

TRADE SECURITY UNDER ARBITRATION LAWS

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I.

The United States was quick to grasp and develop the material possibilities of the Industrial Revolution which started with the introduction of steam power nearly a century ago. It has since recognized and, to a considerable degree, responded to its opportunities for the workers. But it has lagged behind England and the great commercial nations of the Continent in grasping an understanding of the legal obligations involved. We have achieved brilliant progress in the technic of rapid mass production in the shops, and breathless haste in the office to keep marketing in step with output. But the cycle of production for profit does not close with the sales office; it is postponed to the cashier's cage where payment is made. This extension creates two risks of its own: credit and litigation. It is with the problem of litigation and its solution through commercial arbitration that this article will deal.

A considerable measure of security has enabled commerce to develop to the point where the producer frequently sells, and the buyer resells, what has not been made. Often, indeed, a manufacturer's products may be sold through jobber and wholesaler to the retailer who will sell to the ultimate consumer; and this series of transactions may be entered into before the manufacturer has delivery of the raw materials from which these particular goods will be made. The security which makes such marketing methods possible lies in the development of specifications and of trade standards and customs. But it is not full insurance against misunderstandings and errors on the part of responsible business men and against sharp practices on the part of the less responsible. And sudden price fluctuations between the signing of contracts and delivery of the goods sometimes cause too heavy a strain upon responsibility.

Relief in honest differences, as well as in cases of imposition, is theoretically in the courts. Practically, however, security for commerce often falls down here for one of three reasons. The first is that the congestion of court calendars causes serious delay in getting relief, in the meantime tying up goods or money; if novelties, which have become an important supplement to many lines of staple products, are involved, even a comparatively short delay will cause them to miss their market. The second reason is the expense in court costs and attorneys' fees which ac-

cumulate rapidly in delayed or protracted litigation. The third is the uncertainty of intelligent and adequate relief.

This last point is especially significant as the bulk of civil controversies arise not from differences in the interpretation of the law but from disputes as to facts. Our theory of justice is based upon trial by our peers. In the case of an action affecting one's person, this theory is, roughly, sound; for we are all more or less human and can understand one another's motives. In the case of actions affecting property rights or contractual relations of a highly technical nature, we are in no sense all peers. It is inconceivable that a boss teamster or a farmer, a life insurance agent or a shoe manufacturer can intelligently pass upon the quality of a bale of imported lambskins to decide whether certain print goods are sufficiently close to sample to be a good delivery, or determine whether a surgeon was right in charging for two preliminary operations which were necessary when he began to prepare for a special operation; yet we draw our juries from all walks of life to render justice (which assumes a basis of intelligence) in complicated cases involving some one highly specialized trade. Of course, "experts" may be called as witnesses by one side; but this is invariably countered by the other side calling its own "experts". Under such conditions it requires a super-expert to cut through the resulting confusion to the truth; and it is not common sense to suppose that either judge or jury can qualify for this more difficult task if they are not competent to weigh the simple, "uninterpreted" facts.

II.

Having suggested the difficulties inherent in applying the jury system to the highly technical issues resulting from an increasing specialization in commerce, let us examine the physical ability of our judicial channels to care for the present volume of litigation. It is only fair to say that our judicial processes have tried to keep pace with the increasing requirements of commerce. But despite every effort made to simplify procedure and the technical requirements of the courts, despite the liberality of state legislatures and municipal bodies in appropriating funds to provide for additional judges and increased facilities, litigation has failed to furnish the remedy for the speedy and inexpensive settlement of these controversies. In ten years, the business of the Federal courts has more than doubled. On April 30, 1925, there were pending one hundred and sixty-two thousand, six hundred and seventy-five cases (both civil and criminal), according to a recent report of the United States Attorney General. Although one hundred and fourteen thousand cases were *terminated* from July 1, 1924 to April 30, 1925, nearly one hundred and

twenty-six thousand cases were *commenced* during the same period, thus leaving the docket further congested by some twelve thousand cases. In Massachusetts, according to reports of the Secretary of the Commonwealth, fifty-three thousand seven hundred and eighty-four cases were pending in the Superior Court at the end of 1924, twenty-five thousand one hundred and ninety-four having been added during the year, compared with thirty-one thousand six hundred and ninety-five pending at the end of 1914, during which year only fourteen thousand six hundred and twenty-six new cases had been entered. In New York, in the First Judicial District alone, more than twenty-three thousand cases were on the General Calendar awaiting trial, as compared with eight thousand untried cases on January 1, 1917. Justice Charles L. Guy, of the New York Supreme Court, has stated that not more than ten thousand cases, including discontinuances, can be properly disposed of in each year. Yet in 1920, the new issues amounted to eleven thousand, in 1921 to thirteen thousand, and there were corresponding increases in later years. It would take approximately two and a half years to dispose of the present untried calendar; but the normal annual increase of new cases would make it practically impossible to keep abreast of the volume of litigation.

"Various remedies have been suggested", writes Justice Guy in the New York Law Journal of August 5th, 1925, "such as the appointment of masters to dispose of intermediate motions, the limiting of appeals, &c., which will help to some extent, but will not prove adequate to remedy the evil. The only remaining practical remedy that I know of is arbitration, by which it would be possible, in my judgment, to dispose of at least 20 or 25 per cent of litigated cases, involving of course only ordinary questions of law. This would leave our courts still with a sufficient calendar to fully occupy the time of the justices, and even of additional justices if it should be deemed wise to increase the number."

