Volume 71
Issue 1 *Dickinson Law Review - Volume 71, 1966-1967*

10-1-1966

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APPROPRIATE PROCEDURES FOR RECEIVING PROOF IN COMMERCIAL ARBITRATION

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Attorneys sometimes suggest that arbitration clauses would be more acceptable to them for use in commercial contracts if the arbitrator could be required to abide by local rules of evidence.[1] Although it may be possible to impose evidentiary requirements upon an arbitrator by inserting them in the contract,[2] such provisions are seldom found. This paper will examine several of the more controversial evidentiary questions which may arise and will consider whether compulsory and comprehensive rules of evidence are desirable in commercial arbitration proceedings.

"Commercial arbitration" as used here includes tribunals of an adversary nature where both parties ordinarily are represented by attorneys and observe at least a modicum of procedural due process.[3] These tribunals flourish in certain well defined dispute areas. For example, each year there are thousands of insurance policy dispute arbitrations between policy-holders and automobile liability insurance carriers as to liability and damages under unin-

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1. The Negligence Comm. of the Cleveland Advisory Council of the Am. Arbitration Ass'n recently conducted a mail survey of Cleveland attorneys, asking *inter alia* whether an "arbitrator should be required to observe the same rules of evidence followed by a judge sitting with a jury in the jurisdiction in which the hearing is held." Many of the 189 lawyers who responded had recently been involved in accident claims arbitration cases. They classified themselves as follows:

	Yes	No
Those who had served as arbitrators	17	20
Those who primarily represented claimants	21	27
Those who primarily represented insurance companies	12	8
Those who served in both capacities	30	17
Those who had no prior relationship with arbitration	14	19
Total	94	91

It would seem that many of the attorneys believe that rules of evidence would improve the quality of justice produced by arbitration proceedings.

2. Horowitz, *Commercial Arbitration*, 8 PRAC. LAW, 67, 72 (1962).

3. See AMERICAN ARBITRATION ASSOCIATION, THE LAWYER AND ARBITRATION (1966), and arbitration statutes cited therein.

sured motorist claims.[4] There are hundreds of arbitrations involving controversies over building construction contracts,[5] marine charter party agreements and a vast array of other contracts.[6]

The quality of justice within any decision making structure is very largely a direct result of the personal competence and wisdom of the decider—be he judge, juror, referee or arbitrator. A well designed system of justice that is dependent upon foolish or poorly motivated decision makers will fail. But even the most amorphous system may provide first quality justice if it is activated by thoughtful men who are endowed with a high degree of judicial ability, impartiality and experience relevant to the issues involved.

In considering appropriate procedures for receiving proof in commercial arbitrations, it is reasonable to assume that the parties' attorneys have carefully participated in the selection of a neutral arbitrator suitable for their case. To assume that they have permitted the appointment of an unqualified arbitrator is to condemn the proceedings in advance by presupposing a default in the normal duties of the advocate.

The practitioner may erroneously believe that, having selected a reasonably competent arbitrator, his task is simply to place his evidence and his witnesses before the arbitrator. This may be an oversimplification. Much of the literature on arbitration procedure stresses the "mutual needs of the parties" and fails to note that evidentiary disputes frequently serve as gambits in a harsh adversary game.

In court issues of evidence may be utilized to prepare the foundation for an appeal, or to play upon the jury or the trial judge. To somewhat the same degree, disagreement on evidentiary matters may be used to manipulate an arbitrator. Somewhat different considerations, however, may confront an attorney when dealing with an arbitrator. The lawyer who criticizes arbitration for its lack of "court-like" evidentiary regulations may simply be registering his apprehension that courtroom tactics will not work on an arbitrator, or may not impress his client. Particularly where both clients and arbitrator are privy to an exclusive industry jargon,

4. Aksen, *Arbitration Under the Uninsured Motorist Endorsement*, 504 INS. L.J. 17 (1965).

5. Aksen, *Arbitration of Disputes Arising From Architectural, Engineering and Construction Contracts*, AM. INSTITUTE OF ARCHITECTS J., Feb., 1964, p. 63.

6. Coulson, *Tailoring Arbitration to Business Needs*, 1964 BUS. LAW. 1037.

the lawyer may yearn for such a familiar touchstone as the evidentiary objection.

