Throw Down the Muskets, Seek Out the Town Elders

This Is a Brief History of Arbitration in the United States

By Steven A. Certilman

While in the 20th Century it may no longer be typical for people to resort to weapons as a means of resolving their disputes, most will agree that litigation is, to a lesser degree, aggression played out in the dignified theater of the courts with words as the weapon of choice. Ideally, as a means of dispute resolution, ADR represents a choice of peace over aggression. Regrettably, though, as the process of arbitration is re-cast by some lawyers and parties who may have lost sight of arbitration's historic character and benefits, arbitration appears to be morphing in some cases into a private forum for litigation practices. With that in mind, it is hoped that a historical look at the origins of arbitration in North America will aid in reminding stakeholders in the arbitration process of arbitration's intended benefits: simpler, faster, cheaper.

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Colonial Times

Long before Europeans journeyed to America's Atlantic shores, Native Americans used arbitration as a means of resolving disputes within and between tribes.[1] The opportunity to learn from this experience may have initially been lost on the newcomers, however, and it appears that its benefits were first introduced to settlers here long before the Revolutionary War by early colonists who had had business experience in Europe. The use of arbitration in the ports of Europe was already commonplace at that time among maritime and trade businesses. The experience of arbitration as a means of dispute resolution which minimized conflict and allowed continuation of the business relationship was carried across the Atlantic by those coming to live and work in North America.

As early as 1632, Massachusetts became the first colony to adopt laws supporting arbitration as a means of dispute resolution. Historical documents dating to the 1640s tell of a case in New England involving the amount to be paid by a Mrs. Hibbens, "wife of a prominent Boston resident," to Mr. Crabtree, who provided carpentry services in her house. When the parties failed to agree on how much Mr. Crabtree was owed for his services, Mr. Hibbens suggested arbitration. He selected one carpenter and Crabtree selected another. The arbitrators determined a revised fee, but Mrs. Hibbens continued to refuse to pay, pronouncing Crabtree's work unsatisfactory and criticizing the skills of the two arbitrators, "which diminished their reputation in the community. Church elders approached Mrs. Hibbens, but she remained unmollified. After another arbitration attempt failed, the dispute moved into the First Church of Boston, where Reverend Cotton presided."[2]

It is quite remarkable that the Massachusetts Colony arbitration statute preceded that of Great Britain by more than sixty-five years, the latter having enacted in 1698 An Act for Determining Differences by Arbitration 1698 (9 & 10 Will. III c 15). One might assume that this statute, together with that of the Massachusetts Colony, became a model for those enacted by other colonies.

In 1705, the Pennsylvania colony became the second colony to adopt laws in support of arbitration. Despite the opportunity for more widespread use of arbitration created by the enactment of legislation supporting arbitration by two colonies, its use remained common only in maritime and trade disputes. Then, in 1768, the New York Chamber of Commerce broke ground by appointing what has been referred to as the oldest American tribunal for the resolution of commercial disputes. This organizational structure combined with the volume of trade passing through the colony of New York at that time brought more widespread understanding of the arbitral process and its benefits.

Arbitration came to play a role in the last efforts to avoid the American Revolution. The Olive Branch Petition of 1775 was the final attempt of moderate colonists to prevent further bloodshed and halt the seemingly unavoidable slide toward the Revolutionary War. Written by John Dickinson, the leader of the moderate party, the Olive Branch Petition expressed loyalty to the King, begging him to cease fire until an agreement could be reached. In November 1775, the colonists learned that King George III had refused even to read the petition and decided to continue fighting. This led, in June 1776, to the formation of a committee of the Continental Congress to formulate what we now know as the Declaration of Independence.

From the Revolution to Reconstruction

As the port of New York grew and New York expanded its role as the center of trade on the North American continent, so did the use of arbitration in its precincts and its use spread beyond the maritime and trade industries.

George Washington himself gave credence to arbitration through his decision to include an arbitration clause in his last will and testament. The 1799 will provided that "all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants each having the choice of one and the third by the two of those. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their intent of the Testators intention; and such decision is to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States."[3]

In the aftermath of the Civil War, claims of people and nations came to be resolved by arbitration. Disputes between former slaves and former slave-owners were quite common following the war and three-arbitrator panels were often used to settle such disputes. The war left a number of outstanding subjects of dispute between the United States and Great Britain unresolved for six years. Then, upon the signing of the Treaty of Washington in 1871, the so-called *Alabama Claims* were submitted to arbitration before multi-national tribunals.

