PRACTICAL PROBLEMS CONFRONTING THE PRACTICING LAWYER

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Experience shows that clients retain counsel to represent them in arbitration proceedings. Business men realize that the presentation of evidence before an arbitrator requires the skill of a lawyer. Statistics show, for example, that in 80 per cent of the arbitrations conducted under the Rules of the American Arbitration Association (which permit parties to be represented by counsel, as a matter of right), the parties are represented by counsel. In many of the remaining 20 per cent, the amount involved would not have warranted the expense of counsel if the dispute had been litigated at law.

Arbitration benefits the lawyer—have no doubt about that. The lawyer's time is saved and his convenience is served by arbitration. There is no time-consuming procedure of attending calendar calls, waiting for the previous case to be finished, picking juries, and preliminary motions and appeals. The fee of the lawyer in arbitrations not only is at a much higher rate for the time actually spent, as opposed to court actions, but generally is as much in dollars and cents. The disposition of an arbitration in a comparatively short time assures the lawyer that the evidence and witnesses will be available, that a debtor will not have the usual lengthy period while a court action is pending to dispose of his assets and prevent collection of the claim, and that the controversy will be disposed of quickly and the lawyer's fee paid.

The clause in a contract providing for arbitration of future disputes (or the submission entered into after a dispute has arisen) is the mainspring of arbitration, and from that clause and the procedure outlined in it or supplemented by the basic law or chosen by reference to the rules of an association, chamber of commerce or trade group, there will follow good, bad, or indifferent results.

Merely providing for arbitration is not enough. There are pitfalls which must be avoided and experience serves as a guide.

Uppermost in the mind of the lawyer, both from the standpoint of his client and himself, is whether his client will be entitled, as a matter of right, to be represented by counsel at the arbitration hearing. Some trade groups limit or effectively prevent such right of representation by counsel in arbitrations conducted under their rules. Before the client signs a contract or submission which provides for arbitration under the rules of a designated tribunal, it is, therefore, necessary to examine its rules. The Rules of the American Arbitration Association and, generally speaking, the rules of chambers of commerce provide that parties are entitled as a

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matter of right to be represented by counsel without limitation. Many trade groups which have tribunals for the arbitration of disputes arising in their particular lines of business limit or forbid representation by counsel, under their rules. Where the contract provides for arbitration without reference to the rules of any tribunal, then specific provision should be made that the parties shall have the right to be represented by counsel. In the absence of a provision in such rules or in the contract which specifies that a party is entitled to be represented by counsel, the tendency of the courts is to leave the matter to the discretion of the arbitrator. In New York, a law was enacted this year[1] which provides that a party is entitled as a matter of right to be represented by counsel unless he expressly waives that right in writing or by conduct at the hearing.

After a dispute arises one of the parties—usually the one against whom the claim is asserted—may feel that he would be better off if he had not agreed in advance to arbitrate. The reason may be that delay (in a court action) is to the advantage of the defaulting party. But, of course, one never knows in advance who is going to be the plaintiff and who the defendant. Similarly there are certain types of controversies as to which one of the parties would fare better in a court of law. In other cases, for example, claims by manufacturers under clauses providing for arbitration under the rules of a trade group in which such manufacturers occupy a predominant position, the purchaser is frequently at a disadvantage because of the attitude and preconceived notions of arbitrators selected from panels of persons engaged in that particular industry and because the arbitration proceedings are supervised by a staff which has been employed by the particular trade group. That is good reason for providing for arbitration under the rules of a tribunal whose panels of arbitrators are selected from all branches of business and commerce and from the professions, including lawyers, accountants, and engineers.

Consideration should be given as to whether one or more of the arbitrators should be selected from any particular industry or profession and whether one or three arbitrators is desirable. It may be advisable to provide that the arbitrator is to be a chemist, engineer, lawyer or accountant, depending upon the merchandise or product which is the subject of the contract and the nature of the controversy. If there are to be three arbitrators it is frequently desirable to provide that at least two of the arbitrators shall be persons engaged in the same kinds of business as the contracting parties. Unless experience in more than one type of business is required, it is a toss-up whether provision should be made for one or three arbitrators. If in doubt, provide for three. Even where an arbitration is to be conducted under the rules of a designated tribunal, specific provision can and often should be made for arbitration before three arbitrators.