III.

In a number of European countries, for a great many years, business men generally have had recourse to arbitration, instead of litigation, for the settlement of their disputes. In England, the Year Book of Edward II and the next reign make such frequent reference to it that it is evident that submission to arbitration was very common. And Edward II reigned in the early fourteenth century! It was not until 1697, that a statute¹ was enacted making it contempt of court to revoke a submission to arbitration which had been agreed to be "made a rule of court."

¹ (1697) 9 Wm. 3, c. 15.

With the constant use of arbitration, this provision was gradually extended until now every written submission becomes "a rule of court" unless a contrary intention is specifically indicated. "The striking absence of commercial cases from the trial lists of England's great High Court of Justice" is noted in an interesting report on *Commercial Arbitration in England* by Samuel Rosenbaum of the Philadelphia Bar.²

In an introduction to this report,³ Prof. Herbert Harley, Secretary of the American Judicature Society, states:

"It is easy to understand the success of arbitration so far as it involves adjudication of disputed facts in commercial transactions. The procedure of the formal court with judge and jury cannot permit of successful competition in this field.

"1. The jury is necessarily uninformed as to the technical questions involved, usually those of quality and condition of wares. It is hardly possible to educate a jury sufficiently in a particular cause and such education is slow and costly.

"2. The common law powers of the jury, in most American states, are greatly abridged, thus limiting the opportunity for an experienced judge to overcome the inexperience of jurors.

"3. We cannot get away from the jury even in commercial causes, and in the cases when no jury is demanded, the judge, however versed in commercial law, cannot be equal to the expert

² Bulletin XII, of the American Judicature Society, October, 1916, at 7. In an abstract of the report, Mr. Rosenbaum writes: "A very large proportion of the business disputes of England never come into the courts at all, but are adjusted by tribunals established within the various trade associations and exchanges. This is especially true of the vast wholesale distributing trades which are responsible for a great part of the immense volume of imports and exports constantly flowing through the ports of England and giving them the commanding position they occupy towards the sea-borne trade of the world. Disputes over the quality and condition of consignments of grain, cotton, sugar, coffee, fruit, rubber, timber, meats, hides, seeds, fibres, fats, and countless other articles of commerce, as well as every conceivable variety of dispute that can arise out of a contract for sale and delivery, such as questions of delays, quantities, freights, interpretation, etc.,—and all these are passed upon by business arbitrators selected by reason of their familiarity with the customs of the trade and with the technical facts involved, and not submitted to juries whose ignorance would usually be equally comprehensive.

"So firmly established is the custom of arbitration in these lines that every contract-form used by shippers, brokers, buyers and users of these articles contains a clause binding the parties to submit to arbitration any dispute that might arise out of the contract. But it is not these trades alone that resort to arbitration. The arbitration clause will be found in every charter-party for the hire of a ship, in every bill of lading for goods carried by sea, in every salvage agreement, in every policy of marine, accident or fire insurance, in every building contract, in every engineering contract whether mechanical, electrical or gas, in every lease of property, in every partnership or agency agreement, and in innumerable other forms of contract. Finally, there is a well confirmed tradition among business men, even though there is no written contract covering a particular dispute, to submit differences to arbitration after they have arisen."

³ *Op. cit. supra* note 2, at 4.

lay arbitrator who has spent a long career in a narrow and technical field.

"4. The business of the court must be conducted in formal manner, with only limited reference to the convenience of litigants. Causes must take their turn on the calendar and even in courts which are quite abreast of their work—overlooking the fact that such courts are almost unknown in American cities—there cannot possibly be such flexibility with reference to holding of sessions as when lay arbitrators preside. The successful employment of arbitration on any considerable scale permits of the creation of temporary commercial tribunals on short notice in scores of places, expanding or contracting in number to accord with the volume of business. Such a practice goes far to relieve the courts from work which they cannot do economically and permits them to concentrate upon classes of causes in which they are indispensable. The necessity for the organized court to conserve its energies is sufficient warrant for the expectation that such courts will welcome the introduction of commercial arbitration."

IV.

In the United States a number of the states have had for many years some form of arbitration statute, of varying degrees of enforceability and effectiveness. New York State, however, was the first⁴ to enunciate the principle that a clause in a contract to arbitrate any dispute that may arise thereunder is valid, enforceable and irrevocable. A submission to arbitration of an existing controversy was also made irrevocable by the same statute. The states of New Jersey,⁵ Oregon,⁶ and Massachusetts,⁷ followed New York in adopting the same fundamental policies.

The United States Arbitration Act,⁸ signed by President Coolidge on February 12, 1925 and becoming operative on January 1, 1926, contains the same basic principles for enforcement through the Federal courts. Under its provisions, agreements to arbitrate disputes or controversies that may arise out of a contract or that are already existing and which relate to "maritime transactions" or "commerce among the several states or with foreign countries," and which involve diversity of citizenship and sums of \$3,000 or over, are valid, irrevocable and enforceable. The Federal courts are empowered to enforce such arbitration agreements in those cases in which they would normally have jurisdiction of the controversy between the parties. In an arbitration affecting admiralty matters, the right is preserved to libel a vessel or other property at the commencement

⁴ N. Y. Cons. Laws, 1923, ch. 72.

⁵ N. J. Laws, 1923, ch. 134.

⁶ Or. Gen. Laws, 1925, ch. 186.

⁷ Mass. Acts and Resolves, 1925, ch. 294.

