

# BUSINESS ARBITRATION—INSTRUMENT OF PRIVATE GOVERNMENT

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TRADITIONALLY, Anglo-American national and international trade has been governed by the principles of common law, including the rules of conflict of laws and the law of the statute books. Contemporary commercial and industrial interests throughout the world, however, appear to advocate a new and separate law of national and international commercial groups, unhampered by legal tradition or restrictions imposed by municipal law.<sup>1</sup> Business arbitration is one of the means employed to achieve this result. The customary inclusion of arbitration clauses within contracts—relating to purchases, sales, credit or other commercial matters—to secure the appointment, as arbitrators, of executives of cartels, trade associations or exchange institutions has enabled these organizations to develop rules suited to the demands of dominant commercial and industrial interests.

The growth in the United States of this extra-legal use of arbitration, subject at no juncture to judicial supervision, should challenge the complacent and stir those who would place public interest before private gain. The amassing of too great advantages by one sphere of interests is an evil which the law must resist.<sup>2</sup> If arbitration may be perverted to upset or avoid the balance imposed by law, an inquiry into the function it is currently performing seems required.

The concept of business "arbitration outside the law" first appeared in the United States among the recommendations of Owen D. Young<sup>3</sup> to the International Chamber of Commerce in 1921.<sup>4</sup> Mr. Young advocated,

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1. The term *municipal* is used in the customary international law sense, *i.e.*, the internal domestic law of a nation as opposed to private and public law of international character.

2. POUND, *SOCIAL CONTROL THROUGH LAW* (1942) *passim*.

3. Chairman, Committee on Commercial Arbitration of the Chamber of Commerce of the United States (1921).

4. See Young, *International Commercial Arbitration* (1921) INTERNATIONAL CHAMBER OF COMMERCE DIGEST No. 3, 2. Mr. Young's recommendations to the Congress in London on International Arbitration were influenced by his experiences as Chairman of the Board of Radio Corporation of America in connection with the South American radio consortium, which proved to be the basis of the international radio cartel. See TARBELL, OWEN YOUNG: A NEW TYPE OF INDUSTRIAL LEADER (1932) 137-9.

Similar recommendations were made to the London Congress by a Sub-Commission for the regulation of international arbitration. The Commission was advised by Charles L. Bernheimer, President of the Arbitration Committee of the Chamber of Commerce of the State of New York. See INTERNATIONAL CHAMBER OF COMMERCE, FIRST CONGRESS, BROCHURE No. 13 (1921) 4, 5-21.

both in foreign and domestic controversies, submission of American business to arbitration tribunals sponsored by interested groups able to enforce arbitral awards. He stressed that all participants in proceedings before such tribunals should be members of organizations willing to "exert moral pressure, if need be, in favor of carrying out the arbitration decisions *outside the law* and sufficiently influential to make such pressure effective."<sup>5</sup> Although these statements merely indicate a policy to be followed, they become significant in the light of the rapid expansion, supported by commercial organizations<sup>6</sup> and legislative enactments,<sup>7</sup> which arbitration

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5. Mr. Young's fuller report is as follows: "The field of international commercial arbitration is one in which the International Chamber of Commerce may well play an important and influential part. Its success, however, will depend on the recognition by the Chamber and by its individual members of the inherent difficulties and complexities of the situation. The most important of these difficulties lies in the fact that, generally speaking, the business men of continental Europe rely upon a legal sanction for the carrying out of arbitral decisions, whereas in the United States, as well as in England and the South American countries, a moral sanction has been shown to be, certainly for the present, more effective than a legal sanction. To ensure the cooperation of these countries, therefore, some system of arbitration *outside the law* must be provided."

The report continues to the effect that the chamber itself should develop a code of arbitration designed for those business firms which agree in advance to abide by arbitration awards, the enforcement of which is based not upon a legal "but upon a moral sanction, such as can be exercised by the International Chamber of Commerce itself, and by member National Committees, with all the force that business men of a country can bring to bear upon a recalcitrant neighbor.

"Before agreeing to conduct an arbitration outside the law, even when both parties should join in a request, the International Chamber should be convinced that the business men of both countries concerned are sufficiently well organized and that the business organizations are willing to exert moral pressure, if need be, in favor of carrying out the arbitration decision outside the law, and are sufficiently influential to make such pressure effective." Young, *supra* note 4, at 1-2.