The customary procedure in arbitration is generous in its flexibility and grants the arbitrator wide discretion. Many state arbitration laws are patterned after the Uniform Arbitration Law which provides that, "The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing."[7]

Section 30 of the Commercial Arbitration Rules of the American Arbitration Association provides as follows:

> EVIDENCE—The Parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses or documents, he may do so upon his own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrators and of all the parties, except where any of the parties is absent in default or has waived his right to be present.[8]

In addition, the Arbitration Association gives each of its commercial arbitrators a printed manual when he is appointed, for his guidance in handling the case. One section which deals with evidence, defines the normal procedure:

> After a hearing gets under way and the flow of testimony begins, the arbitrator will probably be called upon to make more or less frequent rulings on the admissibility of certain documents or testimony. This question arises even though courtroom rules of evidence do not govern arbitration proceedings. In deciding whether to permit a witness to continue with a line of testimony to which a party objects, or to accept documents, the arbitrator will keep in mind one guiding principle: He must hear everything that may help him understand the issues.
>
> Because arbitration awards are more subject to attack when arbitrators refuse to hear material testimony than when they listen to evidence that may not be relevant, arbitrators are usually inclined to accept doubtful material 'for what it is worth,' giving no weight to irrelevancies just as they disregard testimony they believe to be untruthful.
>
> This does not mean that the arbitrator should auto-

7. UNIFORM ARBITRATION ACT § 5(b).
8. As amended and in effect June 1, 1964.

matically accept everything offered. For one thing, it would prolong the hearing unduly to do so and be inconsistent with one of the virtues of arbitration: its speed. The arbitrator should hesitate to permit a witness to give hearsay evidence on a matter that could be established by an eyewitness account, and he may decline to accept documents or exhibits he deems incompetent or not relevant to the issues. When in doubt as to the pertinence of evidence, or when one party objects to a line of testimony, he may postpone decision until he has heard arguments from both sides on the point. When one party has stated the reasons for his objections and the other has answered with an explanation of what he is trying to prove, the arbitrator is in a position to decide whether the line of testimony should be continued. As indicated above, even when evidence of doubtful relevance is accepted, the arbitrator does not necessarily give it the weight the party offering it hoped for. Just as the arbitrator is the sole judge of what is admissible, so is he the sole judge of how much weight any piece of evidence is worth.

In short, it need give the arbitrator little concern that he may be receiving testimony a judge would have barred in court. Arbitration is a less formal process than litigation in a court of law; the parties, having elected to resolve their controversy in this forum rather than in a law-suit, have themselves agreed not to be bound by strict rules of evidence.[9]

The courts have been reluctant to impose evidentiary restrictions upon arbitration proceedings. Thus, it has been ruled that arbitrators are not bound by the rules of evidence,[10] they may consider hearsay and otherwise incompetent testimony.[11] Their decision may be against the weight of the evidence, indeed it need not find any support in the evidence whatsoever.[12] Furthermore, arbitrators may draw on their personal knowledge in making an award[13] and they need not disclose the facts or reasons behind their award.[14] Customary discovery procedures are not available in ar-

9. AMERICAN ARBITRATION ASSOCIATION, A MANUAL FOR COMMERCIAL ARBITRATORS 14-15 (1964).

10. Burchell v. Marsh, 58 U.S. (17 How.) 344 (1855); Frantz v. Inter-Ins. Exch., 229 Cal. App.2d 269, 40 Cal. Rptr. 218 (Dist. Ct. App. 1964); Springs Cotten Mills Co. v. Buster Boy Suit Co., 275 App. Div. 196, 88 N.Y.S.2d 295 (1949).

11. Dana v. Dana, 260 Mass. 460, 157 N.E. 623 (1927); Anderson Trading Co. v. Brimberg, 119 Misc. 784, 197 N. Y. Supp. 289 (Sup. Ct. 1922); Koepke v. Liethen Grain Co., 205 Wisc. 75, 236 N.W. 544 (1931).

12. Everett v. Brown, 120 Misc. 349, 198 N.Y. Supp. 462 (Sup. Ct. 1923).

13. American Almond Products Co. v. Consolidated Pecan Sales Co., 144 F.2d 448 (2d Cir. 1944); Dampskibsselsk Dannebrog v. Strange & Co., 1 F. Supp. 380 (S.D.N.Y. 1932).

14. Shirley Silk Co. v. American Silk Mills, Inc., 275 App. Div. 375, 13 N.Y.S.2d 309 (1939).

bitration.[15] Absent agreement of the parties, a written transcript of the proceedings is unnecessary.[16]

Although cases indicate that the arbitrator who liberally accepts evidence "for what it is worth" may be wisely protecting his ultimate award, it should also be recognized that the evidentiary arguments of counsel for the resisting party may have a telling effect in blunting the cutting edge of the proof. Evidence received after strong objection may be discounted by the arbitrator.

