

CHAPTER 1

PRESIDENTIAL ADDRESS: ARBITRATION IN A  
LITIGIOUS SOCIETY: ARBITRATION, INNOVATION,  
AND IMAGINATION—ESCAPING THE  
MISSIONARY POSITION

I. INTRODUCTION

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Richard Bloch is a beguiling person. He is a jack-of-all-trades type of person, but he is beguiling because he is a *master* of so many occupations—arbitrator, lawyer, teacher, author, world-class magician and showman, musician, playwright, inventor, hockey player, technology whiz, and raconteur. He is deadly serious—even competitive—in all that he does (which, apart from his many innate talents, explains his mastery of so many occupations), but he is beguiling because he never takes himself too seriously and he never seeks gain at the expense of others. He is thoughtful in addressing serious issues, respectful of others, and wise in his advice, but he is beguiling because he camouflages these generous traits with disarming wit and charm.

Rich and Sue Bloch have been treasured friends for more than 35 years. Our families have developed strong ties over the years, sharing all the joys and tribulations that come with close friendship. Becca and Michael Bloch—Rich and Sue’s daughter and son—are like godchildren to me. And I have worked with both Rich and Sue on a number of projects over the years. You can imagine, then, what a treat it is for me to “introduce” my beguiling friend on the occasion of his Presidential Address before the esteemed National Academy of Arbitrators.

Just over 25 years ago, at the 30th Annual Meeting of the Academy in Toronto—when he was a very, very young man—Rich gave a speech to the Academy entitled “Some Far-Sighted Views of

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Myopia.” The opening lines in that speech are vintage Rich Bloch. Let me read you his words:

I am a full-time arbitrator. I would be pleased to say to you that my background was that of an academician. However, while I taught law school for [several] years, I cannot in good faith tell you I was an academician. The only real publishing experience I *contemplated* was to update the labor law classic by Cox and Bok. I attempted to recruit Nicholas Katzenbach, Arnold Zack, and Eli Rock to join me [in publishing a new edition of *Labor Relations Law*]: Cox, Bok, Katzenbach, Zack, Bloch, and Rock. But the publishers said it wouldn't sell.

I suffer similar qualms, however, in claiming to be an arbitrator. Surely I have some of the indices of success—some transitory “permanent” commitments, an Avis Wizard number, and a set of matched towels from the top Holiday Inns in the country. But I grew up under Dave Miller [, who] viewed this job as a craft. . . . [S]ince I've become a full-time arbitrator, [however], my access to continuing education [has been] severely limited . . . . The craft is changing and we are not.<sup>1</sup>

In his inimitable style, Rich introduced a powerful critique of the profession with wit and self-deprecation. He then amplified his views on the growing changes in arbitration from a self-contained system of industrial self-government to a system that would inevitably incorporate a burgeoning array of federal statutes and regulations. His thesis was sharp and prescient, as he exhorted members of the Academy to stop whining over the “coming end of arbitration's golden age” and to deal with the new realities of arbitration. Rich said (and I quote):

[T]here is a lot to be said for reaching the right conclusion [in arbitration]. So, if we are not yet convinced that the courts or administrative agencies will be tinkering with our [arbitral] wisdom, or if we don't give a damn about tinkers, let me suggest that changes are needed in the interests of being correct, without regard to subsequent [judicial] review. As an Academy, we should accept the responsibility in the future of educating ourselves, because (a) it is right that we do so, and (b) no one else is going to do it for us. . . .

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. . . We must create an Academy which is itself creative. We must begin to educate ourselves and to share our ideas. If we do not, the Academy will not die, but neither will we have the avenue to escape the meanness and meagerness of mere professional existence.<sup>2</sup>

<sup>1</sup>Bloch, *Some Far-Sighted Views of Myopia*, in *Arbitration—1977*, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1978), at 233.

<sup>2</sup>*Id.* at 238–39, 240–41.

Rich did not merely exhort with the words of his 1977 speech. In the ensuing years, he became both a nationally preeminent arbitrator and a thoughtful leader of the profession. He worked hard to develop effective training materials and educational programs for Academy members; he co-authored two books, *Arbitration of Discipline Cases: Concepts and Questions*, and *The Labor Agreement in Arbitration and Negotiation*; he wrote important articles on “arbitrator advertising”; “deregulation, integration, and arbitration” in the airline industry; “absenteeism and arbitration”; “time limits and continuing violations”; and “arbitration and its relationship to the judiciary.”

