ARBITRATION AS A PROCESS

Gabriel N. Alexander*

I have the pleasant assignment of introducing this morning's speaker. Before doing so, I would like to express, for myself and on behalf of all those who have participated and attended, our gratitude and appreciation for the tremendous amount of work that has been put into the preparation and administration of this institute by our friends—Russell Smith, Larry Rogin, Mrs. McLaughlin (Russ's secretary, who has been working very quietly behind the scenes), Ron Haughton, Bill Forsythe, and all the staff members of the Institute.

My role, of course, is a limited one which I accepted very gratefully before any date was set or the program was fully known. Had I foreseen some of the things that were going to be said about arbitrators yesterday and the day before, I probably would have demanded a greater voice. As you see, I am here without eye glasses; and whatever my conceits may be, they are not myopic. I am sure I have conceits, as we all have, but they do not include the notion that the arbitration process is beyond improvement, or that it does not deserve the utmost attention on the part of the arbitrators who sit in the proverbial hot seat, and on the part of the participants, whose seats are only slightly cooler. I think arbitration deserves all of our continuing attention to make it a better and more useful institution and personally welcome criticism on all scores, and from all sources, if it is constructive to that end. I shall say no more as to my reaction to those who would use the arbitrators as the whipping boy for their disappointment in the outcome of particular cases. Of course, arbitrators are not the only whipping boys. Those of you who have attended collective bargaining conferences where the audiences were made up predominantly of representatives of labor and representatives of management have heard lawyers excoriated. I recall one such conference in Philadelphia many years ago, where, no matter what subject matter was slated for a session, it started out with a condemnation of lawyers and ended up with a condemna-

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tion of lawyers. These unpleasantries can be borne; despite them most arbitrators are sincerely interested, I'm sure, whatever may be their conceits or shortcomings, in making voluntary labor arbitration a more useful and better instrumentality of industrial self-government.

One of the problems from the arbitrator's point of view, as I see it, is that the lines of communication between the participants and the arbitrators are too weak. They are usually open only during the course of particular proceedings, when feelings are apt to run high, and the desires to win are intense. At such times the arbitrator, quite naturally I think, tends to discount what he hears. I have suggested, and I look forward to a day when the suggestion is adopted, that we arrange meetings in which the advocates of management and of labor can speak to the arbitrators in more measured and constructive terms, with the hope that better understanding by arbitrators will result. In that way myopia, real or fancied, may be eased by the application of a proper optical prescription.

I delight in the opportunity to introduce Paul Herzog. I knew him only by name until perhaps six months ago, when I met him at the meeting of the National Academy of Arbitrators in St. Louis. Although I'm not given overmuch to great praise, I was at that time deeply impressed by his ability to speak clearly and plainly; by the sincerity of his remarks; and by his constructive attitude towards what has become a rather general problem, the improvement of relationships between the American Arbitration Association and other people and institutions interested in labor arbitration. Many of you know him better than I do, I am sure, and I need not do more than restate for others a little of his background. He is New York born, a graduate of Harvard University in 1927, and has taught at the University of Wisconsin and at Harvard. He went into public service in 1933, when he became assistant to the secretary of the NLRB during the NRA period. In 1935 he went back to law school; received his degree in 1936; went to the New York bar in 1937, and to the District of Columbia and the United States Supreme Court Bars in 1948. He is one of the most experienced men in the labor-management field, having been one of the original members of the New York State Labor Relations Board in 1937, later becoming chairman in 1942. He went into duty with the Navy in 1944. In 1945 he was appointed Chairman of the NLRB and was appointed to a second five year term in 1950, at which time he was unanimously confirmed by the Senate. He resigned that post in June of 1953 to become Associate Dean of the Harvard Graduate School in Public

Administration, and he served as Acting Dean of that School for the first half of 1957. He has been active in the American Arbitration Association since 1955, and in the early months of this year became its Executive Vice-President. With pleasure I give you my friend, Paul Herzog.