A pertinent section of the Sub-Commission Report reads: "In the want of an organized federation for the branches of commerce that are not as yet internationally associated, the practical American spirit has succeeded in arriving at the same result by means of a convention among the most important Chambers of Commerce in North and South America, whereby the Organizations which are a party thereto pledge themselves over their signature likewise to uphold the institution of arbitration. Thus the merchants of these different countries, when they stipulate an arbitration clause if they should fail to observe it, would be responsible to their own central organization which is officially bound to maintain it; and the fear of merited censure and of the moral and economic sanctions which the central organization is in a position to enforce against a delinquent member will avail not less than legal sanctions, where these exist, to secure the observance of the pledge that has been given." INTERNATIONAL CHAMBER OF COMMERCE, FIRST CONGRESS, BROCHURE No. 13 (1921) 15.

6. In 1931, ten years after the Young report, Mr. Comstock in a report to the Washington Congress of the International Chamber of Commerce commented on the extensive development of arbitration in the United States. Over five hundred commercial organizations had supported arbitration procedure, and 1750 towns possessed arbitration tribunals.

underwent during the subsequent decade.<sup>8</sup> Moreover, the fact that relatively few actions for enforcement of arbitration agreements have been brought into court, far from casting doubt upon the actual widespread use of arbitration, as Mr. Nussbaum supposes,<sup>9</sup> suggests that the Young policy may have been adopted and that it now effectively side-steps judicial strictures.

It has not been the express intent of American legislation or court decisions to foster this kind of development. Fundamentally, "arbitration"

See INTERNATIONAL CHAMBER OF COMMERCE, PROCEEDINGS OF THE WASHINGTON CONGRESS, BROCHURE NO. 78 (1931) 82.

7. See Federal arbitration statute: 43 STAT. 883 (1925); 9 U. S. C. §§ 1-5 (1940). The New York arbitration statute adopted in 1920, N. Y. CONSOL. LAWS (Cahill, 1930) c. 2, now NEW YORK CIVIL PRACTICE ACT, art. 84, has been substantially followed by several states. See: ARIZ. CODE ANN. (official ed., 1939) §§ 27-301 - 27-311; CAL. CODE CIV. PROC. (Deering, 1941) §§ 1280-1293; CONN. GEN. STAT. (Rev. 1930) c. 302; LA. GEN. STAT. ANN. (Dart, 1939) §§ 405-422; MASS. ANN. LAWS (Michie, 1933) c. 251; N. H. REV. LAWS (1942) c. 415; N. J. STAT. ANN. (1939) § 2:40; OHIO GEN. CODE ANN. (Page, 1938) § 12148; ORE. COMP. LAWS ANN. (1940) §§ 11-601 - 11-613; PA. STAT. ANN. (Purdon, 1940) tit. 5; R. I. GEN. LAWS ANN. (1938) c. 475; WIS. STAT. (1943) § 298. The following states have enacted the Uniform Arbitration Act: Nevada, NEV. COMP. LAWS (Hillyer, 1929) §§ 510-534; North Carolina, N. C. CODE ANN. (Michie, 1939) § 898; Utah, UTAH CODE ANN. (1943) tit. 104, c. 36; Wyoming, WYO. REV. STAT. ANN. (Courtright, 1931) c. 7.

For compilation of complete texts see KELLOR, *ARBITRATION IN ACTION* (1941) 217 *et seq.*; for discussion see STURGES, *COMMERCIAL ARBITRATIONS AND AWARDS* (1930) 253-62.

Foreign arbitration legislation includes: France: Law of Dec. 31, 1925, [1926] RECUEIL PÉRIODIQUE ET CRITIQUE (Dalloz) 4.25; 1 INTERNATIONALES JAHRBUCH FUER SCHIEDS-GERICHTSWESSEN IN ZIVIL- UND HANDELS SACHEN (Nussbaum, ed.) (Berlin, 1926) (hereinafter cited as JAHRBUCH) 180-1, 1 INTERNATIONAL YEAR BOOK ON CIVIL AND COMMERCIAL ARBITRATION (Nussbaum, ed.) (New York, 1928) 203 (English translation). For discussion see Domke, *Arbitral Clauses and Awards: Recent Development in French Law* (1943) 17 TULANE L. REV. 447. Great Britain: The Arbitration Clauses (Protocol) Act, 1924, 14 & 15 GEO. V., c. 39; The Arbitration (Foreign Awards) Act, 1930, 20 GEO. V., c. 15. Netherlands: Law of May 21, 1931, (1934) 4 JAHRBUCH 7-8. These laws were enacted to incorporate into municipal law the provisions of two Geneva treaties: the Protocol on Arbitration Clauses (1923), and the Convention on the Execution of Foreign Arbitral Awards (1927). See Nussbaum, *Treaties on Commercial Arbitration—A Test of International Private-Law Legislation* (1942) 56 HARV. L. REV. 219, 221, 223. See *infra* p. 48.