Rich has also been a consummate teacher. He has served as an instructor in training programs run by the Air Force and the Department of State; he has lectured at major universities such as Harvard, Columbia, McGill, Michigan, Pennsylvania, George Washington, Georgetown, and Washington University in St. Louis; and, since 1985, he has conducted seminars in South Africa, training arbitrators to handle industrial disputes in that country.

In short, he has been a brilliant emissary for the arbitration profession—enhancing the profession’s credibility with his sterling judgments as a neutral, training others in the ways of arbitration, giving sage advice and guidance to novice arbitrators, and offering new ideas to address the flood of new issues that have confronted the profession in the years since 1977.

And, of course, Rich has served the Academy with great distinction in a continuous succession of leadership positions—beginning in 1977 as Executive Secretary-Treasurer, and thereafter serving on the Board of Governors, Program Committee, Membership Committee, Executive Committee, and as Vice President—before ascending to the Presidency. During his year as President, apart from the routine duties of the office, Rich has settled a dispute with the Federal Trade Commission over a complaint issued by that agency against the Academy, worked to overhaul the Academy’s internal governance structures, and set in motion a plan to assess the future goals of the organization and develop concrete implementation strategies. And, most important, Rich has continued to foster the ideal of arbitration as a profession, not merely a trade, implicating the highest standards of integrity, trust, and stewardship.

Recently, I talked with Rich and asked him what, apart from his family, has given him the most joy in life. He said that what he felt good about, “blessed, really, was having had the desire and free-

dom to taste from a wide variety of offerings in this life.” Rich’s answer did not surprise me, because his life has been enriched by so many interesting ventures: as a musician with three “albums”; as a magician, performing periodically at the Monte Carlo, Mirage, and Flamingo Hotels in Las Vegas; as a creator and builder of magic illusions for Siegfried and Roy and David Copperfield, among others; as an inventor with a patent on a device to help disabled people ice skate; and as an author of law review articles, a couple of books, a television play for Orson Welles, and the book for a stage musical. But Rich made two candid admissions: “Most of all,” he said, “I have loved my practice as an arbitrator and sometime teacher, although had my tryout with the New York Rangers in 1961 been more successful, I would have remained a hockey player.”

Those of us who have been connected to the arbitration profession are thankful that Rich never made it as a goalie in the National Hockey League. Rich Bloch is recognized as one of the great arbitrators in the world, because he exemplifies—by every measure of skill, judgment, temperament, commitment, and integrity—the best that the profession has to offer. It is therefore a real pleasure to introduce my wonderfully beguiling friend, the President of the National Academy of Arbitrators, Richard I. Bloch.

## II. ADDRESS

RICHARD I. BLOCH\*

My thanks to Harry Edwards, my longtime and very dear friend. His introduction of me today should not be allowed to detract from the credibility and great weight to which all the rest of his prolific writings are entitled. As I step down from the position to which I have aspired all my professional life, I am reminded of an 18th-century Italian prime minister who, after a particularly turbulent career, was approached by a colleague who said, “Governing Italy must be difficult.” “No,” he replied, “governing Italy is easy. It’s just useless.”

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**Re: Academy Governance**

Faced as one is with a substantial wealth of knotty issues and a remarkable dearth of available time, the temptation is, on occasion, to simply punt. But I couldn't. I was afflicted with the curse of a caring, energetic, and brilliant Board of Governors and officers who demanded change and who worked days, nights, and weekends, who volunteered their own time and funds to do a little more of what tires us all so much—travel—to breathe life and sparks and energy into this wonderful organization. Where, I ask, are the sycophants when we need them? And the worst of the lot is Dave Petersen, our Secretary-Treasurer, who is tireless, persuasive, caring, and effective. What a curse. Together, this Board has overseen the building of a new framework of governance; it has played midwife to a new and developing Web site and a strategic planning mechanism that will guide us in our continuing desire to serve as a meeting and focal point for ideas and developments in this critical field of dispute resolution. My year as President has been informative and exhilarating. It has been exhausting.