⁸ Act of Feb. 12, 1925, No. 401.

of the proceeding in order to safeguard the interests of the claimants.

The procedure for enforcing the agreement, which is definitely outlined in the Act, assures a speedy and inexpensive settlement of the controversy. If a party declines to proceed with the arbitration, the Federal court which ordinarily adjudicates the subject matter involved, may be petitioned for an order directing that the arbitration proceed in accordance with the agreement. Arbitrators are named by the parties or, upon the application of either party, one or more may be designated by the court; they may summon witnesses, and place them under oath, compel the production of books and papers, hear the evidence and render a decision. The award must be in writing and the parties may agree that, upon proper entry, it shall become a judgment of the court; it may be vacated only where it was procured by corruption, fraud or undue means or where arbitrators were obviously partial, were guilty of misconduct or exceeded their powers, but it may be modified to correct an evident miscalculation of figures or a mistake in description. Proceedings to confirm must be brought within one year after the award is made, and to vacate or correct within three months after it is delivered. All applications to the court are heard in the same manner as motions are disposed of.

The American Bar Association, through its Committee on Commerce, Trade and Commercial Law, which drafted the Federal bill, comments:⁹ "No piece of commercial legislation, no enactment at the request of lawyers has been passed by Congress in a quarter of a century comparable in value to this."

This Federal law has not yet been tested in the courts, but there appears to be ample legal justification for it.¹⁰ The United States Supreme Court, in its decision in the case of *Red Cross*

⁹ A. B. A. JOUR., March, 1925, 153. In commenting upon the fact that the bill was passed unanimously in both House and Senate, the report adds: "At a time when the Bar is charged with lack of appreciation of the needs of business in modeling legal procedure, what greater answer to the criticism can be made than that the American Bar Association, with the support of the business men of the country, prepared and with the aid of the lawyers in Congress secured, the enactment into law of a policy changing an anachronism of three centuries' standing and providing a machinery so simple that it requires only the action by trade bodies throughout the country and of business men generally to make its application effective?"

¹⁰ *Op. cit. supra* note 9, at 154. "By the Constitution of the United States Congress is given power 'to regulate commerce with foreign nations, and among the several States, and with the Indian tribes,' and 'to constitute tribunals inferior to the Supreme Court'. (Art. I, Sec. 3). 'The judicial power of the United States shall be vested in such inferior courts as the Congress may from time to time ordain and establish' and extends 'to all cases in law and equity arising under this Constitution, the laws of the United States,' and 'to all cases of admiralty and maritime

Line v. Atlantic Fruit Co.,¹¹ expressed itself very definitely, however, regarding the enforceability of an arbitration agreement entered into under the New York Law. Despite the fact that the dispute involved a maritime transaction and arose out of a contract containing an arbitration clause, entered into in New York, the Court held that New York "had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, as well as by the law of the State, which is contained in a contract made in New York and which, by its terms, is to be performed there."

Incidental questions of law were also indirectly disposed of by this decision. An agreement to arbitrate is always valid, but its specific performance cannot be ordered without statutory provision. Where such a remedy is provided under a state law and the state courts have acquired jurisdiction, they may enforce an agreement to arbitrate a dispute, even though it arises out of a maritime transaction, which normally comes within the jurisdiction of the Federal courts. Having gone so far in enforcing a state law, which is so similar to the new Federal Act, it is safe to assume that the latter will also be held constitutional. Its beneficial effects in determining controversies over which the Federal courts would normally have jurisdiction should therefore be far-reaching.

V.

Trade organizations and chambers of commerce, as well as professional associations, have naturally been actively interested in arbitration. An analysis recently made by the Arbitration Society of America indicates that approximately one hundred and seventy-five trade groups, exclusive of commercial associations, are promoting arbitration among their members; some fifty have adopted standard contracts containing uniform arbitration clauses, while the remaining one hundred and twenty-

jurisdiction.' (Art. III, Secs. 1 and 2). Congress is given authority to make all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government or any department or officer thereof. (Art. I, Sec. 8). Powers not delegated to the United States are reserved to the States. (Tenth Amendment).

"It does not seem that the law depends for its validity solely on the exercise of the interstate commerce and admiralty powers of Congress. The statute establishes a procedure in the Federal courts for the enforcement of arbitration agreements. It rests upon the constitutional provision by which Congress is authorized to establish and control inferior Federal courts. So far as congressional acts relate to the procedure in the Federal courts, they are clearly within the congressional power. This principle is so evident and so firmly established that it can not be seriously disputed."

¹¹ (1924) 264 U. S. 109, 44 Sup. Ct. 274.

five have facilities or advocate arbitration in some form, although not all have regularly established tribunals or permanent committees. Their activities range from the constantly functioning tribunals in the motion-picture industry, where thirty-two tribunals representing distributors and exhibitors operating under a compulsory arbitration clause have adjusted some eleven thousand controversies in one year, to the simple endorsement of the principle of arbitration and of its use among its members by the American Society of Mechanical Engineers.

An individual, firm or corporation may assure itself against litigation by providing for arbitration through the insertion of an appropriate clause in contracts, purchase slips, sales orders, letters and other forms of agreement, under the arbitration laws of the United States and of the states of New York, New Jersey, Oregon and Massachusetts. Although the enforceability of an award is dependent upon the effectiveness of the particular statute, or upon the good-will of the parties, it is significant to note that trade organizations and business firms and corporations, whose standard contracts contain an arbitration clause, report that the mere presence of such a clause automatically reduces the number of formal arbitrations. The fact that the voluntary agreement to arbitrate then becomes compulsory, usually brings about an amicable adjustment of the dispute by the parties themselves.