Whether or not the arbitrator has a familiarity with the traditional rules of evidence, counsel must be prepared to supplement the arbitrator's understanding by cogent oral argument. Certainly the effective advocate must fully understand the generally accepted rules and be able to explain their foundation in reason. Although the rules are not strictly applicable in arbitration, it is quite clear that arbitrators seek to abide by analogous evidentiary concepts when they are persuaded of their appropriateness by the logic of counsel's argument. Rules must be defended on the basis of reason, rather than as a fixed dictate of the tribunal.

Particular point should be made of the difference between the commercial arbitrator and the arbitrator of labor grievances.[17] Court opinions sometimes draw direct analogies between these two tribunals without noting their substantial differences.

One distinction between the two is in the nature of the arbitrator and the role he plays. The labor arbitrator generally holds himself out as an expert decision maker, not only an authority on the law of the shop and the meaning of complex collective bargaining contracts, but also an accomplished sifter of evidence and weigher of opinion. The commercial arbitrator conceives himself in the more passive role of determining a case as it is brought to him by the parties.

It has been said of labor arbitration that:

> It would, of course, be desirable in the search for truth if the parties in arbitration proceedings had sufficient background in the rules of evidence to understand the reasons behind the rules. Realistically, this may be too much to expect and certainly should not be a precondition to participation but it is essential that the arbitrator who presides have the requisite background to determine when limitations should be imposed upon the introduction of evidence. On occasions he will have cases presented to him in which

15. Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359 (S.D.N.Y. 1957).

16. Andersen Trading Co. v. Brimberg, 119 Misc. 784, 197 N.Y. Supp. 289 (Sup. Ct. 1922).

17. Abelow, *Standards of Evidence in Arbitration Proceedings*, 16 ARB. J. 252 (1949).

> either one side or both sides will be represented by counsel. Inevitably, no matter how sophisticated in labor-management relations the lawyers may be, reference will be made to the rules of evidence. The arbitrators should know the rules and particularly should know the reasons behind the rules. We would urge most strongly that this be considered as essential background for a neutral no matter what his calling may be.[18]

Almost the opposite conclusion could be reached as to commercial arbitration. One might say that although it would be desirable if the arbitrator had some understanding of the rules of evidence, it is essential that the advocate have the requisite background to explain to the arbitrator when limitations should be imposed upon the introduction of evidence. In commercial arbitration the lawyer must often guide the arbitrators, who are sometimes laymen with no training in judicial matters, through the evidentiary logic.

In addition to the distinctly different role which the arbitrator plays in labor cases, there is often a different relationship between the parties. In labor matters, the parties often know each other intimately due to long experience with their chosen form of collective bargaining and grievance procedures. On the other hand, the parties to a commercial contract are often in dispute with each other for the first and only time.

Relevant and Material Evidence

A specific responsibility of an arbitrator is to determine the "relevance and materiality of the evidence." To this extent an important rule of evidence is inserted into the arbitration process and invites informative argument by counsel.

In labor arbitration, even irrelevant evidence may have a healthy cathartic effect upon the parties or their employee-witnesses. This is less often the case in commercial arbitration. Cases may exist, however, where an arbitrator will wish to permit a party to wander far afield, over the objection of opposing counsel.[19] For example, in marital dispute cases, a growing field for arbitration, there may well be positive family benefits in letting one of the parties get testimony "off his chest."

In other cases, testimony that is clearly irrelevant may contribute to the arbitrator's understanding of the witness' credibility or technical competence and therefore may be helpful in ascertain-

18. Workshop Project, 1966 Annual Meeting of the National Academy of Arbitrators.

19. Kellor, *The Taking of Proofs in Arbitration Proceedings*, Arbitration in Action 272 (1941).

ing the truth in a very special way.[20]

Opinion Evidence

In arbitration an attempt is made by the appointing agency to accurately match the unique experience and competence of an arbitrator with a particular cluster of compatible case-related issues. Insofar as these issues may cut across various subject areas and may also include procedural issues involving admissibility and credibility, the appointing agency's task of providing a "compatible artibrator" may be almost impossible. But even approximations of the "compatible" arbitrator may be preferable to the entirely incompatible jury and the substantially incompatible judge.

For example, what kind of arbitrator is best able to determine a case involving a confrontation of contrary testimony as to the reasonable shelf-longevity of a new miracle drug? Should the arbitrator be a chemist, a trial attorney, or should he be particularly familiar with the administrative processes of the Pure Food and Drug Administration? These are judgments that must first be made by the appointing agency in submitting a list of arbitrators, then made again by each party in picking arbitrators from that list.

