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A SYMPOSIUM ON ARBITRATION

FOREWORD

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Twenty years ago an article on arbitration would have been an oddity in a law review. Significant of the change in thinking with regard to arbitration on the part of attorneys, bar associations, and law schools is the fact that within the past few months several law journals and reviews have had major articles devoted to various aspects of arbitration. This new literature in the legal field serves as notice to the practitioner and to the law student that arbitration has come of age. The editors of the *Vanderbilt Law Review* and the faculty of the Law School are, therefore, to be congratulated for their foresight in devoting an entire issue to the subject of arbitration.

During recent years, it has become apparent to the American businessman and his legal counsel that the ability of the free enterprise system to survive and withstand increasing pressures for regulation, compulsion and controls would depend to a large extent on the atmosphere in which day-to-day commercial affairs are transacted.

This awareness of social implications of private activities, no less than concern for his immediate self-interest, has been the source of renewed interest on the part of lawyers in the arbitration process. Evidence of this interest is seen in the increasing number of lawyers who participate, both as arbitrators and as representatives of parties, in arbitrations administered by the American Arbitration Association, and, perhaps most indicative, it is seen in the fact that the Commissioners on Uniform State Laws and the House of Delegates of the American Bar Association have adopted a uniform arbitration law the frank purpose of which is to encourage the practice of private, voluntary arbitration.[1]

The background of this development is worth recalling. There was a time when many lawyers, if not most, were inclined to see in the practice of arbitration a danger which threatened to rob courts

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1. Adopted by the National Conference of the Commissioners on Uniform State Laws at Philadelphia, Pa., Aug. 20, 1955; approved by the House of Delegates of the American Bar Association at Philadelphia, Pa., Aug. 26, 1955. Amended by the National Conference of the Commissioners on Uniform State Laws at Dallas, Texas, Aug. 24, 1956; approved by the House of Delegates of the American Bar Association at Dallas, Texas, Aug. 30, 1956.

of their jurisdiction, lawyers of their function, and clients of their right to justice. This conception, now happily outlived, dated back to a decision made over 300 years ago by Lord Coke. In 1609, that jurist propounded the doctrine in the *Vynior* case that private, voluntary arbitration "ousted" courts of their jurisdiction and that agreements to arbitrate could therefore not be enforced except by suits for breach of contract. This decision was carried over into the colonies and weighed heavily on the subsequent history of arbitration, for if arbitration agreements could not be enforced, much of the advantage of arbitration was lost.

This unsatisfactory state of affairs met its first real challenge in 1920, when Governor Alfred E. Smith of New York signed into law the first modern arbitration law. This signal achievement, the work of the New York State Bar Association and the Chamber of Commerce of the State of New York, was soon followed by action in other states and by the Congress of the United States. Today, there is a Federal Arbitration Statute and similar legislation in 15 of the states.

This legislation greatly encouraged arbitration, as it was intended to do. In the process, lawyers discovered that far from having become obsolete, they were more essential than ever. They discovered, in fact, that arbitration, while offering the businessman new—and often times more direct—avenues of justice, was creating for the lawyer new outlets and additional opportunities to render indispensable services to clients.

Arbitration systems made possible by favorable legislation won high praise not only from businessmen, lawyers and the public who were the first to benefit from quick and inexpensive procedures, but from judges, whose special concern was to see that "due process" and our traditions of fair play were not lost sight of for the sake of speed. Some years ago, Judges Augustus N. Hand, Henry W. Goddard and John Bright, in an opinion of the United States District Court for the Southern District of New York,[2] on reviewing a system of arbitration set up for the motion picture industry under a consent decree in an anti-trust law proceeding, said that arbitration had "dealt with trade disputes . . . with rare efficiency." This was high praise indeed, coming from a court which once feared that its jurisdiction was being "ousted."

Perhaps a clearer expression of the new attitude of jurists to arbitration was that of Harlan F. Stone, late Chief Justice of the United States Supreme Court. "The very refinements and complexities of our court machinery," he wrote, "often make it cumbersome and dilatory when applied to controversies involving simple issues of fact or law. This is especially the case when the issue of fact turns upon expert knowledge as to the nature or quality of merchandise or the damage

2. United States v. Paramount Pictures, Inc., 66 F. Supp. 323 (S.D.N.Y. 1946).

consequent upon the failure to perform a contract for its delivery . . . which can be better determined by a layman having training and experience in a particular trade or business than by a judge and jury who have not had that training and experience."[3]

The special skills, knowledge and training of the lawyer are essential to his client at every stage of the arbitration process. There are, of course, obvious differences between commercial arbitration and labor arbitration. At the same time there are some close similarities. In commercial arbitration the lawyer must judge whether the advantage to his client lies in providing for future arbitration by means of a standard contract clause, or in waiting until a controversy develops before deciding how to cope with it. The lawyer must know his client's business and understand to what extent speed, economy and privacy are important. He must also be concerned on occasion with his client's need for continuity of relations with business associates.