Chambers of commerce in a number of cities have taken the leadership in promoting the use of arbitration, and especially in securing the necessary legislation, as in Boston, Cleveland, Indianapolis, Newark, New Orleans, New York, Rochester, St. Louis, San Francisco, etc. Where arbitral tribunals are maintained, they function in business and commercial disputes generally, and vary, therefore, from the trade organization tribunals in that they are not limited to controversies arising within a particular trade or a specialized market.

The Arbitration Society of America maintains an arbitral tribunal, in addition to its nation-wide educational and legislative activities, open to the public generally. Controversies of miscellaneous character are, therefore, arbitrated under its rules. It is of interest to note that a considerable proportion of the several hundred cases so arbitrated have been referred to the Society by lawyers, acting in behalf of their clients. Different types of cases have been formally settled in this tribunal, as evidenced by the following brief summaries from its docket:

Docket No. 165—A silk manufacturer sent twenty-three pieces of goods to a dyeing establishment to be crossed-dyed, the design to be a light background with a large check. He later refused to accept the goods, claiming that the background was so dark as to make the merchandise unmarketable. Two silk merchants

and the vice-president of a dye works were agreed upon as the arbitrators. After hearing the evidence they examined the goods and found that as a practical matter it was impossible to dye the goods as ordered by the silk manufacturer. They also found that part of the material could be re-dyed in other combinations that were in considerable demand in the market. They awarded the silk manufacturer an allowance of fifty cents a yard and directed that the goods be re-dyed without charge in five colors to be agreed upon between the parties to the dispute. One of the arbitrators was designated as umpire in case any question should arise as to the five colors.

Docket No. 110—A New York jobber and a toy manufacturer' in the Middle West had been doing business together for some twenty years, the volume having grown to some \$60,000 annually. There had been no specific contract as to territory or amount, the jobber having merely given a general estimate of his requirements for the year, ordering as he desired and paying on delivery. A son took over the manufacturing business and asked the jobber for a written contract for a stated amount of merchandise and a definite territory. Considerable correspondence developed about this proposed contract. The jobber then discovered that the toy manufacturer's New York office had been selling to some of his customers and that certain large department stores had been given the jobbers' price instead of the regular wholesale price to retailers. A controversy arose over this situation and finally arbitration was suggested. When the manufacturer was in New York on other business he inquired into the State Arbitration Law and consented to arbitration. He claimed some \$11,000 as balance due on goods delivered and the jobber made a counter-claim of some \$37,000 for alleged breach of contract. The arbitrators agreed upon by the disputants and the reasons for their selection were: John H. Towne, of Yale & Towne, as an experienced manufacturer; Arthur Ginsberg, of the Edmund-Wright-Ginsberg Company, as an outstanding factor and jobber; and ex-Senator James A. O'Gorman, former Justice of the New York Supreme Court, for his knowledge of the law. The unanimous award was that no contract existed, that the claim for breach of contract was therefore disallowed, and that the admitted balance of \$10,906 be awarded to the manufacturer. A feature of the proceedings was that the hearings were arranged to coincide with the manufacturer's regular business trips to New York, thus causing him no extra expense in time and money.

Docket No. 173—A noted eye doctor agreed to perform for \$1,000 an operation to remove a cataract. A preliminary operation was performed but just before the time for the major one, the patient, who was eighty-one, complained of trouble with the lashes of the affected eye. The doctor therefore performed a special operation known as the Ziegler puncture. He then permitted his patient to go to the country for the summer. Upon his return tests were again taken preliminary to removing the cataract. Infection was discovered in the eye and the doctor decided that it was necessary to remove the tear glands. This was done and soon after this the cataract operation was performed satisfactorily. The doctor then rendered a bill for \$2,300, which included the \$1,000 for the removal of the cataract, \$500 each for the two special operations and \$300 for office treatments.

The bill was disputed and both parties agreed to arbitration. The arbitrators agreed upon by them were a well-known publisher, the president of an important real estate company, and a doctor who is generally recognized as the dean of opticians in this country. The doctor called three prominent men in his profession as witnesses. Examination of the patient brought out that his sight had been greatly improved, that he was in much better physical condition than he had been, and that the total charge was not beyond his means. The doctor testified that, while he could have removed the cataract without prior operation on the tear glands, the result would have been the death of the patient; that the question of pay did not influence his action where he deemed operations necessary, and that ninety per cent of his operating was done free in public hospitals. The doctor was awarded his full claim of \$2,300.

Docket No. 258—An actress signed a Standard Minimum Equity contract to appear in a play which duly opened in New York. After running two months the lease on the theatre expired and, there being no other theatre available in New York, the producer decided to transfer the play to Chicago. The actress refused to go, alleging that she had a verbal understanding that she was to play only in New York. The dispute was arbitrated before one of the leading factors in the textile industry. In support of her allegation the actress testified that she had leased an apartment in New York with the full knowledge of the producer, and that he had been, in fact, one of her references when she made this lease. She had entered into a business undertaking involving several hundred dollars and it was essential for her to stay in New York to carry it out. The producer testified that the only understanding had been that there would be no try-out of the play on the road and that this understanding had been lived up to. He brought out that it was a rule of the Actors' Equity Association that unless the performers had contracts specifying New York City only, they must accompany a show on the road; or, where they had Standard Minimum contracts, they could give two weeks' notice and then leave. The producer further testified that he had offered the actress a salary increase to compensate for this forced trip to Chicago. The arbitrator's award was that the actress must give two weeks' notice if she wished to terminate the contract, and therefore must go to Chicago to open there with the show. In the findings the arbitrator recommended that the producer forget the differences and give the actress the salary increase suggested.

