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ARBITRATION'S IMPORTANCE TO THE LAWYER

SYLVAN GOTSHAL*

I. WHAT MODERN ARBITRATION IS

Arbitration was feared in earlier days as an "ogre" which would only tend to oust the courts of their jurisdiction. As a result, arbitration agreements were held to be unenforceable and the best a claimant could hope for was nominal damages for breach of the agreement to arbitrate. It is significant that, in this, the fortieth year of the anniversary of the passage of the first modern arbitration statute in the United States,¹ the modern trend away from the aforementioned hostile attitude is now clearly shown.

With the upsurge of business since World War II the commercial world has turned toward arbitration as the modern method for the speedy settlement of its disputes. However, arbitration is no newcomer to the field of law for it has been utilized in some form or another for centuries. Indeed, historians have said that arbitration may actually have been a forerunner to the court system itself.² Whatever the reason for its upsurge of popularity, the fact remains that the arbitral mode of dispute settlement has now even achieved a favored position in both state and federal courts of the country. Most recently, the United States Court of Appeals for the Second Circuit in *Robert Lawrence Company, Inc. v. Devonshire Fabrics, Inc.*³ firmly implanted arbitration in the federal courts by interpreting the Federal Arbitration Act⁴ to cover all substantive problems within the jurisdiction of the Act. This decision in a case involving a Massachusetts woolen goods company contains comments and views which are clearly favorable to the advancement of commercial arbitration.

That the Massachusetts attitude toward arbitration has long been favorable is reflected by its 1925 statute,⁵ which allows enforcement of agreements to arbitrate future disputes, the absence of such legislation in the majority of states having been the principal cause of discouraging businessmen and attorneys from entering into such agree-

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¹ The first modern arbitration statute was passed in New York in 1920. N.Y. Civ. Prac. Act §§ 1448-1469.

² Jones, An Inquiry into the History of the Adjudication of Mercantile Disputes in Great Britain and the United States, 25 U. Chi. L. Rev. 445 (1958).

³ 271 F.2d 402 (2d Cir. 1959).

⁴ 9 U.S.C. §§ 1-15, 61 Stat. 670, as amended by 58 Stat. 1233 (1954).

⁵ Mass. Gen. Laws Ch. 251 (1932).

ments. Judicial approval can be clearly discerned from such Massachusetts decisions as *South American Minerals and Merchandise Corp. v. Lewis*⁶ and *Maxwell Shapiro Woolen Co., Inc. v. Amerotron Corp.*,⁷ where the courts gave credence to arbitration awards rendered in New York.

Arbitration gives to the attorney an added arm in his arsenal of weapons to cope with the many and varied needs of his business clients. The speed within which a dispute may be heard and an award rendered can never be matched by more lengthy court proceedings. Simplicity of the demand for initiation of the arbitration and the informal hearings are implicit in its operation. The rules of agencies administering arbitration, such as the American Arbitration Association, provide for the award to be rendered within thirty days from the close of hearings, though many are delivered sooner.

The business community has seen in arbitration a means of airing their disputes "out of the public eye." Revelation to the world of certain trade practices and disputes as to qualities of goods can easily cause harmful, if not ruinous consequences. They can hardly be suppressed in a public court proceeding. I always recall the court litigation commenced by a cosmetic manufacturer against a supplier, accusing the latter of shipping adulterated material. His victory was truly a hollow one, as the admission during trial that these adulterated cosmetics were passed on to the consumer had the unmistakable effect of loss of business to his concern.

There are still many uses to which arbitration can be put that are as yet untapped by the legal world. The State of New York has gone far in advancing more and more fields of controversy into the arbitral orbit. Areas formerly thought to be completely unsuitable for arbitration are now slowly being integrated. Matrimonial matters, although not arbitrable, do not prevent any monetary claim arising under a separation agreement from being arbitrated. The entire realm of disputes which arise in partnerships and close corporations have also been brought into the sphere of arbitration. Even the difficult problem of specific performance of personal service contracts has been dealt with.⁸ Although these areas have only been introduced freely in the State of New York, this does not mean that they will not spread to the rest of the country. Heed the advice of the old cliché—"A word

⁶ 337 Mass. 298, 149 N.E.2d 385 (1958).

⁷ 1959 Mass. Adv. Sh. 851, 158 N.E.2d 875.

⁸ *Staklinski v. Pyramid Electric Co.*, 6 N.Y.2d 159, 160 N.E.2d 78 (1959), noted 73 Harv. L. Rev. 776(1960). See annotation to decision below, 6 App. Div. 2d 565, 180 N.Y.S.2d 201 (1st Dep't 1958), 1 B.C. Ind. & Com. L. Rev. 73 (1959).

to the wise is sufficient," for attorneys must be prepared to absorb these cases into their repertoire when clients request them.