Where a technical issue of substance is primarily involved, it is often possible to obtain an arbitrator who is particularly competent to evaluate opinion evidence in his own field of expertise. In such a case, it may be sensible to relax the highly complex opinion evidence rules applied in the courtroom.

The credentials of the "expert" witness may be more meaningful to an "expert" arbitrator. He may be better able to judge the validity of conclusions based upon available data. Participation by the arbitrator in cross-examination may be essential. The ability of the arbitrator to satisfy his own informed curiosity is often an important aspect of the arbitration hearing. Furthermore, evidence which would be considered "expert" in a court is not necessary in arbitration because of the arbitrator's knowledge. The scope of judicial notice is expanded.

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20. For an example of the complexity of this process see *Arbitration and Patent Problems, a Colloquy among Members of the New York Patent Law Association*, 21 Arb. J. 98 (1966):

> The use of an experienced patent man as arbitrator could shorten the proceeding considerably, particularly, say, where the question is one of infringement and there is a problem of patent claim language. A senior patent man would be admirably suited to give you a quick and objective . . . view of the infringement questions. However, you might have to give a judge quite an education in patent and claim construction in order to get a similar result.

Id. at 106.

An important part of the attorney's duty at an arbitration hearing is to first ascertain the scope of the arbitrator's expertise, and then to enlist his tacit support in assaulting the weak points of the opponent's case. Encouraging the arbitrator to "work along" with the cross-examination seems to be a conventional arbitration hearing tactic.

It is important to emphasize the need for comprehensive preparation by counsel as to the technical background of the case. Only by such preparation can the attorney effectively establish his personal credibility with the arbitrator and create the necessary "work along" relationship.

Offers of Compromise

Testimony concerning settlement discussions or offers to compromise is usually excluded. Since settlement offers are influenced by factors such as customer relations, collection policy or cost of litigation, it is the concensus of most arbitrators, and a fixed policy of the American Arbitration Association, that offers of compromise should be excluded as irrelevant to the issue.

The arbitrator generally avoids involving himself in settlement discussions. It is customary for the parties to carry on such negotiations without his participation and without his being privy to the details. The secondary effect of excluding evidence as to settlement offers is to encourage prior discussion of potential settlement areas. Admission of such evidence over the objection of one side might mitigate against frank efforts toward compromise.

On the other hand, cases do arise where both parties wish to circumscribe the arbitrator within a part of their total controversy. For example, they may have been able to settle certain parts of their dispute, subject to a determination as to the balance. In such cases it might be appropriate to stipulate as to the discussions which led up to and defined the limits of an acceptable award. In arbitration, the parties may at any time change the rules of the game to their mutual advantage.

Parol Evidence

Another hotly contested evidentiary issue concerns the arbitrator's authority to admit parol evidence as to the contract between the parties. This issue ordinarily involves basic questions about the arbitrator's jurisdiction. Is the arbitrator, by listening to testimony about the meaning of terms in the agreement, thereby asserting a right to change the agreement?

Generally it would seem sensible for the parties to probe beneath the parol evidence issue and to examine the more vital controversy.[21] Cases where an arbitrator has been charged with exceeding the bounds of his authority under the contract are available for use in this setting and may offer more substantial ammunition than parol evidence authorities.[22] In other cases, however, the parol evidence rule and its several exceptions may be inescapably involved in the determination, particularly where the issue of ambiguity is virtually conceded to exist by both parties.

In labor arbitration the practice is for the arbitrator to listen to evidence offered as to past practice when he has initially determined potential contract ambiguity. It may well be argued that the decisions involving commercial arbitration suggest a more exclusionary policy. The labor arbitrator is conceived to be an expert in the interpretation of collective bargaining contracts, whereas the commercial arbitrator may be less familiar with the contracting processes of the particular industry and parties involved. Here then is another sample of the risk involved in transferring to commercial arbitration any conclusion reached in labor arbitation. These are substantially different tribunals.

Right to Appeal

It may not be worthwhile trying to require an arbitrator to observe rules of evidence unless his award can be set aside when he refuses to be bound by the rules or makes a substantial mistake in applying the rules.

The traditional judicial remedy would be an appeal to a higher court. It is questionable whether this is a practical remedy in arbitration. If either party may appeal an award where the arbitrator has violated a rule of evidence, it is unlikely that either will forego the opportunity of obtaining a transcript to preserve questions of evidence for the appeal. By seeking a seemingly reasonable remedy to protect against procedural mistakes by the arbitrator, the parties will convert the simple and final procedure of arbitration into something much more complex. Unless an official transcript is prepared, there cannot be an appeal procedure. How else can the question of whether the original arbitrator erroneously accepted or excluded evidence be submitted to an appellate forum?