Docket No. 89—A manufacturer of paper pie-plates placed with an importing company an order for Scandinavian pulp board to the amount of \$37,181.62. The board was delivered in bundles of a definite size and weight, but in the shipment in dispute the individual sheets were thicker than called for. The greater thickness meant an increase in quality but a decrease in quantity. The buyer sought an allowance because extra quality is of no moment in a paper pie-plate. Both parties agreed to arbitration and chose as arbitrators three experienced men in the heavy paper trade. Samples for this and previous shipments were examined and it was brought out in the testimony that the seller knew the purpose for which the paper-board was wanted and had discussed with the buyer the question of sheetage in con-

nection with a previous shipment. The award was that the buyer was entitled to an allowance of $2\frac{1}{2}\%$ on the purchase price to compensate him for the decreased sheetage caused by unexpected increase in thickness. An interesting feature of this arbitration was that, while waiting for the arbitrators to decide upon their award, the seller started negotiations with the manufacturer to sell him another shipment and received a verbal acceptance on the way down in the elevator as they left together after the decision had been rendered.

Docket No. 33—A contractor entered into an agreement to remodel and renovate a house for \$14,000; this was later amended and increased by \$1,500. The sum of \$11,500 was paid on account. Delays developed in the work and, after several disagreements, a new contractor was called in to complete the job. The first contractor claimed that there was only \$400 of work uncompleted, but the contract with the second contractor was for \$3,000. Nine sub-contractors under the first contract filed claims and a majority of them filed mechanics' liens. Arbitration was agreed to by the first contractor and the owner, and, after a conference at the offices of the Arbitration Society, all nine sub-contractors also agreed to submit their claims to the same arbitration. An arbitration board, consisting of two attorneys and the president of a large realty company, was agreed upon and nine hearings were held Saturday afternoons to permit the witnesses to appear without loss of business time. The arbitrators awarded to the contractor \$1,304.50 on the contract and \$300 for extra work; awarded to the sub-contractors a total of \$4,208.99; directed that the award to the contractor be deposited with the Arbitration Society for pro-rating among the sub-contractors, that judgments be awarded to them against the contractor for the balance of their claims, and that the satisfaction of mechanics' liens filed with the arbitrators be turned over to the owner of the building so that his title might be cleared. Over protest by the contractor the complete award was deemed proper by the Supreme Court, Kings County, and was duly entered as a judgment. Thus, this one arbitration disposed of ten separate issues at the same time (several of the sub-contractors had already started actions in the Supreme Court but had discontinued them upon agreeing to arbitration) and the cost was \$5.00 each to the sub-contractors and \$15.00 each, plus the arbitrators' fees of \$600, to the contractor and the owner.

New York State has had five years of practical experience with the operation of an effective and comprehensive arbitration law. It has withstood many attacks, and the courts have gradually interpreted the scope and meaning of its provisions. Because the Federal Act parallels so closely the New York statute, an analysis of the decisions under the latter may be helpful in an understanding of the former.

The validity of an arbitration agreement has been definitely affirmed. A statutory provision making a contract to arbitrate enforceable and irrevocable, except on such grounds as existed in

law or in equity for revocation of any contract, is constitutional.¹² Such an agreement is not self-executing, however, as the arbitration law merely provides machinery whereby the court may apply sanctions to carry out the terms of the agreement, but it can no more now than formerly proceed *ex parte* without the direction of the court.¹³

The strict rules governing an action at law are not applicable to arbitration proceedings. An arbitration, while it partakes of the nature of a quasi-judicial proceeding, is not such a proceeding in a technical sense. It is a domestic tribunal as distinguished from a regularly organized court. The very existence of the tribunal depends upon the voluntary acts of the disputants. They select their own judges. Its object and aim is to arrive at a just determination of the matters in dispute, and finally dispose of them in a speedy and inexpensive way, thus to avoid any future litigation between the parties. To require an arbitrator to follow the fixed rules of law in arriving at his award would operate to defeat the object of the proceeding. The proper court would still have to pass upon and decide the law and the facts as if no award had been made.¹⁴ The word "irrevocable" as used in Section 2 of the New York Arbitration Law,¹⁵ providing that an arbitration agreement "shall be valid, enforceable [sic] and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract," means that the contract to arbitrate cannot be revoked at the will of one party to it, but can only be set aside for facts existing at or before the time of its making which would move a court of law or equity to revoke any other contract or provision of a contract. It does not mean that the agreement to arbitrate is irrevocable by the mutual agreement or consent of the parties.¹⁶

While the Arbitration Law provides for the enforcement of arbitration, there is nothing in it which prevents the parties from agreeing between themselves to resort to any other method of settlement or to abandon the arbitration provision in their contract.¹⁷ In fact, if the legislature should attempt to prevent

¹² *Berkovitz v. Arbib & Houlberg* (1921) 230 N. Y. 261, 130 N. E. 283.