In short, there are advantages and disadvantages to both court litigation and arbitration. The lawyer who wants to give full measure of service to his client must be in a position to gauge the situation accurately and recommend, plan and carry through the method which would be most suitable in the particular situation.

At the hearing itself the lawyer's skill is again in demand. Arbitration does not necessarily require the participation of lawyers, but the record shows that an overwhelming majority of the parties in commercial disputes prefer to be represented by counsel. They appear to recognize that the lawyer trained to assemble the essential facts and present them lucidly has an advantage over the untrained layman.

Since the procedures of arbitration are more informal, the lawyer naturally modifies his conduct at the hearing accordingly. The object of examination of witnesses is to get the facts; arbitrators will usually permit witnesses to go somewhat afield, as long as relevant facts are being produced. The lawyer's function is to marshal the facts for his client and to present them in an expeditious and business-like manner.

In summary, it can be said that the growth of commercial and international trade arbitration during the past three decades has opened new opportunities for lawyers to serve their clients. Through these opportunities, lawyers have broadened their own professional activities and enhanced their personal prestige and security. Lawyers would be less than human if they were not concerned with their personal prosperity, as well as the level of their public service. From this point of view, the following conclusion of Judge Stanley Mosk in an article in the Journal of the American Bar Association is pertinent:

3. 10 ACAD. POL. SCI. PROC. 197 (1923).

> The lawyer who has given arbitration a fair opportunity finds no menace to his professional security. On the contrary, he may experience in organized tribunals, standard rules of procedure, favorable arbitration laws, available qualified arbitrators and comfortable hearing rooms, opportunity for the practice of arbitration which ultimately may have as large a role in his total program as have court trials.
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> Lawyers who have had prior misgivings over fees in arbitration matters for the most part have been disabused of those fears. While on a strictly hourly billing, court trials will produce more revenue for the law office, as a practical matter most lawyers charge clients on a basis of hours plus results achieved. A client who has been saved both the inconvenience of a long delay before trial, and a tiresome trial itself, and who has experienced a less protracted and more expedient arbitration proceeding, may well consider the results achieved sufficient to justify a thoroughly adequate counsel fee.[4]

In the final analysis, there need be no conflict between arbitration and the lawyers on the one hand, or arbitration and the judiciary on the other, for neither field is a panacea for all the ills of commercial conflict. Both may well exist in complementary relationship, with each exuding its value to the body politic and economic.

In the labor-management field some points discussed above are applicable. The lawyer in labor-management arbitration naturally applies many of the fundamental principles which he has learned in the law schools and from his normal everyday practice in and out of court. From his qualification, a lawyer is, I believe, admirably suited to represent his client, either company or union, but a clear word of warning must be given to the lawyer who appears in labor-management relations. In these circumstances the lawyer, contrary to most litigation in court, is influencing for better or worse, the relationship between parties who are permanently wedded to each other. This relationship between labor and management, we know, is a continuing one after the particular case in arbitration is won or lost.

The first important consideration for the lawyer, whether he represents management or labor, is at what stage of a problem does he enter the arbitration picture. This varies from company to company, from union to union. In some instances the attorney is consulted after the grievance comes to the attention of the personnel department. Sometimes he is consulted at the last step of the grievance procedure. Sometimes he is only called in to present the case, occasionally after the arbitrator has been selected. A similar situation exists in many unions. It is obvious, therefore, that the role that the lawyer plays as the adviser with respect to arbitration problems is quite different from the role that he plays as a presenter of cases in hearings.

