CHAPTER 20

THE PROBLEM OF THE "POLITICALLY CORRECT" ARBITRATOR

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I. Introduction

As arbitral, legal and procedural regimes have reached greater maturity, arbitration proceedings in large, complex commercial disputes have tended to become as expensive, complicated and protracted as cases litigated in domestic courts. One factor that has contributed to this undesirable condition is that many arbitrators have adopted a form of "political correctness" to avoid offending the parties that have chosen them.

II. The "Politically Correct" Arbitrator

This manifests itself in a reluctance to manage the process effectively, particularly by failing to impose reasonable limits on the nature and extent of proofs submitted by the parties. Allowing evidentiary matters irrelevant to the issues to be heard delays the final resolution of the case and unnecessarily increases the cost of the process.

Under the rules and practices of the major arbitral agencies, parties are given exceedingly wide latitude in the evidence they can offer in support of their claims and defenses.[1] Offers of proof, however, are subject to the

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[1] American Arbitration Association Commercial Arbitration Rule R-33(a) provides: "The parties may offer such evidence as is relevant and material to the dispute...." Art. 19(1)

arbitrators' rulings as to relevance, materiality and admissibility of evidence.[2] The major institutional rules also give arbitrators broad discretion to apply law, rules of evidence under carefully prescribed procedures, or rules governing the conduct of the case.

Furthermore, under some institutional rules, arbitrators are encouraged to conduct the proceedings in the most expeditious manner.[3]

The scope of discretion to admit or exclude evidence does not differ significantly between arbitration and litigation. Judges, for practical reasons, are motivated by congested court dockets and pressure from court administrators to issue rulings that will expedite the closing of cases.

However, arbitrators ordinarily are considerably less zealous in imposing limits on the course of arbitral proceedings. When asked to make a limiting or exclusionary ruling, arbitrators are often heard to say, "We'll take it for whatever it's worth," or words to that effect. This sort of "non-ruling" postpones indefinitely the tough task of weighing the materiality of the offer of proof to a particular issue or the entire case.

There are more than a few possible reasons for such behavior by arbitrators. Many are probably reluctant to cut off a party's proffer of proof out of a "politically correct" but misguided desire not to offend, and remain in the good graces of, the parties. Others may simply come to the hearing unprepared to make difficult judgments excluding proofs, having spent an inadequate amount of time to become familiar with the facts of the case or the applicable law. It is also likely to be the case that arbitrators have their eye on the grounds to vacate an award, particularly the ground that the arbitrator refused to hear evidence pertinent and material to the case.

But the fact is that except in rare cases of arbitrator misconduct, arbitral awards subject to the Federal Arbitration Act are fundamentally

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of the AAA International Arbitration Rules provide: "Each party shall have the burden of proving the facts relied on to support its claim or defense."

[2] The AAA's commercial rules state: "The arbitrators shall determine the admissibility, relevance of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant." R-33(b).

[3] The AAA's commercial rules provide: "The arbitrator, having his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case." R-32(b). The AAA's international rules contain similar provisions in Article 16 (2) and (3). These rules also provide: "The tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case."

unreviewable by the courts.[4] Moreover, even in those cases when the award has been challenged on the ground that the arbitrator refused to hear pertinent evidence, courts usually uphold awards.[5] This, together with the standard of relevance or materiality in institutional rules, makes arbitrators virtually omnipotent in deciding the probative value of evidence proffered.

Arbitrators should be instructed to exercise their authority to make evidentiary rulings that cut down on hearing time and not allow political correctness to influence their decisions. To this end, arbitrator training programs should emphasize the need to conserve hearing time by imposing reasonable time limitations on the presentation of evidence. They should also teach arbitrators how to apply timesaving methods and techniques that will allow them to make appropriate evidentiary rulings. Arbitrator training programs are the ideal vehicle to teach the desirability of:

- requiring early submissions by the parties to enable the arbitrator to study the case in detail in advance of the hearing;
- discussing the case with other members of the tribunal and identifying together the matters that are relevant to deciding the case and issuing an award;
- using witness statements as a substitute for direct testimony. This technique has proved its utility in many international arbitrations. Witness statements are expressly authorized by the new International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration (Article 4). They are also impliedly authorized by Article 20 of the International Chamber of Commerce Rules, which admonishes the tribunal to "proceed within as short a time as possible to establish the facts...by all

[4] 9 U.S.C. § 10 contains the grounds for vacatur in the Federal Arbitration Act. See cases such as Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc., 473 U.S. 614 (1985). *See e.g.*, Generica Ltd. v. Pharmaceutical Basics Inc., 125 F.3d 1123 (7th Cir. 1997) (arbitrator's refusal to permit continued cross-examination of a nonparty witness that the arbitrator deemed immaterial to the proceeding did not deny a party due process). *See also* Pegasus Construction Corp. v. Turner Construction Co., 929 P.2d 1200 (Wash. Ct. App. 1997) (no misconduct found where the arbitrator refused to conduct a full hearing after making the dispositive ruling that neither party complied with the claims procedures required by their contract).

[5] *But see* Halligan v. Piper Jaffray, Inc., 148 F.3d 197 (2d Cir. 1998), where the 2d Circuit, apparently in shock over the injustice of the award, widened the familiar "manifest disregard of law" doctrine to include evidence within the definition of law. Supporters of the finality of arbitration awards may rest a little easier since a different panel of the same court recently upheld an award on the ground that manifest disregard of law was not established. *See* Alberti v. Dean Witter Reynolds Inc., 205 F.3d 1321 (2d Cir. 2000).

appropriate means" (emphasis added), and by R-34 of the Commercial Dispute Resolution Procedures and Rule 16 of the International Arbitration Rules of the American Arbitration Association,[6] which encourage efficiency in conducting the hearings. Use of witness statements could replace the practice of allowing extensive direct examinations of friendly witnesses who are usually coached by counsel to make detailed self-serving recitations;

- limiting cross-examination to matters fundamentally germane to the witness' direct evidence, to prevent counsel from deposing the witness during the hearing.

It is not necessary to amend existing arbitral rules, which are more than adequate, to achieve the goal of efficiency in even the most complex cases. What is required, however, is considerably more prehearing homework on the part of the arbitrators, effective early case management, adequate study of the parties' submissions and evidence, and the courage to make necessary but fair rulings, even those excluding offers of proof that are irrelevant or merely cumulative.

III. Conclusion

The use of timesaving measures can improve the overall efficiency of the arbitral process. The major administering authorities have improved their arbitration rules and procedures to meet the changing needs of parties. Especially salutary are rules promoting preliminary hearings as an occasion where the parties assist in framing the issues and identifying witnesses and documentary evidence.[7] Other rules make clear that the arbitrator has discretion to make the rulings necessary to conduct efficient, but fair proceedings. The parties and arbitral institutions must encourage arbitrators to exercise their discretion and take steps to shorten arbitrated proceedings without in any way diluting the quality of the process.

[6] *See supra*, n. 3.

[7] The ICC's practice of requiring "terms of reference" has played an important role in focusing the tribunal and the parties on the precise issues to be determined. Article 18 of the ICC Rules of Arbitration.