Imagine the thrill of waking each morning to more than a hundred e-mails. Concededly, not all were directly relevant. Forty percent tell you how to lose points on your mortgage or gain inches on your penis. How'd they get my name? I have a great mortgage. Thanks, too, to my brilliant and long-suffering wife, Susan, who continues to roll with the punches after 37 years together. Susan continues to serve above and beyond the call of duty, sharing my delights and disappointments, nursing my psychic wounds, writing my awards.

I am frankly honored that my children cared enough to join us here today. Michael, should he survive his remaining two years at Harvard Law School, will likely become an aggressive pain-in-the-ass litigator and thereby be compensated handsomely for what heretofore he's done for nothing. Rebecca, too, will enter the legal world when she starts her law career at Washington University in St. Louis this fall.

This is Rebecca's second visit to an Academy meeting. The first was 26 years ago and I can now reveal publicly a true story concerning how Rebecca, at age 1, saved my life. I was Secretary-Treasurer of this organization at the time, and the then-President gave me a copy of his 50-page presidential luncheon address to review. When he asked me what I thought, I made the mistake of assuming he wanted an honest answer. I told him it was life-

threatening. Acting on that conclusion, I ensured I was not seated on the dais during his address. Instead I sat way in the back of the room, accompanied only by Rebecca, in a stroller. As the President began what I anticipated to be a 90-minute speech, Rebecca began to cry inconsolably. Good father that I was, I immediately jumped up and wheeled her from the room. I was concerned about upsetting the President's speech, disturbing the neighboring guests, and concerned mainly by the big red welt on Becca's leg where I had pinched her. We spent the afternoon at the zoo. Fortunately, San Juan has no zoo, so the children are both here.

The thanks I am about to give are more than a gesture of courtesy; they are fundamental to the premise of my remarks. I was educated in this business and nurtured by Dave Miller and Arthur Stark, who, together with a host of other close and dear friends in this group, imparted to me a true sense of the caring and the craftsmanship that can be and ought to be the hallmark of this arbitration process. And, equally, my thanks go to the practitioners and guests who, while not technically members of the Academy, nevertheless join us, year after year, and who are co-trustees of this remarkable system of dispute resolution. I do not take lightly the honor of having been invited as the outsider decisionmaker by parties who value and protect the ongoing nature of the industrial relationship. In the daily crush and bustle of business, we can too easily forget what a remarkable process this is. We live in a difficult and frightening time, one wherein we truly worry about the human condition and our ability to just plain get along.

During the latter part of his career, depressed by financial downturn and the loss of his wife, Mark Twain wrote some cynical but piercingly prescient pieces, including a short story, "The Mysterious Stranger." In one scene, a young boy, accompanied by Satan, witnesses a scene occurring inside a prison:

A young man lay bound, and Satan said he was suspected of being a heretic, and the executioners were about to "inquire" into it. They asked the man to confess to the charge, and he said he could not, for it was not true. Then they drove splinter after splinter under his nails and he shrieked with the pain. Satan was not disturbed but I could not endure it, and had to be whisked out of there. I was faint and sick but the fresh air revived me and we walked toward my home. I said it was a brutal thing.

Said Satan: "no, it was a human thing. You should not insult the brutes by such a misuse of that word . . . no brute ever does a cruel thing—that is the monopoly of those with the moral sense. When a

brute inflicts pain he does it innocently; it is not wrong; for him there is no such thing as wrong. And he does not inflict pain for the pleasure of inflicting it—only man does that, inspired by that mongrel moral sense of his! The sense whose function is to distinguish between right and wrong, with liberty to choose which of them he will do. He is always choosing, and in nine cases out of ten he prefers the wrong.”