Paul M. Herzog*

In speaking this morning, I will pretend neither to be a technician nor to explore the details of arbitration. I do not yet know enough about them, although presumably it will not be possible to use that excuse much longer than these seven months on a new job. My task, rather, is to attempt to set the stage for your discussion, in a somewhat larger perspective. Much will sound extremely trite, but Justice Holmes is authority for saying that "education in the obvious is more important than investigation of the obscure." Therefore, today's session will begin with a master of the obvious, who leaves the more obscure matters--with great relief and great confidence--to those highly skilled obscurantists who are to follow.

You have proceeded here for three days, from subject to subject, on a basis which reproduces, in a microcosmic way, the history of industrial relations in the United States for the past quarter of a century. Labor relations have progressed during the past 25 years much as the wise draftsman of your program has had these three days progress. After the NRA in 1933 or the Wagner Act in 1935, or after 1937 if you prefer to use the date of the Supreme Court decisions, first, came the enforcement of the very right of collective bargaining; second, came development of the process of collective bargaining under the tutelage of the law; third, came the evolution of a private administrative process, not dependent upon government, by which labor and management could work out their day-to-day problems--problems that could only grow out of already consummated collective bargaining. If you will re-examine your program for these three days, you will see that that has been the way your discussion has also evolved.

Now we have reached, in most parts of the country, the third of these stages. That stage, in one of its aspects, is best represented by arbitration. It could not have been reached, surely, without America's passing in large measure through the first two stages. But we passed through them so rapidly, after attaining the first stage so belatedly as twenty-five years ago--that many of today's problems were inevitable. It is not flattering labor and in-

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dustry unduly, or government unduly, to say, in view of the accelerated pace we have all experienced over a mere twenty-five years, over only one generation, that labor and industry and government have not done too badly.

Arbitration is important not only for what it does, but also for what it is: A process by which men who prefer the use of reason to trial by ordeal, or by battle, or by technical legal legerdemain, try to agree on one thing. That is to allow a trusted private citizen to decide the issues upon which they disagree. Thus arbitration begins with a fundamental agreement, although it is invoked, case by case, by disagreement upon issues which may or may not be fundamental. It ends with acceptance of the result. In this respect, arbitration is singularly analogous to constitutional government in a democracy. What does constitutional government entail? It is based, first, on community agreement upon a few basic principles. Secondly, it devises certain methods, especially the electoral process and the courts, to resolve differences which everyone assumes are going to arise in a healthy society, and which indeed should arise if that society is to continue to be healthy. And third,--here the analogy to arbitration continues--it requires that the results reached through that method be accepted not only graciously by the loser, but not too high-handedly by the winner.

This, I believe, is why voluntary arbitration is not only a hallmark of a democratic society, but also a means by which that society can be strengthened. It provides much more than a road to industrial peace, important though that obviously is. DeTocqueville said, 125 years ago, that "the health of a democratic society may be measured by the quality of the functions performed by its private citizens." How much truer that surely is today, when the growing centralizing forces in America are driving us all toward dull conformity in our thinking and toward reliance upon governmental fiat in our doing. Arbitration affords an opportunity to bring private citizens back into participating roles, whether as parties to cases or as part of a gradually increasing core of trained arbitrators. It is dependent, of course, upon the exercise of individual free will; it generates good-will. Arbitration offers a technique that is available to every commercial and industrial enterprise, by which human beings can develop the habit--at the grass roots, where habits have to be formed, and gradually, as human beings have to form them,--of trusting one another just as far as possible and trusting a third person from that point on. Without such trust, collective bargaining cannot work, just as constitutional democracy cannot

survive.