¹³ *Bullard v. Morgan H. Grace Co.* (1924, 1st Dept.) 210 App. Div. 476, 206 N. Y. Supp. 335.

¹⁴ *Everett v. Brown* (1923, Sup. Ct. Spec. T.) 120 Misc. 349, 193 N. Y. Supp. 462, wherein the court added that the "arbitrators are usually laymen, inexperienced in the technical rules of law, but usually possessed with a fund of common sense which enables them to do substantial justice between the parties."

¹⁵ *Supra* note 4.

¹⁶ *Matter of Zimmerman v. Cohen* (1923) 236 N. Y. 15, 139 N. E. 764.

¹⁷ *Ibid.* In this case the plaintiffs brought their action in a court of law, ignoring the agreement to arbitrate, and defendant answered setting up a counterclaim, upon which he asked the court to give judgment against the plaintiff, served notice of trial and procured an order for the taking

parties from modifying their agreements to arbitrate or from subsequently agreeing to enter the courts of law for the settlement of their disputes, it would be such an abridgment of the right of citizens to contract, that the constitutionality of the law might well be doubted.

In the absence of some statutory prohibition, any person may be selected to act as arbitrator, irrespective of legal or natural disabilities. Every person must use his own discretion in the choice of his judges. A party cannot be compelled, however, to arbitrate before a foreign corporation without the state, for the reason that no award taken without the state may be the basis of a judgment.¹⁸ One of the first requisites of an arbitrator is that he possess judicial impartiality and that he be free from bias; and before the court will set aside an award for partiality, the partiality of an arbitrator must be clearly shown, the burden for which rests on the party making the charge.¹⁹

Under the rules of the Arbitration Society of America, both parties to a dispute are urged to agree on *all* of the arbitrators in a given case; in other words, the one, three or more arbitrators who are to hear the evidence and render the award, should represent *both* parties and thus be able to approach their task with a judicial mind. Under the rules of certain trade organizations, however, each side is permitted to select its own arbitrator, and the two then agree upon a third, who is the umpire; in this manner each side really has its own *advocate* on the arbitration board rather than an impartial arbitrator.

The New York Court of Appeals recently ruled that after the final hearing and submission of the controversy to the arbitrators, one of three arbitrators cannot by his resignation prevent the other two from rendering a valid award under a submission agreement providing for an award by a majority and for the filling of vacancies in case an arbitrator resigns, and condemned the

of depositions in preparation for trial. These acts were held clearly inconsistent with the defendant's later claim that the parties were obligated to settle their differences by arbitration, the court saying that "the facts in this case show that the parties elected to settle their disputes not by arbitration but in a court of law. The arbitration provision of the contract was abandoned or waived."

¹⁸ *In re California Packing Corporation* (1923, Sup. Ct. Spec. T.) 121 Misc. 212, 201 N. Y. Supp. 158. The written agreement here provided for the submission to arbitration to an association in California. In California, neither party could be compelled to arbitrate under their agreement. See Calif. Civ. Code, 1919, sec. 3390.

¹⁹ *Everett v. Brown*, *supra* note 14, wherein it was held that the fact that an arbitrator made an affidavit in an action pending between the parties to a submission, a short time after he participated in making the award (in which he related certain facts which he had observed and heard) was not sufficient to sustain a charge of partiality.

practice of arbitrators of conducting themselves as champions of their nominators.²⁰

Arbitrators must not go beyond the limits of the questions submitted to them, since parties must not be deprived of their constitutional rights to redress in the courts, in the absence of agreement to forego such rights. The fact, however, that certain subjects are specifically mentioned as matters to be submitted does not justify the conclusion that all others are to be excluded. The agreement for arbitration is to be given effect in the most liberal sense, as accomplishing a complete and final settlement of all existing controversies²¹; and when the arbitrators act impartially within the powers confided to them by the parties, their award cannot be interfered with by the courts.²²

In determining the validity of an award, the courts have held that every reasonable intendment will be indulged in to give effect to the proceedings of the arbitrators and in favor of the regularity and integrity of their acts. Exact certainty is not indispensable to the validity of an award.²³ There is no provision in the statutes authorizing the court to vacate an award because it is against the weight of evidence or because, perchance, there is no evidence to support it. The strict rules governing an action are not applicable to a proceeding of this nature. Arbitrators are permitted to disregard strict rules of the law of evidence, and may decide according to their sense of equity. An award

²⁰ “. . . the practice of arbitrators of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitrations, and as calculated to bring the system of enforced arbitrations into disrepute. An arbitrator acts in a quasi judicial capacity, and should possess the judicial qualifications of fairness to both parties, so that he may render a faithful, honest, and disinterested opinion. He is not an advocate whose function is to convince the umpire or third arbitrator. He should keep his own counsel, and not run to his nominator for advice when he sees that he may be in the minority. When once he enters into an arbitration he ceases to act as the agent of the party who appoints him. He must lay aside all bias, and approach the case with a mind open to conviction and without regard to his previously formed opinions as to the merits of the party or the cause. He should sedulously refrain from any conduct which might justify even the inference that either party is the special recipient of his solicitude or favor. The oath of the arbitrators is the rule and guide of their conduct.” *American Eagle Fire Ins. Co. v. New Jersey Ins. Co.* (1925) 240 N. Y. 398, 405, 148 N. E. 562, 564. See comment on this case in (1925) 35 YALE LAW JOURNAL, 106.

²¹ *Matter of Priore* (1923, 2d Dept.) 204 App. Div. 332, 193 N. Y. Supp. 57.