The controversy began when agents of the Confederate States contracted for warships from British boatyards. Disguised as merchant vessels during their construction in order to circumvent British neutrality laws, the ships were actually intended as commerce raiders. The most successful of these ships was the *Alabama*, which captured 58 Northern merchant ships before it was sunk in June 1864 by a U.S. warship off the coast of France. When the parties finally agreed to arbitrate, it was agreed that one panelist each would be selected by the President of the United States, the Queen of England, the King of Italy, the President of the Swiss Confederation and the Emperor of Brazil. The five arbitrators met at Geneva and the award, issued in 1872, required England to pay $15,500,000 in gold to the United States in full and final settlement of all claims.[4]

In 1871, the New Orleans Cotton Exchange adopted arbitration for the resolution of its disputes. Somewhat surprisingly, this seemed to bring about an awakening of the benefits of arbitration for many industries, most notably the securities industry. The New York Stock Exchange adopted arbitration for claims between members and their customers in 1872.

In 1874 the New York State legislature created within the City of New York the office of "Arbitrator of the Chamber of Commerce of the State of New York," and thereafter fixed the salary at ten thousand dollars a year.[5]

Voluntary, binding arbitration of labor disputes was enacted by Maryland in 1878. Over the next ten years similar laws were passed in other states. In 1886, New York and Massachusetts each created permanent arbitration boards with mediation and arbitration authority.

The first federal labor dispute law, the Arbitration Act of 1888, was enacted into law. It provided for both investigative authority and voluntary arbitration but as its arbitration provision was voluntary, it was infrequently used. This short-lived law was superseded in 1898.

Another instance of diplomatic arbitration took place in 1892 with the Fur Seal Arbitration Proceedings in Paris. This tribunal was constituted to determine issues which had arisen between the United States and Great Britain concerning the jurisdictional rights of the United States in the waters of the Bering Sea and, in particular, regarding the fur seals of the Pribilof Islands.[4]

The Erdman Act was enacted by Congress in 1898 to strengthen the Arbitration Act of 1888. It retained the original act's voluntary arbitration provision but eliminated the investigative authority and provided for mediation by the Commissioner of Labor and the Chairman of the Interstate Commerce Commission at the request of either party.[6]

A key event in the use of ADR in labor disputes occurred in 1902. To try to bring an end to a long and acrimonious strike, President Theodore Roosevelt used the weight of his office to bring the principals together to resolve the Philadelphia & Reading Coal & Iron Company miners' strike. The conduct of the mine owner at these proceedings caused the President to lean in favor of the striking minors. The resulting settlement was achieved, for the mine owner, with significant pressure. Nevertheless, this miner strike and the railroad strikes of the same era ushered in a large-scale trend in the use of mediation and arbitration to resolve labor disputes.

The 20th Century

Within the first decade of the 20th Century, major trade groups sought to apply arbitration's benefits of simplicity, speed and minimal enmity. When New York's The Association of Food Distributors, Inc. (originally known as the Dried Fruit Association of New York) was formed, its bylaws included an arbitration panel for the resolution of disputes. This was a choice which worked to minimize the risk that its disagreeing members would, after resolution of the dispute, find themselves unable to resume their business relationship.

The use of ADR in labor disputes was further refined by the creation in 1917 of the U.S. Conciliation Service as an agency of the Department of Labor, which had been created in 1913. The USCS was a mediation organization with no direct mandate for arbitration.

When the League of Nations was founded in 1919, its members committed themselves to the use of arbitration

through the Permanent Court of International Justice. Unfortunately, the United States Senate failed to approve the treaty creating the League of Nations so this early and inspired act of world support for the arbitration process did not include the United States.