For this reason, among others, it would be a mistake to think about arbitration exclusively in its labor-management aspects. While that happens to be the concern of this Institute, it remains true that those who are concerned with arbitration, not only as a technique for solving certain problems but also as a way of life, cannot forget its importance in the commercial field as well. The advancement of commercial arbitration was the main reason for the creation of the American Arbitration Association thirty-three years ago. It was not until the 1940's that the Association entered the labor arbitration field in a conspicuous way. Even today, although the bare statistics may not show it that way, nearly half of the energies of the Association as a whole are devoted to commercial arbitration. Commercial arbitration is just as important as labor arbitration in developing the habit of mutual trust and for reducing court litigation. While the details and the purposes are obviously different from those in labor arbitration, the basic principles are much the same. A decentralizing process operates in both instances: both provide an opportunity to keep our society just as pluralistic as possible in these times when the centripetal forces are almost overwhelming.

There are pragmatic arguments that lead to the same conclusion. While businessmen's relationships are much more sporadic than those continuing ones which exist between labor and management, they too can benefit by using expert arbitrators to resolve their differences. Whether or not you like the impact of recent statutes, state and federal, upon the field of labor arbitration, or recent decisions of the courts on certain subjects which are still hotly argued, most people would surely agree that they are designed to facilitate the use of arbitration in the commercial field. Those who find arbitration a good medium for solving some of their problems in labor relations, may find that it also provides a solution for their commercial problems.

This applies not only on the domestic scene, but to international business relationships as well. Only two months ago a conference was held at the United Nations at which a new convention on International Commercial Arbitration was drafted for submission to participating countries for ratification. Those who believe in peace through law at the international level realize that in this world one has to start somewhere. We should also realize that one way of getting into this habit is thinking in terms of arbitration between individuals from different nations. The habit is so difficult to achieve

by beginning at the level of governments, that developing it between private individuals from different countries may help to carry it over someday to the point that will matter most.

However, you are here to consider labor arbitration, and it is plain that the dramatic growth in the past decade has been in that area. Statistics are not too important, but I should reiterate the old cliché that over 90% of the collective bargaining agreements in this country now contain arbitration clauses. At the American Arbitration Association alone, the number of labor cases has doubled over the past six years. It rose to 2600 cases in 1957, which represented not only a 100% increase over 1952, but also a 20% increase over 1956. 1958 discloses a similar upward trend.

The principal cause of this is the growing maturity of labor relations. Something else is also clearly involved: the increase in long-term contracts. The longer the contract, the more problems have to be solved in mid-term, problems that cannot await the power-struggle of the collective bargaining process, which may take place every three or five years. These problems will not await that struggle, nor should they. They have to be solved somehow; they grow out of the agreement which was the result of the last power-struggle. The very fact that arbitration is used during the period between contractual negotiations, to fill in the interstices in the contract, tends to alleviate the harshness of that power-struggle when it must occur at periodic intervals.

Here again, we come back to the growth of healthy habits. Men who have to deal with one another day by day and become used to relying on a mutually acceptable decision by an arbitrator, learn something much more important, infinitely more important, than just compromising their differences. That is not too hard to learn in life. What they really learn, slowly and painfully, is something about the other fellow's needs, the other fellow's aspirations, and the capacity to live together. This capacity is much more important than a momentary victory on some transitory issue, a victory which may look very good to the winner for a few days, but which may, if it is not fairly won, engender resentment which he himself will be paying for for months and years to come. As this habit of dealing with and trusting one another gradually develops, when the big issues do arise, when new contract negotiations come along, both labor and management will have removed the poisonous underbrush of resentment from a path which, whether they like it or not, they still have to travel together.

In speaking of arbitration so enthusiastically, I should add two

words of caution. Perhaps they will surprise you, coming from someone who is supposed to be a professional advocate of arbitration. First, you will spare yourselves disappointment, and what Henry Stimson called "the deadliest of all sins, cynicism," if you do not expect too much of arbitration. We must realize that arbitration, no matter how great its virtues, will not solve all our problems, or all of industry's problems, or all of labor's problems, or all the world's problems. It will solve some, much better than anything else possibly can, but let us not pretend that it is a universal nostrum. If, like one of today's wonder-drugs, it is used where it is not appropriate, two consequences are sure to follow: first, it may kill the patient; secondly, it will destroy its own usefulness. Rather than see arbitration discredited by overuse, I would urge that it be resorted to, with discrimination, only where the nature of the controversy calls for it. That is a choice that the parties must make. When it is used, however, it should be used to the hilt.