4. Mosk, *The Lawyer and Commercial Arbitration: The Modern Law*, 39 A.B.A.J. 193 (1953).

Years ago it was felt that a lawyer's sole responsibility in a labor-management dispute was to advise his client with respect to rights under the contract. At the present stage of industrial government, if the phrase may be used, lawyers have more recently been invited to consider not merely concepts of contract rights, but also general future relations and plant interests. Many things which one would say about the lawyer's advisory role to management can be seen in the actual appearance of the lawyer in an arbitration hearing. The experienced arbitration lawyer knows that there is a particular art in telling a story to a stranger who, although an expert in many fields, is nevertheless often completely uninformed with regard to a particular factual background. In presenting cases, as was mentioned in connection with some commercial cases the lawyer must realize that the relationship between the parties is a continuing one. The extent to which he would go in court to win his case must be evaluated against the possible damage to the relationship between the company and the union. There may be evidence, there may be witnesses which he should not use in view of the continuing relationship between the parties.

The following list is but a brief summary of things which a lawyer experienced in arbitration will do for his client in an actual case, whether the client is a company or a union.

(1) He will make a completely fresh investigation of the grievance and take a new look at the problem to be presented to the arbitrator. His investigation will be as thorough as time permits and, because he is not so close to the emotional atmosphere of the dispute, he may have a greater insight into the problem. As a matter of fact, from his observation of the job in question or the job description, you may be saved from going to arbitration with a faulty case.

(2) He will prepare what may be called an opening brief, whether oral or written, which should be uncomplicated and unemotional. He will not make an impassioned and flowery appeal since such an appeal usually does not impress an experienced arbitrator.

(3) He will save you from unnecessary arguments about the burden of proof because in most instances in arbitration it is the duty of each side to present its case and to justify its position. It may be noted that this is somewhat of a reversal of court procedure. At the same time, it points out to management or to labor that their prime job is to accentuate the positive.

(4) He will not destroy the usefulness of emloyees in the future by rigid, sarcastic or over-aggressive cross examination. This does not mean that he is a "Mister Milquetoast," but he will bring an atmosphere of calm, thoughtful reasoning to the case and be no less the strong advocate because of his temperate approach.

(5) He will recognize that the rules of evidence are not strictly applied. This does not mean that he will calmly admit all sorts of irrelevant matters and hearsay evidence. He knows that the arbitrator will recognize such matters as comparatively unimportant. He will by mild observation and comment point to the appropriate weight to be given to such testimony, if any. In turn he will not offer hearsay evidence if more direct sources are available. If he must present hearsay evidence or affidavits, he will lay the groundwork for this in his opening statement.

(6) Finally, he will give you a careful, brief, but adequate summation, making sure that essential points have been covered, at the same time eliminating extraneous matters and freeing the issue from the quicksand of technicality.

(7) The skilled lawyer's services are especially desirable for the preparation of post-hearing briefs, in which he will ascertain and correlate all the facts so as to present a comprehensive statement of the contentions and supporting proofs which have been advanced at the hearing.

Discussion of the role of the lawyer in the arbitration process would not be complete without brief reference to the actual participation of lawyers in hearings and as arbitrators. The statistics are interesting. According to surveys of the American Arbitration Association cases in commercial arbitrations, lawyers appear in 91.6% of the hearings; in labor-management arbitration cases, 64% of the time; in accident claims, 100% of the cases. Figures are also available with regard to the number of attorneys serving as arbitrators. 61% of the arbitrators who serve in labor-management cases are lawyers; 21% of those in commercial cases are lawyers, and 100% acting in accident claim cases are attorneys.

In concluding this foreword a significant development in the educational world should be noted, namely, the tremendous interest which law schools and universities have shown in the arbitration process. Graduate courses in arbitration law are being given in several law schools throughout the country. "An Outline of a Course in Arbitration Law" by J. Noble Braden and Martin Domke,[5] has been published by the American Arbitration Association and has had wide distribution among Professors of Law. The curriculum for law schools is at the present moment too crowded to admit of an arbitration course in the average law school, although there is some indication that certain schools have introduced courses as electives. It is clear also from the interest of law professors that the number of lectures or units on arbitration, both labor and commercial, is on the increase. This increased

5. 11 ARB. J. (n.s.) 115 (1956).

interest of legal education in arbitration is all the more noteworthy as law schools are of necessity traditionalistic.

A further indication of the interest in arbitration is seen in the many conferences on arbitration conducted by law schools throughout the country. In addition, the practicing law institute for two years running has had extensive treatment of the subject, and many bar associations through their arbitration committees, labor committees, or committees on continuing legal education have had lectures on varied phases of the arbitration process.

That the *Vanderbilt Law Review* is dedicating this entire issue to the subject is evidence of this trend as well as Vanderbilt's forward thinking. At the same time, it is a clear mandate to the lawyer, both young and old, to learn the fundamentals of arbitration if he is to give the most effective service to his clients.