In 1978, Alexander Solzhenitsyn addressed the Harvard University graduating class. He, too, spoke bitterly, but as a friend, of the shortcomings of Western society:

Western society has given itself the organization best suited to its purposes, based, I would say, on the letter of the law. . . . [P]eople in the west have acquired considerable skill in using, interpreting, and manipulating law, even though laws tend to be too complicated for an average person to understand without the help of an expert. Any conflict is solved according to the letter of the law and this is considered to be the supreme solution. If one is right from a legal point of view, nothing more is required, nobody may mention that one could still not be entirely right, and urge self-restraint, a willingness to renounce such legal rights, sacrifice and selfless risk—it would sound simply absurd. . . . I have spent all my life under a communist regime and I will tell you that a society without any objective legal scale is a terrible one indeed. But a society with no other scale but the legal one is not quite worthy of man either. A society which is based on the letter of the law and never reaches any higher is taking very scarce advantage of the high level of human possibilities. The letter of the law is too cold and formal to have a beneficial influence on society. Whenever the tissue of life is woven of legalistic relations, there is an atmosphere of moral mediocrity, paralyzing man’s noblest impulses. And it will be simply impossible to stand through the trials of this threatening century with only the support of a legalistic structure.

How is that relevant to us? It’s germane because, as I look around us in the cloud of corporate mismanagement and executive greed on a domestic level and incalculably dangerous saber rattling and warring internationally, I look back at labor-management and I look at what it is we all do, impressed as we all are with the unavoidable necessity of getting along, and I think we just might be the only folks who know how to do it right.

The glue that holds the dispute settlement mechanism together and bonds the entire industrial-labor relationship in this country is the reality and shared goal of continuing the relationship. After the battle, the fever pitch of strikes or lockouts or the more tempered confrontations at arbitration, the parties must get back to the business at hand if they are to survive. That fact at once distinguishes our battling from divorce court and constitutes by far

the most important factor underlying the success of the collective bargaining process and the extension of that process—the dispute resolution system.

Game theorists identify the phenomenon as that of the “repeat players.” The theory, which is intuitively apparent and empirically solid, is that players (negotiators) will treat each other more equitably, perhaps more hospitably, when they know they will have to meet, and deal with, each other again. Upper hands will not be pressed as readily. In Solzhenitsyn’s terms, agreement in bargaining is most readily achieved when the parties identify what is right and fair and not simply what can be achieved through the wielding of economic power and advantage.

This is the true enigma of the Middle East. Like it or not, the Arabs and the Jews, Semites all, are repeat players, tied inextricably to the land. Yet they continue to behave as if there can actually be a winner, a side that will prevail on its own terms. Somehow, someday, someone will be able to convince them that, in that land where all political questions become religious and all religious questions become political, there is no alternative but to recognize their collective status as repeat players. Compromise is not only desirable, it is unavoidable. It should only happen in our lifetime.

Some years ago, I was appointed to chair the Foreign Service Grievance Board by then-Secretary of State Henry Kissinger. The Secretary, you may remember, was then engaged in very high-profile Middle East shuttle diplomacy and, following a brief meeting, one of his staff told me a story that had been making its way around the office.

One day, Kissinger invited Prime Minister Begin and President Anwar Sadat to meet him at the Tel Aviv zoo. There, in the presence of the two leaders and a crowd of tens of thousands, Kissinger displayed a large shrouded cage. Raising his hand for silence, Kissinger said, “Look what I have done.” With that, he whipped away the shroud and inside the cage, resting peacefully beside each other were a lion and a lamb. As the crowd went wild, Kissinger stated, “See what I have caused to happen—now let us proceed, together, to make peace.” The crowd cheered again and Kissinger led the two men away. A young bystander, moved to tears, turned to the zookeeper who was recovering the cage: “Is it not wonderful,” he said. “Surely if Kissinger can bring the biblical parable to life, if he can cause the lion to lie down with the lamb, he can guide us all to peace.” “Yes,” said the old zookeeper, “but he’d best hurry. We are running out of lambs.”



However uneasy the parties are in one another's company at times, the industrial relationship continues. The process of arbitration itself is, by now, honed and polished to a fine point. We know how to do that. But our skills at alternative dispute resolution within the grievance procedure short of arbitration, or at modifying existing processes to accommodate changing realities are considerably less developed. Too often, that's simply because the parties haven't explored other possibilities. But the industrial-based marriage, like the other kind, needs innovation and experimentation to keep it vibrant. What I shall propose is not a new idea except, perhaps, in some limited areas of emphasis. Rather, it is a plea toward more general experimentation. Thus, the subtitle of my talk: "Arbitration, Innovation, and Imagination—Escaping the Missionary Position."