Until the early 1920s, the only law governing arbitration proceedings in the United States came from court decisions, some dating back to the 17th and 18th Centuries. Lord Coke's opinion in Vynior's Case (Trinity Term, 7 Jac. 1), decided in 1609, formed the basis for the common law doctrine that "1) either party to an arbitration might withdraw at any time before an actual award; and 2) that an agreement to arbitrate a future dispute was against public policy and not enforceable." The precedent established in Vynior's case (from which it was extrapolated that the parties to a dispute "may not oust the court of its jurisdiction"-meaning that courts may not be deprived of their jurisdiction even by private agreement) became "the controlling decision in American arbitration law" until the New York State legislature abrogated the common law doctrine in 1920, and until a federal arbitration statute was passed in 1925. Other states soon followed suit, and for the first time in America, agreements to arbitrate future disputes were "legally binding and judicially enforceable." This was the pivotal moment for the widespread use of arbitration in America.[7]

In 1925, The Federal Arbitration Act (9 U.S.C. §§ 1 et seq.) was enacted. Its enactment was a recognition of the benefits of arbitration and the statute established a national policy favoring arbitration. Functionally, the Federal Arbitration Act was designed to overcome existing judicial hostility toward arbitration which appears to have evolved from the English courts. It has been written that English judges were paid fees based on the number of cases they decided. Arbitration, then, would infringe on their livelihood. English courts were also strongly reluctant to surrender their jurisdiction over various types of disputes.[8]

As the nation became more industrialized and the number of disputes increased, the resistance to arbitration diminished with the increased number of disputes. Where the agreement at issue concerns "a transaction involving commerce," (9 U.S.C. § 1), the FAA continues to form the framework for arbitration cases.

The founding of The American Arbitration Association in 1926 by Moses Grossman, a New York lawyer, and Charles Bernheimer, a New York businessman, ushered in the modern era of ADR. Each of these men had formed an organization to promote the use of arbitration and by combining their efforts in 1926, they created what remains the dominant provider and promoter of ADR in the United States.

With the rapid industrialization of the U.S. in the 1930s and the passage of the National Labor Relations Act during that era, a steep rise in the use of arbitration and mediation in labor contracts began. When the United States entered the Second World War, the resulting economic boom and the unacceptability of shortages in war materials due to labor strikes resulted in a government requirement that grievance-arbitration clauses be placed into collective bargaining agreements. Now, though they are not actually required, approximately 75% of all collective bargaining labor contracts continue to retain an arbitration clause.

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In a further effort to ensure the availability of war materials, President Franklin Roosevelt created in 1941 the National Defense Mediation Board to handle disputes not resolved by the U.S. Conciliation Service. This board was replaced one year later by the War Labor Board, which was empowered to employ arbitration, mediation and policymaking dispute processes. Following the War Labor Board, the Federal Mediation and Conciliation Service was created in 1947. An outgrowth of the U. S. Conciliation Service, the FMCS was created as an agency independent of the Department of Labor to address the concern of its management constituency that the agency had been inherently biased as the USCS because it was an agency within the Department of Labor.[9]

A major milestone in the use of arbitration in international agreements involving businesses of the United States was achieved in 1970 when the Uniform Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention) became law in the United States by the addition of Chapter 2 to the Federal Arbitration Act. To this day, the New York Convention provides a framework for enforcement of foreign arbitral awards in the United States which is more reliable and consistent than existing frameworks for enforcement of court judgments internationally. In 1990, the Federal Arbitration Act was expanded one step further by the enactment of Chapter 3 of the Act, the Inter-American Convention on International Commercial Arbitration.

Conclusion

Litigation is the eight-hundred pound gorilla in dispute resolution. It is predictable that as litigation practices shift, so will those of arbitration. The shift from disclosure to discovery and the advent of e-discovery have both had a great effect on arbitration. After all, the advocates representing arbitration clients are generally the same

ones who represent litigants. Their training and practice methods cannot be expected to be materially different in the differing fora. The same can be said for the standards of thoroughness ("*leave no stone unturned*") demanded by their firms on behalf of their clients. As many now recognize that arbitration's core values of simpler, faster, cheaper are becoming more elusive, it falls upon us as arbitrators and party advocates in arbitration to redouble our focus on securing for the parties the benefits of the arbitration process that they elected.

Endnotes

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Steven A. Certilman, steven@certilman.com, is an Attorney, arbitrator and mediator with offices in Stamford, CT and New York. He is a Chartered Arbitrator and Fellow of the Chartered Institute of Arbitrators.