8. Even since 1931 arbitration has continued to expand. See (1937-42) 1-6 ARB. J.; (1943-44) 1-2 ARBITRATION IN ACTION. Sir Lynden Macassey commented in 1938 that the development of commercial arbitration, both national and international, in the United States had been "phenomenal." Macassey, *International Commercial Arbitration: Its Origin, Development and Importance* (1938) 24 TRANSACTIONS OF THE GROTIUS SOCIETY 191.

9. Nussbaum, *supra* note 7, at 236-7. Mr. Nussbaum's discussion of arbitration deserves special attention, since from the beginning of the century he has been a prominent supporter of the arbitration movement, but has never lost sight of its inherent dangers.

has always been considered merely a "speedy and inexpensive proceeding" <sup>10</sup> between individuals to resolve or avoid litigation, or to interpret standardization rules of products and marketing methods. The emphasis has been upon the adjustment of specific controversies between parties neither one of which occupies a strongly predominant position and the settlement of whose disputes does not invade the interests of third parties.<sup>11</sup> The danger that arbitral procedure might be used to overthrow this naturally achieved balance and establish control by monopolies and cartels was not generally foreseen, particularly since arbitration seemed to operate primarily in connection with the product exchanges, a traditional fortress of free enterprise. Nevertheless, such have been the changes effected by the growth of a more complex and highly organized economy that arbitration now rarely functions at its former simplified level. Few commercial transactions affect only the interested parties; the simplest contract may give rise to unexpected repercussions. And with this expanding sphere of influence has come the opportunity for dominant interests to weigh down the balance in their favor. Arbitration, viewed as a social instrument, has moved from the sphere of isolated individual transactions into a realm where its significance in the light of public interest may be overlooked no longer.

#### TYPES OF ORGANIZATIONS UTILIZING ARBITRATION

The arbitration system has its origin in no unified or coherent plan. Developing as an instrument of independent organizations, both in the United States and abroad, its pattern may be traced through the various organizations which have made use of it. Agreements to arbitrate questions not

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10. The facts reported in *Electric Research Products v. Vitaphone Corp.*, 20 Del. Ch. 417 (1934), make it appear doubtful whether arbitration tribunals are as efficient as usually alleged: 162 hearings were held, about 8000 pages of testimony reported, \$450,745.00 was paid for expenses including \$1000 per day for each arbitrator—and no decision was rendered.

11. The difference between arbitration between individuals and modern organized arbitration or arbitration dictated by leading commercial concerns becomes obvious when contrasted with the arbitration provision in George Washington's will:

" . . . my will and direction expressly is, 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 those two,—which three men thus chosen shall, unfettered by law, or legal constructions, declare their sense of the Testator's 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."

*Cf. Kent, Pioneers in American Arbitration* (1940) 17 N. Y. U. L. Q. Rev. 501, 592-3. It is clear that this arbitration clause can hardly have effect beyond the parties to the controversy.

susceptible to private adjustment are employed by three general types of organizations: (1) by individual business entities—corporations and the like—one of which may be in a sufficiently strong position to control both the terms of the commercial agreement (of which the arbitral agreement is a part) and the arbitration tribunal itself; (2) by exchange institutions and trade associations devoted to the advancement of particular products or trades, arbitration agreements being controlled by these organizations in all matters concerning members or members and third parties; and (3) by the International Chamber of Commerce, and, on a lesser scale, by local or city chambers of commerce.