One has only to look at the development of legislation in our country and in the treaties of the world to begin to see the importance of arbitration today. Some eighteen states of the Union have statutes making enforceable agreements to arbitrate future disputes.⁹ The Federal Arbitration Act is widely used and the aforementioned *Lawrence* case shows its relevance. The draft of the Uniform Arbitration Act¹⁰ has been adopted in its entirety by Minnesota, Wyoming and Florida.¹¹ Commercial treaties with fourteen foreign countries¹² contain arbitration clauses for settlement of disputes. The United Nations Convention on the Recognition and Enforcement of Foreign-Arbitral Awards of June 10, 1958¹³ is valid testimony to the importance of the world arbitral role.

Modern arbitration consequently is important to the busy attorney because of the security he and his client obtain from arbitration. Security against risks of expensive litigation, the prevention of excess cost and the waste of delayed settlements, are surely worth consideration. Parties making a contract with an enforceable arbitration clause possess this security. This promise to arbitrate made well in advance of any strain of dispute, will operate automatically to provide security when controversy arises.

Perhaps a word should be mentioned here about the cost of arbitration since merely saying it is inexpensive may lead one to improper conclusions. Even though the arbitrators in most commercial cases are not compensated, the associations rendering arbitration services

⁹ New York 1920 [N.Y. Civ. Prac. Act §§ 1448-1469 (1955)]; New Jersey 1923 [N.J. Rev. Stat. § 2A:24-3 (1952)]; Massachusetts 1925 [Mass. Gen. Laws Ch. 251 § 14 (1959)]; Oregon 1925 [Ore. Rev. Stat. 33.220 (1959)]; California 1927 [Cal. Code Civ. Proc. § 1282 (1955)]; Louisiana 1928 [La. Rev. Stat. tit. 9 § 4201 (1950)]; Pennsylvania 1928 [Pa. Stat. Ann. tit. 5 § 161 (1930)]; Arizona 1929 [Ariz. Rev. Stat. §§ 12-1509 - 12-1511 (1956)]; Connecticut 1929 [Conn. Gen. Stat. § 52-408 (1958)]; New Hampshire 1929 [N.H. Rev. Stat. § 542.1 (1955)]; Rhode Island 1929 [R.I. Gen. Laws § 28-9-1 (1956)]; Ohio 1931 [Ohio Rev. Code § 2711.03 (1958)]; Wisconsin 1931 [Wis. Stat. § 298.01 (1958)]; Michigan 1941 [Mich. Comp. Laws § 645.1 (1958)]; Washington 1943 [Wash. Rev. Code § 7.04.010 (1956)]; Florida 1957 [Fla. Stat. §§ 5710, 5711 (1957)]; Minnesota 1957 [Minn. Stat. § 572.08 (1957)]; Wyoming 1959 [Wyo. Comp. Stat. § 1-1027 (1959)].

¹⁰ See Pirsig, *Some Comments on Arbitration Legislation and the Uniform Act*, 10 Vand. L. Rev. 685 (1957).

¹¹ Massachusetts adopted, with modification, the Uniform Arbitration Act for labor-management only, Acts 1959, ch. 546, effective December 31, 1959.

¹² Commercial Treaties of the U.S. with Ireland, Greece, Israel, Italy, Denmark, Japan, West Germany, Haiti, Iran, Nicaragua, the Netherlands, Korea, Pakistan and France.

¹³ Domke, *the United Nations Conference on International Commercial Arbitration*, 53 Am. J. Int. L. 414 (1959).

must necessarily charge fees adequate to meet their needs. However, by comparison with the time and effort which both attorney and client would have to put forth in arriving at a court determination of the dispute, these fees are most moderate.

II. HOW THE LAWYER CAN USE ARBITRATION IN HIS PRACTICE

It is a generally recognized fact that businessmen today are more interested in carrying on their commercial dealings in a free and easy manner and seldom draw up a contract with the feeling that it will later result in the determination of a dispute through some type of legal process. However, arbitration has now become an integral part of the settlement of controversies in the business world and is an effective new outlet by which the attorney may serve his client.