²² *Matter of Goff and Sons v. Rheinauer* (1922, 1st Dept.) 199 App. Div. 617, 192 N. Y. Supp. 92.

²³ *Matter of Priore*, *supra* note 21; *Everett v. Brown*, *supra* note 14; *Hano v. Blanchard Co.* (1922, 1st Dept.) 199 N. Y. Supp. 227, wherein it was said, “The arbitrators as a rule are not men trained in legal learning. It is not to be expected that they will use language with that nicety and precision of expression which is employed by lawyers and judges . . . ‘certainty to a common or reasonable intent is all that the law requires.’”

by a majority of arbitrators is valid, unless the concurrence of all is expressly required in the submission.

Under a provision of the New York Statute²⁴ relating to misconduct of the arbitrators in refusing to postpone the hearing for sufficient cause, or in refusing to hear evidence pertinent and material to the controversy; or to any other misbehavior by which the rights of any party have been prejudiced, the personal investigation of the arbitrator without notice to the parties after the close of the hearings, has been held prejudicial and sufficient cause for vacating the award.²⁵ There is no provision in the statute authorizing the courts to vacate an award because it is against the weight of evidence or because perchance there is no evidence to support it. The court has no supervisory powers over an award. If the arbitrators keep within their jurisdiction, their award will not be set aside because they may have erred in judgment either upon the law or the facts.²⁶

Before hearing any testimony, arbitrators must be sworn, under the statute of New York, faithfully and fairly to hear and examine the matters in controversy and to make a just award according to the best of their understanding, unless the oath is waived by the written consent of the parties to the submission or their attorneys.²⁷ This provision of the statute is not a jurisdictional requirement, and may be waived by the conduct of the parties.²⁸ Accordingly, if a party with knowledge of an irregularity in the proceedings, continues without objection to take part in them, he waives any objection on account of such irregularity.²⁹ There is no provision under the statute requiring

²⁴ N. Y. C. P. A., 1921, sec. 1457 (3).

²⁵ *Berizzi Co. v. Krausz* (1925) 239 N. Y. 315, 146 N. E. 436, reversing (1924, 1st Dept.) 208 App. Div. 322, 203 N. Y. Supp. 442, wherein it was held that the fact that the arbitrator acted in good faith in making his personal investigation was not the less prejudicial. The court said on page 319 that ". . . sec. 1451 . . . provides that the arbitrators 'must appoint a time and place for the hearing of the matters submitted to them, and must cause notice thereof to be given to each of the parties.' There would be little profit in fixing a time and place of hearing, if the arbitrators were at liberty when the hearing was over to gather evidence *ex parte*, and rest their award upon it". In this case, the buyer of merchandise shipped from China to New York, refused to accept same on arrival, urging various excuses and, finally, defects of quality. Seller asked for arbitration pursuant to a clause in the contract which was agreed to by the buyer, and after the close of hearings, the arbitrator proceeded without notice to the parties to make a personal investigation and learn, he said, that the merchandise was defective; and it was on the strength of this investigation, as well as upon the testimony submitted, that his award was made.

²⁶ *Everett v. Brown*, *supra* note 14; *Anderson Trading Co. v. Brimberg* (1922, Sup. Ct. Spec. T.) 119 Misc. 784, 197 N. Y. Supp. 289.

²⁷ N. Y. C. P. A., 1921, sec. 1452; *Cohen Iron Works Co. v. Jaffe* (1921, 2d Dept.) 198 App. Div. 309, 190 N. Y. Supp. 476.

²⁸ *Krauter v. Pacific Trading Corp.* (1921, 1st Dept.) 194 App. Div. 672, 186 N. Y. Supp. 109; *Davis v. Rochester Can Co.* (1924, Sup. Ct.) 124 Misc. 123, 207 N. Y. Supp. 33.

²⁹ In *Davis v. Rochester Can Co.*, *supra* note 28, it was held that in addition to the fact that no objection was interposed by either party to the proceedings, every possible security assured to the defendant by the taking of the arbitrator's oath was afforded it, by the constitutional oath which

witnesses to be sworn.³⁰ The refusal on the part of arbitrators to permit a party to the submission to have his testimony taken down by a stenographer and transcribed, is not deemed such misbehavior as to entitle him to reject the award.³¹

In an action to enforce an award, only such errors of serious import as appear upon the face of the award can be examined. The errors must be such that their commission is responsible for the making of the award. A court of law may also inquire into an award to ascertain if the arbitrator has exceeded his authority or has decided some matter not included in the submission, or has neglected to decide some question submitted to him. The proceedings before the arbitrator, which form the basis of the award, may also be a subject of inquiry for the purpose of determining whether the arbitration has been conducted in accordance with the principles of "natural justice". These matters affect the legality of the award itself, and if found to exist, a court of law may regard the award as void. On the other hand, as to matters which merely render the award a voidable determination, such as, for example, the partiality, corruption, or misbehavior of the arbitrator, or fraud extraneous to the award, a court of law possesses no supervisory jurisdiction. A court of equity alone has the power to set aside an award on such grounds.³²

The interpretation of the New York Law, as briefly summarized in the preceding section, will undoubtedly be followed in general in the other three states having somewhat similar comprehensive laws, as well as in the Federal courts. In the thirty-four other states³³ that have some kind of arbitration stat-

the individual members of the Interstate Commerce Commission (the arbitrators in this case), were required to take before entering upon the transaction of the duties of their office. The same rule was applied in the case of *Krauter v. Pacific Trading Corp.*, *supra* note 28, where the controversy was submitted to members of the New York Produce Exchange, who are required to take the oath of office pursuant to the by-laws of the organization.