There is room in this dispute resolution process to better utilize and, indeed, to expand the use of its neutrals. My case for better exploitation of the possibilities begins with the observation that arbitration, however effective, is almost always less preferable than anything the parties can cook up by themselves.

Some years ago, Arthur Stark, one of the great and grand gentlemen we've ever known, presented a meticulous review, by way of his presidential address, of unique arbitration systems. I would refer you to that paper, reprinted in this Academy's *31st Proceedings*, as a source for the wondrous varieties of final resolution. I address today just a few variations on the theme because they illustrate well, I think, the realization of the potential of this jointly trusted system.

The first example represents a tip of the cap to the airline industry, and my friends who serve on the so-called System Boards of Adjustment. These are, as you know, multiperson panels that generally function with a single neutral flanked by partisan arbitrators appointed by the parties from their own ranks. The process is wasted if all it does is offer the parties another chance to reargue the case. On the other hand, it reaches its fullest potential to the extent it allows the rendering of a decision that utilizes the combined creativity and expertise of the constituent members to transcend the limits of what a single neutral might otherwise be too uninformed, or reluctant, or too unimaginative to achieve.

Such was the case in a recent board I participated in that dealt with the furlough of more than a thousand pilots just following 9/11—this in the face of a no-furlough clause in the contract. The clause had an exception for forces majeure, and a majority of the

board concluded that 9/11 was, in fact, such an event. But we also agreed, unanimously, that it would be appropriate to retain jurisdiction in the event circumstances should change. If the flying public were to return, we held, the layoffs should be halted and the pilots recalled.

About a year later, we were convened to resolve the predictable dispute on just this issue. The board decided, unanimously, that circumstances had changed. To be sure, the economics of the company, and the industry, were just as dismal, but the effects of 9/11 on the flying public had dissipated; folks were flying, albeit on deeply discounted fares. Together, the board constructed an algorithm that sought to implement the recall, together with labyrinthian training considerations, in such a way as to mitigate, to whatever extent possible, the potentially disruptive impact of a stark back-to-work order. In crafting the remedy, the partisan arbitrator members donned true cloaks of neutrality that made them vital and valued colleagues in the process. It was an example of the cooperation and caring for the institution and the process that exemplifies the near-fiduciary relationship the neutrals should and do assume as trustees and stewards of this system.

If one believes in the process and takes seriously the role of the arbitrator as trustee, there is no limit to the imaginative dispute resolution alternatives that are available. Following completion of a lengthy interest arbitration in the transit industry, the parties and I sat down to deal with a serious backlog problem involving drug-alcohol cases. They had hundreds of bus and train operators, all of whom had been discharged, all of whom had filed for arbitration. This system was seriously overloaded. Given that a full-blown drug case could last two or three days, it would be years before some people could have their day in court. Most of that time would be spent in the demanding and time-consuming task of challenging drug and test results.

My proposal was as follows: Grievants could, of course, challenge the discipline, which was generally discharge, in the normal fashion. But if they wanted to avoid the extensive wait for a hearing, and if their gripe was not with the test results themselves but with the procedures, due process failures, or the extent of the penalty, they could utilize an expedited procedure to bring issues of potentially mitigating circumstances for review by a joint committee empowered, in essence, to review cases on the grounds of compassion, extenuating circumstances, or even post-discharge rehabilitation—conduct that might well be irrelevant in a standard arbitration.

For the past 10 years, that program has succeeded. Indeed, while we have heard perhaps 400 to 500 cases in that time, only one case has gone through the established arbitration channel. The committee hears three to seven cases in a single sitting—no lawyers, very informal. There are written opinions signed only by me to avoid political problems. And they're short. To the driver, Mr. Watson, who claimed that his positive drug test must have resulted from windblown smoke from a campfire containing a discarded marijuana joint, I wrote a one-sentence decision: "The only one blowing smoke here is Watson." Besides, I went to college: No one throws away a marijuana joint.

One of my favorites, however, was the train operator who tested positive for alcohol. It was Thanksgiving, he said, and he had eaten his brother-in-law's rum cake. "How much?" I asked. "The whole cake," he said. The committee's decision was that if his brother-in-law could make another cake from the same recipe and he could eat the whole cake and blow a 2.1 on a breathalyzer, we would reinstate him to the alcohol rehabilitation program. He hasn't returned. The backlog is gone. Some people who need—and deserve—help are getting it and in the process, the dispute resolution is working.