Those lawyers who have given arbitration an opportunity to show what it can do, have discovered favorable arbitration laws, available qualified arbitrators, standard rules of procedure of agencies administering arbitration, and comfortable hearing rooms which provide maximum utility for all concerned. Too often has an attorney found himself in the embarrassing position of having told his client to appear in court at a certain time, together with books and records and witnesses to try a case, while the client arrives only to be sent home nervous and annoyed because of another case preference or prior appointments, or illness of opposing counsel, or any other of the many reasons which may cause delay. This happens rarely in an arbitration proceeding, since the only appointment scheduled for the arbitrators and the hearing room is the one pre-arranged hearing. Both attorney and client are thus spared delay and the client cannot help but be impressed by the efficiency and informality of the proceedings.

Those practical minded attorneys expressing misgivings over fees in arbitration proceedings need not overly fret; the loss of hourly income for billing purposes does not necessarily mean a loss of total revenue. Surely the client who has been spared the inconvenience of pre-trial procedures, to say nothing of the tedious trial itself, may well consider that the expedition of the arbitration hearing is sufficient to justify some type of proportionate fee based on the result and time saved.

Too often the cry has been heard that the congestion of court calendars has been the major contributing factor to the increased use of arbitration by the commercial world. In truth the world has been using this method of settling disputes for centuries and its introduction in the United States was evident long before our court clogging became so apparent. The time has come to realize that arbitration is a

more satisfactory method of handling certain categories of disputes and that court procedure is often more ponderous in settling many of the problems of the modern complex business world.

There are numerous reasons why the commercial world prefers arbitration to the ordinary maze of judicial proceedings. Business relations are better preserved and better opportunity for beneficial results to the parties can be achieved. This is brought about by the use of specialists or experts in each field of business who are chosen as the arbitrators and who are able to bring their knowledge of the customs of the trade into play so as to provide a flexibility of procedure and a correctness of result which is often unknown in the realm of judge and jury. On the other hand, a lawsuit, because of its burdensome procedures, will usually cause a disharmony among the parties with resultant feelings of ill will, to say nothing of a possible discontinuance of business dealings which may be brought about by adverse publicity.

In a field where a practical decision should be rendered by one who is familiar with the nature of the issue before him, the arbitrator—free from extended and time consuming terminology presentations in which he is already well versed—renders a just decision consistent with the needs of the trade. Imagine the perplexity of a modern jurist concerning an issue as to whether a shipment of bubble gum exported to a foreign country was of fair and average quality. Would not the patience of businessmen be exhausted in court while “expert” witnesses, constrained by strict rules of evidence, contradicted each other for the benefit of the judge and jury?

Of course, there are advantages and disadvantages to both court litigation and arbitration. In order to serve properly the interests of his clients the lawyer must be in a position to anticipate the most expedient forum for disputes that may arise. He must determine when the arbitration clause expressing the common intention to arbitrate future disputes is preferable to litigation.

Prejudiced antagonistic feelings toward this informal method of dispute settlement has left many an attorney unaware of the potential of an area where he may not only serve needs of his clients, but where, in addition, he has an opportunity to serve in the role of a judge by being himself an arbitrator.

Discussion of the role of the lawyer in the arbitration process would not be complete without brief reference to the number of attorneys who serve as arbitrators. The American Arbitration Association boasts that some 30% of its own National Panel of Arbitrators are members of the legal profession. In the new field of arbitration of

uninsured motorist accident claims the arbitrators are exclusively lawyers.

III. HOW LAWYERS SHOULD ACT WHEN USING ARBITRATION

For years now lawyers have had to keep pace with the vast changes in the practice of law and have been forced to adjust their tactics to different methods of protecting clients' interests before tribunals. No longer can the attorney rely on his knowledge of courtroom proceedings alone and feel that he is secure. It is not uncommon to be called upon to appear before fact-finding and quasi-judicial agencies of State or Federal governments. A lawyer may be called upon to draw up contracts, advise on business dealings, plan estates and render many more professional services, too numerous to mention, which bear little resemblance to the common conception of the familiar advocate pleading before judge and jury.

All these developments and changes have an immediate impact on the welfare of the modern attorney in his practice of law. Today it seems particularly fitting and necessary that lawyers should take a constant interest in the expanding field of voluntary arbitration and thereby become fully qualified to handle the arbitral mode of dispute settlement.

Lawyers should forget any past prejudices against arbitration and realize that hesitation may cause the loss of future business. This is well illustrated in the tax and management-labor fields where attorneys not schooled in arbitration are deprived of great sources of revenue by their failure to keep abreast of the times, as many accountants and labor relations counselors have done. A lawyer must have familiarity with all aspects of arbitration and its procedures in order to enable his client to utilize this forum adequately and advantageously. In order to advise businessmen whether to use or consent to arbitration, or in drafting an arbitration clause in a contract, he must know the nature of the process, its best areas of utility, the character of the agency administering the hearings and its rules. Furthermore he should know the type of controversy which is arbitrable—as both the legislature and courts have made restrictions—as well as any requirements of statutes and judicial decisions.