³⁰ N. Y. C. P. A., 1921, sec. 1453; *Hano v. Blanchard Co.*, *supra* note 23.

³¹ *Anderson Trading Co. v. Brimberg*, *supra* note 26, wherein defendant moved to dismiss the award on the ground that the arbitrator refused to have his testimony taken by a stenographer, the court saying, "there is no rule, however, which requires this practice in arbitrations. . . . While a refusal to permit a record to be made might in some cases be evidence of misconduct, prejudice or failure to perform honestly the duties of an arbitrator, no attack is made in this case upon the fairness and honesty of the arbitrator, and it appears affirmatively that the defendant's insistence for a stenographic record was based upon his desire to review rulings upon testimony and points of law. But such a review . . . is something he would not be entitled to." The award of an arbitrator cannot be set aside for mere errors of judgment whether as to the law or as to the facts. See also *Cohen Iron Works Co. v. Jaffe*, *supra* note 27, wherein it was sought to set aside an award on the grounds that the arbitrators failed to take the oath as required by statute. The court held that the statutory requirement was waived by the parties having signed an agreement to "waive any provision as to form, and do hereby further agree that a memorandum in writing signed by a majority of the board of arbitrators, shall be accepted as a decision duly made pursuant to the Arbitration Law."

³² *Hano v. Blanchard Co.*, *supra* note 23.

³³ These States include Alabama, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky,

ute, however, the majority of these decisions will probably not be followed.

In several of the states, such as Maine and New Hampshire, controversies may be referred to referees, appointed by the courts, who file their report in court "for acceptance, rejection or recommittal." In Connecticut, executive guardians, etc. may be authorized by the probate courts to settle "any doubtful or disputed claims." In Maryland, controversies between corporations "in which the State may be interested as stockholder or creditor" may be submitted to arbitration before the Board of Public Works. In Vermont, the law provides for arbitration of a controversy over an order of a building inspector, where the question involved cannot be the subject of a civil suit. North Carolina, Oklahoma, Rhode Island, South Carolina or South Dakota apparently make no statutory provision for arbitration in any form.

In the states other than New York, New Jersey, Oregon and Massachusetts, statutory provisions for arbitration are more or less limited in scope. Only *existing* disputes may be submitted to arbitration—clauses in contracts to arbitrate *future* disputes not being enforceable. Either party, under the majority of these statutes, may withdraw from the arbitration at any time before the award is rendered, if the submission has not been made a "rule of court." In a few states, such as Illinois and Massachusetts, either party may request that any question of law arising during the hearing be referred by the arbitrator to the court, which may "in its discretion instruct the arbitrator upon a question of substantive law," and such instruction is binding.

The submission to arbitration in most states must be in writing, but in Arkansas, for instance, that may be inferred from the conduct of the parties. Arbitrators must be sworn in most states, and have the same powers as a referee to subpoena witnesses, administer oaths, hear and determine the dispute, etc. In a few states, such as Arizona and Delaware, arbitrators must possess the qualifications of jurors.

"Any controversy which might be the subject of suit may be submitted to arbitration", is a frequent statutory provision; but questions of title to real estate are specifically excepted in such states as California, Indiana, Michigan, etc. It is generally required that the award of the arbitrators shall be in writing and be signed by the arbitrators; a majority decision is adequate in most states. In some states, the award is given to the parties, but generally it must be filed with the clerk of a court if it is to be recorded as a judgment.

Awards may generally be set aside by the courts for fraud,

Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Pennsylvania, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Wyoming.

partiality, corruption, or other misconduct; but this varies occasionally, as in Maine, where the court may accept, reject or recommit the award, either party may file exceptions and may bring a writ of error to secure a reversal of a judgment thereon. In Illinois, the aggrieved party may appeal on matters of law.

VI.

The American Bar Association, whose Committee on Commerce, Trade and Commercial Law drafted the United States Arbitration Act and approved the proposed Uniform State Act, based substantially upon the New Jersey Arbitration Law, had until this year been definitely committed to the principle of providing for the arbitration of future disputes through the insertion of an appropriate clause in a contract. The Commissioners on Uniform State Laws expressed their disapproval of this policy, however, and advocated a Uniform State Act which would limit the enforceability of an arbitration agreement to *existing* controversies. The conflict between these two policies was brought to a head at the Annual Convention of the American Bar Association of 1925, held last summer in Detroit, Michigan. The Commissioners won out, so that the American Bar Association is now on record as favoring legislation which limits arbitration to existing disputes.

If trade security is to be made possible through arbitration, the principles enunciated in the Federal Act and in those of New York, New Jersey, Oregon and Massachusetts, must be enacted into legislation. The absence of such enabling legislation is the outstanding weakness of the statutes now in effect in the thirty-four states previously mentioned. A provision in a contract to arbitrate any dispute that may later arise thereunder is an insurance policy against litigation. Our factories and offices may never be burned down, yet we always carry fire insurance policies. Many business concerns never have lawsuits, yet they should be permitted to insure themselves against the costs, delays and friendship-destroying results of litigation. Only then will students of our method of administering justice be able to note "the striking absence of commercial cases from the trial lists" of the courts of the United States.