The second caveat goes to the question of when arbitration should be used. Even where the subject-matter makes its use appropriate, it must not be invoked too soon or too often, if its greatest value is to be preserved. Otherwise arbitration, instead of being the desirable final step in the jurisprudence of an industrial enterprise, will become a premature substitute for something else--something much better--an attempt by the parties to work out their difference by themselves. Surely, they ought never to run to a third party until they have to. And surely it is incumbent on all of us, the American Arbitration Association and arbitrators alike, not to encourage them to run to arbitration too soon. The important test of arbitration cannot be the frequency with which it is invoked. Usually the contrary is the fact. What counts is its existence as a potential recourse, plus mutual acceptance of the result whenever it actually is used. The mere existence of a well-drawn arbitration clause and the availability of good arbitrators provide preventive medicine, medicine which seems to me most likely to guarantee a healthy enterprise. for the true test of strength in this world lies in the existence of power and not in its constant exercise.

Self-restraint, the mark of civilized men, is the key to it all. Arbitration is a system of self-imposed law, in itself the fruit of self-restraint. It springs from that highest exercise of human freedom, referred to in the writings of the ancient philosophers, the voluntary surrender by an individual of part of his freedom. A party who agrees to arbitrate is surrendering something that he had before--perhaps physical power or economic power or a technical

legal point. He is doing it in order to allow a trusted third person, a person who lacks the panoply or the power of the State, to decide some portion of his destiny.

This imposes a very special responsibility upon the third persons who are selected to decide that portion of his destiny because, being trusted, they have become trustees. Their duty, therefore, rises much higher than the mere exercise of ordinary care, or the display of ordinary, taken-for-granted, integrity. It follows that, as arbitration becomes increasingly accepted, it does not suffice to limit the obligation of self-restraint to the parties themselves. It applies equally to the administrators of arbitration, like the American Arbitration Association, and to arbitrators themselves. Arbitration, still regarded as an experiment by some, is becoming "big business." With bigness comes power, and with power, as we all know, responsibility. Unless that responsibility is very wisely exercised by us all, what now appears big, could indeed again become small, because whatever grows too fast always carries the seeds of its own destruction within. It is our common task, mine as well as yours, to guard arbitration against that danger, particularly in these days when everything appears to be going so extremely well.

To avoid these dangers, a few principles must not be forgotten. The first, and most fundamental, is that arbitration exists for the parties, and not the other way around. Barring some request that is outrageous on its face, or likely to establish a destructive precedent or a generally unwise policy, it is the desires of the parties that should govern every arbitration proceeding. It is they who give it life; it is they who give the arbitrator his very being. Even at that moment when he is at his strongest, the moment when he is handing down his award and is--temporarily--the master of the parties, he is still their servant, the creation of their joint wills.

If he compromises like that earliest of arbitrators King Solomon, the author of the first split decision in history, he is doing less than the parties asked him to do, because he is not really deciding their case. If, on the other hand, he does more than they have asked him to do, by mediating when they have asked him only to judge, or by deciding questions that they have not submitted to him, he is doing something far more serious than that which people often criticize arbitrators for doing when they do either of these two things. He is not merely raising in their minds, or in a court's mind, technical questions about his authority or questions as to what is or is not arbitrable. He is taking the name of his creators in vain; he is forgetting the limited reasons for his own creation.

In conducting the proceeding, and in fixing his fees as well, the arbitrator who remembers these things will be the one who can surely serve arbitration best. Here again it takes self-restraint. It takes one kind of self-restraint to act like Caesar's wife, above suspicion; but it takes another kind, equally important, to avoid acting like Ceasar's wife's better known husband. This responsibility is not only upon arbitrators; it applies equally to agencies like the American Arbitration Association which administer arbitration proceedings. We, too, are only the servants of the parties. We can only grow because and if the parties want us to grow. For us, something more is needed than self-restraint: self-criticism. This is doubly important lest certain bureaucratic encrustations lead us to place the letter above the spirit, or to place precedent—which has grown for some reason, perhaps originally a good reason—above common sense. We, too, must look all the time for the cast in our own eye.

