ARBITRATION

PRECEPTS and PRINCIPLES

by CAMERON K. WEHRINGER

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ARBITRATION

PRECEPTS

and

PRINCIPLES

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ABBREVIATIONS

There are certain works that are cited with the frequency due their use. These are cited in abbreviated form. The full title, and the abbreviation chosen, are:

Ass'n (and page number)
Committee on Arbitration, The Association of the Bar of the City of New York, **An Outline of Procedure Under the New York Arbitration Law, July 1, 1965** (1966)

Domke (and page number)
Domke, **Commercial Arbitration** (Prentice-Hall, N.J., 1965)

Domke II (and page number)
Domke on Commercial Arbitration (Callaghan & Co., Illinois 1968)

Lazarus (and page number)
Lazarus, Bray, Carter, Collins, Giedt, Holton, Matthews and Willard, **Resolving Business Disputes** (Amer. Management Ass'n, N.Y., 1966)

The statutory and rule references are, with the abbreviations selected:

Rules (and section number)
American Arbitration Association, Commercial Arbitration Rules

CPLR (and section number)
The New York Arbitration Law, Article 75, Civil Practice Law and Rules

Uniform (and section number)
The Uniform Arbitration Act (of 1956 and amended in 1965)

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Chapter 1

ARBITRATION: ITS MEANING AND SCOPE

1.1 What is Arbitration?

Arbitration is an imperfect system for arriving at a final conclusion. Nevertheless "For the lawyer to resist the spread of arbitration would be as futile as the ill-fated experiment of King Canute." Phillips, **A Lawyer's Approach to Commercial Arbitration**, 44 Yale L. J. 31, 52 (1934).

Arbitration is not a panacea. It is, at the least, a hearing and a determination of a difference between parties. It is a voluntary matter (with certain trade exceptions) before an impartial person, who renders a decision, called an Award, ending the dispute. This process results in a final conclusion, bar certain special situations.

Arbitration is not appealable, except for matters such as fraud or misconduct of the arbitrator, unless an appeal situation is established within the particular arbitration framework.

In giving the disputants a hearing and a decision (Award), arbitration permits the disputants (or gives them no alternative) to get back to their business and not continue the dispute.

1.2 Arbitration Is Not

1.21—Appraisement

Appraisement "is a determination by one or more persons based upon their own knowledge and investigation, the determination generally being made to prevent future disputes rather than to settle a present one." Horowitz, **Guides For Resorting to Commercial Arbitration**, 8 (No. 1) The Practical Lawyer 67, 67 (1962).

1.22– Compromise

Compromise is each side giving something and meeting somewhere between the polarity of each party's view. Compromise does not require an outside party, although one may assist. Compromise can be had by the parties working matters out between or among themselves.

1.23– Mediation

Mediation is, in part at least, compromise. The mediator seeks to bring the positions of the contestants together. The mediator is an active participant in negotiations, and works at the parties agreeing between themselves—for whatever reason—as an end result.

1.3 Compromise and Arbitration Can Meet

Arbitration, as it is a flexible dispute-settling process, can result seemingly in compromise. But, this is not compromise in the pure sense of the word. "Honorific compromise" can occur. Lazarus, 44, 81-82. "Honorific compromise" would be a decision by the arbitrator that a proper evaluation is not that expressed by either contending party, but is somewhere between. The parties have given the "outer parameters of the dispute", or put their best foot forward.

The compromise alleged distasteful to those who are reserved as to the worth of arbitration is not the "honorific" type. Properly, it is the "invidious compromise." This means not considering the merits of the matter, but recognizing the outer limits and splitting the difference. This would be an improper use of an arbitrator's powers. Where it occurs, arbitration has failed.

An example may serve to distinguish between the distasteful "invidious compromise" and the seeming ("honorific") compromise that may arise in an arbitration. The assumed matter concerns a buyer, who contracted for certain goods, which he received, but which he believes are inferior from the ordered merchandise. He can use the goods, but believes the full price should not be paid. He opines that a price allowance of one dollar per unit should be made. The manufacturer-seller disputes the claim of inferiority.

In an arbitration hearing the arbitrator may find there was a deficiency, but not to the extent claimed. For reasons of the facts presented, he may award a 50% per unit reduction, or 50 cents per unit allowance. In a compromise, that is the "invidious compromise", the decision would not consider the facts, but would consider only the wish to resolve the matter. An "invidious compromise" award at the same 50% per unit reduction would bear no relation to the degree of inferiority and potential of use. Domke, 4.

The purpose of arbitration is not to please all parties to some extent; it is to reach a decision with due regard to all facts and circumstances presented in the Hearing.

1.4 A Definition

The American Arbitration Association, of which more later, defines "ar-bi-tra-tion" as "The reference of a dispute by voluntary agreement of the parties to an impartial person for determination on the basis of evidence and argument presented by such parties, who agree in advance to accept the decision of the arbitrator as final and binding." Amer. Arb. Ass'n., **Arbitration for Buyers and Sellers** (a booklet), inside back cover.

1.5 Commercial Arbitration

Arbitration is tri-partite, as was Caesar's Gaul. There is "commercial" arbitration, "labor" (or "industrial") arbitration, and "accident claims" arbitration. International trade arbitration is a part of commercial arbitration, the differences going to locale and not to substance. Commercial arbitration relates to the disputes of individuals and of business people and of business organizations. "For both the jury and Association arbitrators, institutional pressure converge toward the production of a simple final product. In the case of the jury the product is the verdict; in arbitration it is called the award. Typically the product is limited in form to a "yes" or "no" answer or to a dollar amount." Mentschikoff, **Commercial Arbitration**, 61 Columb. L. Rev. 846, 866 (1961).