At the present time, transcripts are made in few arbitration

21. Matter of Bay Iron Works, Inc., 17 App. Div.2d 804, 232 N.Y.S.2d 746 (1962).

22. See, *e.g.*, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Matter of National Cash Register Co., 8 N.Y.2d 377, 208 N.Y.S.2d 951 (Ct. App. 1960).

cases. Where a transcript is required, the parties must involve themselves in the correction and certification of the transcript, so that a mutually agreeable transcript may be available to the arbitrator. The arbitrator must then study the transcript. This task requires further delay and further expense. In addition to preparing the transcript, those cases which do involve transcripts are far more likely to involve the writing of briefs. All of this increases the costs to the parties. Most parties understand that an appeal procedure will destroy one of the greatest advantages of arbitration, finality.[23]

Conclusion

Probably, only rudimentary evidentiary instructions, similar to those found in the Rules of the American Arbitration Association, should be given to arbitrators. Arbitrators should be authorized to listen to all relevant and material evidence, and to decide which evidence should be excluded.

Arbitration is a system of justice which must be constructed by the parties for their own use. If adequate rules were not already available, it would be necessary for the attorneys to agree as to a multitude of contingent procedural agreements. By using the American Arbitration Association's Rules, it is possible to have these matters determined in advance in accordance with provisions that have helped resolve tens of thousands of commercial cases over the past forty years. One of the many matters covered in the Rules is the question of what evidence should be received at the hearing.

Although requiring the arbitrator to follow local procedural rules is probably unwise, the counsel who drafts a commercial contract may wish to suggest that the arbitrator consider local evidentiary rules.

In the American Arbitration Association Rules, the arbitrator is authorized to exclude irrelevant and immaterial evidence. Other directions may be inserted by the parties in their contract. The arbitrator may be directed to stay within the bounds of the contract

23. In the arbitration rules of the National Institute of Oilseed Products there is an "appeal" procedure of a different kind. A second panel of arbitrators may be established at the request of the losing party to consider the documents submitted to the original panel, in order to determine whether the original decision was correct. There is no oral hearing in these cases. Thus there is no issue as to whether evidentiary rules were violated by the original arbitrators. Even under these rules, the cases take substantially longer than if there were no such appeal. The parties complain about delay and increased costs. Therefore, it seems to be unwise to engraft this "appeal" system upon the final and binding arbitration machinery.

under which he is acting. In other cases, it may be useful to the arbitrator and to both attorneys to know in advance that the arbitrator is permitted to accept affidavits[24] or certificates from doctors, hospitals or government agencies.

Otherwise, arbitrators may best be left to their own discretion. Informed guidance should be given at the hearing by the attorneys in connection with evidentiary points. Oral arguments should concern themselves less with the technical rules of evidence than with the underlying reasons for such rules. Rather than stressing that an offer of evidence violates a particular rule, the advocate should point out why that evidence is not acceptable.

The arbitrator's final award should not be subject to an appeal procedure by which an appellate tribunal would decide whether or not substantial evidentiary mistakes had been made in the case. An appeal procedure runs counter to what the parties are usually trying to accomplish by using arbitration to resolve their disputes. They seek prompt and final justice. They do not seek perfect adherence to technical procedural rules.

No tribunal can give parties perfect justice.[25] Even cases in litigation sometimes, because of evidentiary issues, climb laboriously from trial, to initial review, to further appellate review. Decisions often are overturned from level to level, and finally decided by a split court. Such cases hint at a certain uncertainty in the application of evidentiary rules. Is pure justice well served by a law case which rises to the supreme court of a jurisdiction on an evidentiary issue, there to be decided by a mere majority of one? Or is justice perverted more by an arbitrator who renders a clumsy or an improper ruling as to evidence which he should not have admitted, but which had little weight in his final award?

Arbitration is not a technique which emphasizes procedural perfection in acceptance or refusal of particular scraps of evidence. It is a procedure which seeks to do substantial justice between the parties and to do justice reasonably promptly. The award should be final, not subject to review except upon statutory grounds.

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24. See section 31 of the Commercial Arbitration Rules of the Am. Arbitration Ass'n, which so provide.

25. Mosk, *The Lawyer and Commercial Arbitration: The Modern Law*, 1953 A.B.A.J. 193. "It seems certain that either method of resolution of controversy depends upon the good faith of the contestants and the wisdom of the arbitrator or judge. There is no system yet devised that can eliminate the human equation." *Id.* at 258.

Dickinson Law Review

Published Since 1897