After a dispute has arisen under an agreement purporting to make it arbitrable, he must also know the procedure whereby provisions for arbitration may be enforced or prevented. When the proceeding is initiated, he must know the method by which the arbitrator is selected, and how to prepare for, and participate in the hearing. Lastly, when the award is made, he must be familiar with

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the practice for confirming, vacating or modifying it, and the problems involved in its enforcement.¹⁴

The resulting rewards of using arbitration as an additional weapon in his legal arsenal justifies the time involved in mastering its use.

In discussing the use of arbitration as an added device for lawyers, it was said recently:

"A similar process of adaption can and does take place when a lawyer represents a client in commercial arbitration. The forum has attributes familiar enough so that he can soon feel completely at ease. It has advantages enough, in appropriate cases, so that he can recommend it to his client. What cases are, in fact, appropriate for arbitration, only the individual lawyer can determine. Once he has reached such a determination, and reached it affirmatively, experience is more than likely to make him an advocate for arbitration as one more valued tool of his profession."¹⁵

In bringing a dispute to arbitration the attorney should remember that careful preparation of the case is just as essential as careful anticipation of a courtroom appearance. Since the arbitrator will make his award on the basis of the facts and exhibits presented to him at the hearing, all the requisite documents and papers should be carefully assembled and labeled so as to make for an orderly presentation of the case. Where it is practical photostatic copies of the material to be presented should be made for the arbitrators and the other party so that the hearing will not be unnecessarily delayed to allow for reading of this evidence. If some of the documents that are needed by one side are in the hands of the other party a prior request should be made to have them at the proceedings. If any trips to various places are required of the arbitrators for some on-the-spot investigation, careful plans should be made in advance, since representatives of both parties will have to be in attendance, unless specific authorization to the contrary is given.

All witnesses must be carefully interviewed so that they understand the importance and timeliness of their testimony as the freedom from rules of evidence usually means that each witness is asked merely "to tell his story" and cross-examination is generally kept to a minimum. The arbitration hearings are conducted with the same degree of decorum as courtroom proceedings except that they are much less

¹⁴ Gotshal, *New Uses of Arbitration*, N.Y.L.J. May 29 and 31, 1956.

¹⁵ Herzog, *Commercial Arbitration: A Tool for the Lawyer*, 4 Boston Bar J. 7 (1960).

formal. The outstanding difference is that arbitrators are not required to follow strict rules of evidence. True, they must hear all the evidence necessary to the material presentation of the case, but they are sole judges of what is relevant. Awards are generally not reviewed by courts as to the facts found and the law applied by the arbitrator.¹⁶ Although the arbitrators may be inclined to hear evidence which a court would not, this does not mean that all evidence received is of equal weight. Most arbitrators will say that direct testimony of witnesses is much more persuasive than hearsay evidence and facts will be more clearly established by documentation than by mere argument.

Since there is no real problem of burden of proof, the arbitrators may vary the procedure as to which party proceeds first, but usually it is the complainant who begins the hearings. The important thing is to be sure that the arbitrators hear all that the lawyer wishes to be presented and therefore the following four points should be carefully included in any presentation: (1) An opening statement which merely indicates the controversy and what is to be proved; (2) Explanation of the remedy sought; (3) Systematic introduction of witnesses so as to clarify the nature of the controversy and identification of documents and exhibits; (4) A closing statement which summarizes the evidence briefly and also refutes the opposition's arguments.

Most important to the success of the hearings is a helpful and cooperative attitude on the attorney's part, for any exaggeration or concealment of facts or prolongation of technical or useless argument will only result in delaying the hearings. Certainly, introduction of legal technicalities without basic merit but with the object of delaying proceedings or confusing the arbitrators, as well as continued disregard for the informal arbitral method, can only have an adverse effect on the Arbitrators. As it was once said:

"There need be no conflict between arbitration and the lawyers on 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."¹⁷

¹⁶ Cf. *Spence, Bryson, Inc. v. China Products Co.*, 308 Mass. 81, 30 N.E.2d 885 (1941); *La Cotonniere De Moislains v. H & B American Mach. Co.*, 19 F.R.D. 6 (D.C. Mass. 1956). Cf. also Note, *Judicial Review of Arbitration Awards on the Merits*, 63 Harv. L. Rev. 1022 (1948).

¹⁷ Mosk, *the Lawyer and Commercial Arbitration: The Modern Law*, 39 A.B.A.J. 193-6, 256-8, March 1953, and 58 Com. L.J. 63 (1953).