Or consider the next alternative as a pre-arbitration step. What follows is a relatively simple but effective variation that has led me to a proposition I'll leave with you in moment. Some time ago I served as "permanent" umpire for a company and union for about 10 years (that's way beyond my average). What developed, over the years, was an informal and very effective pre-hearing process I dubbed the "What If" sessions. The two advocates would sit down with me with 10 or 20 case files. Each would make a presentation that went something like, "What if I had a witness who said this . . . ?" And, "What if I showed you a contract provision that said this . . . What might you be likely to rule?" I'd take my best shot. Armed with that information, the parties could decide whether to go forward or to fold their tents. At times, they could use my pronouncements as ammunition to move their clients to settlement. The process worked. Recognize some of its benefits:

1. It's a chance to test your views head to head and to get your respective acts together.
2. You participate in an informed discovery process. The grievance procedure substitutes informal meet-and-discuss for the potentially burdensome and, at times, abusive discovery. But

it's an imperfect mechanism and, too often, cards are not laid on the table.

This "trial run" promotes the better sharing of information because the dynamics are reversed. In seeking the neutral's opinion, however informal and nonbinding it may be, it is to each side's advantage to disclose, not because the chances of resolution are enhanced (which they are) but because it is a better barometer of how your case will turn out. From the standpoint of time and money, this represents a substantial potential for real savings.

This is, as I have said, not a new concept. Systems like this, some incorporated in grievance mediation processes, use mechanisms of this nature as part of the mediation exercise. What I am suggesting is more emphasis on this "moot courting" as a stand-alone process. It is "expedited, albeit non-binding arbitration" in the extreme. To those who would indulge in this experiment, I would offer the following procedural suggestions:

1. Hire a neutral who will be foreclosed from hearing the case. This leaves the neutral free to offer opinions as well as, perhaps, to mediate. Remember, though, the purpose of this is to get an answer. One who is there to mediate may well feel a certain reluctance to be candid, at least at the onset, feeling that the party with the perceived leg up will be unwilling to compromise. (That's why this step should be seen as a post-mediation step: Settle it if you can, and if you can't, get an answer.)
2. Neither side waives any positions. If it doesn't work, on to arbitration, as with any other step in the grievance process.
3. There should be no actual presentations—the emphasis should be on expeditiousness.
4. There should be no written reports by the neutral.

Some have dissented from this notion of so-called peek-a-boo arbitration. But I endorse it emphatically. What this amounts to is an exercise that, failing everything else, will serve as nothing more than an additional, and very revealing, step in the grievance procedure. Litigation attorneys would shrink in horror at the prospect of that kind of disclosure, but there again is one of the profoundly different aspects of this process. The grievance procedure is meant to be a problem-solving arena. To be sure, the process is not for everyone. There are many cases, as we all know, that are sufficiently complex, politically sensitive, or otherwise

troublesome that they simply must be fought to a conclusion. And the sine qua non of this model is a base level of trust in the process and in the neutral. The notion of doing a run-through with the opposition would be anathema in standard litigation. But we started with the recognition that we operate with different goals: Again, this is a system based on repeat players. Stated otherwise, it requires a recognition that we are all co-trustees of this process. We are imbued with the responsibility to keep it functioning in a responsive manner and to ensure that industrial disputes are resolved quickly and effectively.

My final point is that this is where this Academy comes in; it's why I have, for 30 years, cherished my relationship with it and with you, my colleagues. More than any other venue, this forum, this meeting ground, has offered practitioners, arbitrators and neutrals, and scholars the opportunity not only to exchange views and contribute thoughts but to come to know one another personally and to plant the seeds of mutual respect that will, in the long run, support this process. All of us in this room and in this profession are the trustees, the stewards. The notion that the combatants and the decisionmakers, as repeat players, not only will meet together as colleagues and friends but also dedicate themselves to perpetuating this remarkable peacemaking effort stands even brighter and taller in current world circumstances. And that is the reason I am so very honored to have been placed in this position and to have been allowed to address you this past year and today.

