said about the future direction of the American Arbitration Association. We earnestly believe that our success in the field of dispute resolution—one in which all of us here have an abiding interest—can best be achieved through a close and harmonious working relationship with the National Academy of Arbitrators.

I would truly enjoy the opportunity to say more, but I fear that I have already overstayed my welcome, and I will resist talking further in deference to a charming story that I stole openly from Bill Gould. Bill tells the story about the priest who is greeting parishioners at the door at the conclusion of a service. One of them stopped and said, "Pastor, I liked your sermon—it was brief." The priest thought a minute and said, "Well, thank you so very much, I didn't want it to be tedious." The parishioner thought a second and then said, "It was also tedious!" And so, to avoid being *more* tedious, I will conclude here with my very sincere thanks for the opportunity to be on the program at the Annual Meeting of the National Academy of Arbitrators and for your very kind attention.