We have rules, to be sure, to assure a degree of certainty, and to guarantee orderliness in procedure. Those of you who do not like those rules must remember that their absence led many parties, and particularly their lawyers, to view arbitration with suspicion. Those rules were not made to be broken, but they certainly are not sacrosanct. The Association, and its Executive Vice President, welcome suggestions for their amendment whenever labor and management, whose servants we also are, believe that the parties' interests will be advanced by their amendment. What really matters is the fostering of arbitration as a means of doing justice, and not some favored doctrine of the American Arbitration Association itself. We stand ready to work hand in hand with the National Academy of Arbitrators to achieve this purpose, whenever it can be done for the benefit of the parties to arbitration.

The parties, too, have a role to play in the future of arbitration. They have much to ask of arbitrators and its administrators, but they must not ask too much. No arbitrator can rise above his source, and his source lies in the parties themselves. They must therefore also demand something of themselves. The principal thing is not to place today's victory ahead of tomorrow's good relationships. This, to return to an old theme, also calls for a special kind of self-restraint, not always easy to achieve in the heat of controversy. It means something else. It means avoiding invoking arbitration just to harass the other party, or just to save face in a situation which a party cannot quite work out within its own organization, whether that party be labor or management.

It means not seeking advantage by raising technical points, even though they may be appropriate in a court of law. This is true, not because it is necessarily wrong for a lawyer or a party to raise technical points--it may often be right--but for a very different reason, which brings us back to the basis of arbitration as a voluntarily selected means of disposing of controversy. It is often wrong to raise technical points that would be appropriate in a court of law for the simple reason that that is the very thing that the parties agreed not to do when they themselves chose arbitration, instead of a court, as the forum for a resolution of their problem. If their goal is peace, surely they cannot attain it by using the instruments of legal warfare.

To exercise these various forms of self-restraint is not easy for any one of us. Therein lies the challenge. As the relations between management and labor pass out of the political stage, using that word in its broadest sense, and as the issues between them are becoming increasingly administrative, there is growing need for more and more men to develop the habit of objective thinking, whether they be advocates or judges. That surely is one reason why educational institutions like The University of Michigan create institutes of this kind. For one task of a university is to educate individuals to think in objective, disinterested terms.

At the administrative stage of human problems, labor or otherwise, there are problems to be solved, rather than battles to be won. Arbitration does much more than provide a means of solving them. It develops manpower where manpower is most needed. It trains citizens equipped not only to solve the problems that are before them at the moment, but also, by reason of that training, to deal thoughtfully with many other problems that will arise in their communities. Arbitration provides a way for thousands of private citizens to educate themselves to build something together, undramatically and detail-by-detail, precisely as medieval men built their cathedrals. History may not recount who, among medieval men or among you, installed any particular stone in the cathedral, but later generations will have good reason to be grateful to the builders, every single one of them.

The future of arbitration lies in our hands. We are not missionaries, but we do have a mission. Allow me to close with the words of Woodrow Wilson in his first inaugural address: "Who shall live up to the great trust? Who dares fail to try?" Those questions I address not only to you, but also to myself.

PANEL DISCUSSION: THE EMERGING "INDUSTRIAL JURISPRUDENCE"

Chairman: Harry H. Platt
Detroit, President, National Academy of Arbitrators

Discussants: Frank Elkouri
Professor of Law, University of Oklahoma
Ralph T. Seward
Attorney and Arbitrator, Washington, D.C.
Lester Asher
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Theophil C. Kammholz
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10:00 A.M., August 2, 1958

F. ELKOURI, R. T. SEWARD, H. H. PLATT, L. ASHER, AND T. C. KAMMHOLZ