It may be provided, if desired, that the arbitrators are to be designated from certain lines of business or from certain professions by a distinterested person such as the president of the local chamber of commerce. Provision may be made in the

[1] N. Y. Laws, Chapter 547 of April 7, 1952, amending §1454, Civil Practice Act.

contract for the selection of arbitrators from the respective kinds of business in which the parties are engaged. Rules of most tribunals are designed to result, and actually result, in the selection of persons who are familiar with the customs and practices of the trade and who deal in and with merchandise or products covered by the contract.

In commercial arbitrations it is a serious mistake to provide that one arbitrator is to be selected by each party. Experience shows that this procedure results in the selection of two persons who act as advocates of the respective parties and not as disinterested arbitrators. Such advocates in the guise of their position as arbitrators frequently delay and obstruct the arbitration and contribute nothing to assist the third disinterested arbitrator, but, on the contrary, present solely their biased opinions, tug one way or the other as suits the interests of the party who selected them, and confuse the issue and the disinterested arbitrator. There are instances where an arbitrator selected by one of the parties refuses to fix or delays in fixing a date for hearing, or, after the time of the hearing is set, insists upon adjournments—because that is what suits his "client." Advocate-arbitrators have been known to resign immediately prior to the hearing, or during the course of the hearing, resulting, in the latter event, not merely in delay but in a re-trial before the remaining two arbitrators and the new arbitrator who must be selected.

If provision for selection of one arbitrator by each of the parties cannot be avoided, it is advisable to provide in the contract for procedure for the selection of an arbitrator in the place of one who resigns or fails or refuses to act; and this procedure should specify a quick method, such as the designation of a new arbitrator by a disinterested person: for example, by the head of the local chamber of commerce. If the party who selected the obstreperous arbitrator is permitted to designate another arbitrator in his place, he will be likely to choose another advocate of the same type. The rules of associations and trade groups usually provide a quick procedure for selecting an arbitrator to replace one who has resigned or failed for any reason to act.

Of course, the arbitration clause should be broad enough to cover all disputes which may arise and all claims which may be asserted, including interpretation of the provisions of the contract. It may be advisable to provide that the hearing is to be held in a particular city or state and that service of notice to commence the arbitration and to confirm the award and enter judgment may be made by mail or personally outside of the state in which the hearing is to be held. Such provisions have been upheld by the courts. Unless the foregoing matters are covered, jurisdiction may not be obtained in the state where the parties originally intended to arbitrate. On the other hand, such provisions may place one party at a great disadvantage by compelling him to arbitrate at a considerable distance from his place of business, with attendant inconvenience and expense. There are instances where retailers doing business in California find themselves confronted with a contract requirement that they arbitrate in New York City.

One of the problems which is in its formative stage is the question of equity powers of the arbitrators, including awards or intermediate awards in the nature of specific performance and directions that a party do or refrain from doing certain acts. Frequently a money award is not fully compensatory or it is necessary to direct one party to take delivery of merchandise or to do some specific act during the course of the arbitration in order to assure beneficial relief to the claimant in the event that he should be successful. It is the writer's opinion that arbitrators have and should have such powers, but courts do not always regard arbitrations in the most friendly manner, and may be inclined to limit the powers of the arbitrators. It is submitted that courts will take a more favorable attitude if the contract grants specific designated powers to the arbitrators—always being careful to indicate that those powers are in addition to all others.

A very practical reason for arbitrating under the rules of a designated tribunal, whether it be an association, chamber of commerce or trade group, is that such tribunals attend to all procedural matters, such as fixing a date and place for the hearing, sending out notices for the hearing, supervising the hearing, marking exhibits and preparing the award—all of which make the task of the lawyer that much easier. When an arbitration is conducted without the benefit of such a tribunal, the lawyer for one side or the other must assume the burden of all such matters.