Labor arbitration "is similar to the mediation activities of the medieval craft guilds." It is an end result to a multi-step grievance system. Lazarus, 10. "While generally, arbitrators regard commercial disputes as subject to the restrictions of a judicial process, labor arbitrators seem to feel that mediation or conciliation is an essential ingredient of their functions." Abelow, **Standards of Evidence in Arbitration Proceedings**, 4 Arb. J. 252, 253 (1949).

Accident claims arbitration is a growing matter. It grew out of the New York compulsory automobile insurance law of 1956, as amended by article 17-A, creating the Motor Vehicle Accident Indemnification Corporation (MVAIC). "The purpose of the coverage was to provide some protection for innocent people who were involved in accidents with uninsured motorists. One of the conditions of the system was that, should the corporation and the insured be unable to agree on legal liability and/or the amount of damages owing, the determination should be made by arbitration." Lazarus, 17 citing Aksen, **Uninsured Motorist Coverage, A Guide to MVAIC and Arbitration**, 15 Arb. J. 178, (1960).

In this writing, commercial arbitration is taken as the norm. A few words at the end of this book note the certain distinctions among the three parts of arbitration.

1.6 Voluntary It May Not Be

In all definitions of arbitration an emphasis is found on the word "voluntary". In certain trade associations disputes are settled by arbitration. The right to trade, as it were, requires an adherence to its practices, and arbitration is one of these practices. The semantic question if this is, or is not, "voluntary" is not answered. This fact is noted for the businessman and his attorney who are not regular members of the arbitration-demanding trade and its association. They should be forearmed.

Chapter 2

THE PAST AND THE PATTERN

2.1 History

Arbitration was known by the Greeks. In the city-states, back in the sixth, fifth and fourth centuries B.C., disputes were settled by arbitration. The nature of the disputes included "boundary delimitation, ownership of colonies, ownership of particular pieces of territory, assessment of damages suffered through a hostile invasion, (and) in recovery of money owed by one state to another, and in all sorts of religious matters." Lazarus, 17, citing Smith, **The Greeks Had a Word for It**, 1 (Nos. 4-5) Arb. in Action 5 (April-May 1943).

In the United States arbitration "began in 1787 when the Chamber of Commerce of the State of New York set up the first privately administered tribunal of business men and became the first administrator of arbitrations." Morgan, **Standard Arbitration—What It is and What It Does**, 6 Arb. J. 81, 81 (1951).

The first modern arbitration law was enacted in 1920 by New York state. Today, most states have enacted arbitration laws. A Uniform Arbitration Law was adopted by the National Conference of the Commissioners on Uniform State Laws in 1955 and amended in 1956. The American Bar Association approved the law and amendment. Twenty-two (22) states, and the federal government, have so-termed "modern arbitration statutes" according to the American Arbitration Association. (Appendix B).

2.2 The Pattern

The method, the manner, and the means in all commercial arbitration matters follow a general pattern. The topic,

be it a contract for wheat, a real estate lease, or even a subjective evaluation, fit into the same pattern. Arbitration can consider many facets of life. It can be concerned with copyrights, patents, **Arbitration of Copyright Problems**, 21 Arb. J. 1 (1966), **Arbitration and Patent Problems**, 21 Arb. J. 98 (1966), **Arbitration and Trademark Problems**, 21 Arb. J. 164 (1966), and even whether or not a school for a child was 'snobbish', and therefore, unreasonably chosen. Strauss, **We Hate to See Grown Men Fight**, May 28, 1966, Harvard Alumni Bull. 628, 628.

Arbitration requires the parties to prepare their views, present them, and with a claim of speed, a promise of privacy, and perhaps a claim for experience and expertness in the person of the arbitrator, achieve a final answer. This can lead to an economy of litigation expenses, a retaining of a measure of goodwill, complete privacy as to the dispute, convenience to the parties, and time to spend on the business of the disputants.

Chapter 3

WHEN ARBITRATION?

3.1 What Issues Are Outside Arbitration

As a defending party, arbitration should not be agreed to, or sought, when there is an absolute defense. An example would be the bar to recovery by a Statute of Limitations.

Conversely, a complaining party should not seek arbitration, or voluntarily agree to it, if Summary Judgment, or other relatively rapid and final remedy is available.

Arbitration is for the issues inbetween.

3.2 Factual Issues

Arbitration must be equated with the matter to be won or lost. If the matter would mean a financial life or death to a losing corporation or individual, arbitration should be avoided. If such a matter were lost, an appeal would be desired, and this is not customarily available in arbitration. Unlike in arbitration, if such a matter were lost in court, other aspects of law protection could be sought, including those sometimes scornfully referred to as "technicalities". Financial life or death is too final to have but one attempt at its preservation. Even in the best of presentations, and wisdom of judging, errors can be made.

Arbitration should be used when the cost of resolving the controversy through the judicial process of the courts would cost more than could be gained (all other factors as well as the dollar being viewed) or when the decision is one not adapted for court review.

In between the two will be the hard decision for the attorney and his client.

By way of example, if a small corporation nets $100,000. per year average profit, and has a claim against it of