In each of these instances it seems apparent that, if the dominant commercial interests are sufficiently strong, few of these controversies will come into court.<sup>12</sup> Moreover, the spread of proceedings may be limited even within these three categories, for, if the tribunals set up by the first two types of organizations function efficiently, it is not improbable that they will absorb the majority of controversies, leaving few to the International Chamber of Commerce, or to local commercial organizations, a fact which Mr. Nussbaum may have overlooked.<sup>13</sup>

*Individual Business Organizations.* While only official investigation could hope to penetrate the secrecy which surrounds the arbitration system, the Carboly agreement<sup>14</sup> is a published instance of the function of arbitration between individual corporations. Carboly Company, a subsidiary of General Electric, having obtained an exclusive license under

12. Examination of the latest volumes of the New York Supplement discloses the comparative scarcity of sales contract cases despite the tens of thousands of sales transactions taking place daily within the jurisdiction of New York courts. The following cases involving individual concerns illustrate to some extent the trend toward elimination of judicial settlement of sales disputes where arbitration clauses are in use: *Miskowitz v. Starobin*, 181 Misc. 445, 41 N. Y. S. (2d) 786 (Sup. Ct. 1943) (litigation between buyer and executor of seller dealing with liquidation of joint business undertaking where questions relating to sale is only one of the issues); *Methuen Heel Co. v. Tupper*, 41 N. Y. S. (2d) 357 (City Ct. 1943) (actual sales litigation); *Flamm v. Noble*, 43 N. Y. S. (2d) 922 (Sup. Ct. 1943) (rescission of contract for fraud not excluding the possibility that the contract contained an arbitration clause); *Hauswirth v. Rosenberg*, 180 Misc. 945, 43 N. Y. S. (2d) 206 (City Ct. 1943) (actual sales litigation in which no arbitration clause was agreed upon); *Popper v. Centre Brass Works, Inc.*, 180 Misc. 1028, 43 N. Y. S. (2d) 107 (City Ct. 1943) (no arbitration clause); *Lipschitz v. Rosenberger*, 43 N. Y. S. (2d) 64 (Sup. Ct. 1943) (involving whether Army and Navy contracts are covered by priority rules; no reference to arbitration clause); *Onyx Oils & Resins v. Steinberg*, 180 Misc. 315, 44 N. Y. S. (2d) 583 (City Ct. 1943) (intervention of a governmental agency in a private dispute; no reference to arbitration clause). 45 N. Y. S. (2d) contains no sales cases.

13. Nussbaum, *supra* note 7, at 236-7.

14. *Hearings before Senate Committee on Patents on S. 2303*, 77th Cong., 2d Sess. (1942) pt. I, 294 (hereinafter cited as *Hearings*). Agreement made Jan. 2, 1929, between Carboly Co., Inc. and Firth-Sterling Steel Co.

certain patents, relating to hard metal composition, from the German firm, Krupp, granted a license for manufacture to Firth-Sterling Steel Company on the express condition that its prices, terms and conditions of sale for all tools and dies made of hard metal composition should be no more favorable to the customer than those to be established from time to time by Carboloy.<sup>15</sup> The agreement between Carboloy and Firth-Sterling provided for arbitration of controversies which the parties were unable to adjust between themselves,<sup>16</sup> and through a supplementary instrument<sup>17</sup> the form of arbitration procedure was agreed upon: "For the period of one year from March 1, 1931, the parties hereby appoint Harold Norberg . . . as the sole arbitrator over controversies which may arise between the parties or either of them concerning violations of their respective obligations to maintain the prices, terms and conditions of sale established from time to time by Carboloy. . . . The arbitrator in performing his functions shall act impartially between the parties."<sup>18</sup> Since the Mr. Norberg in question was at the time of his appointment and subsequently an employee of Carboloy,<sup>19</sup> there seems hardly any doubt that arbitration was used here by Carboloy both to control prices at the expense of its licensee and to prevent such a scheme of price fixing from coming into court.

A similar predisposition to control through arbitration is illustrated by the conditions of sale contained in sales contracts in almost every field of business. A conference called by governments in Rome in 1928 to discuss unification of sales law was confronted with the argument that such unification had in fact already been achieved by private groups without participation of governments or legislatures.<sup>20</sup> Thus the inclusion of arbitration clauses takes the interpretation of privately dictated rules out of court and centralizes it in private hands.<sup>21</sup>

*Exchange Institutions and Affiliated Trade Associations.* In the rules governing arbitration promulgated by exchange institutions and trade associations, the growth of the same pattern may be traced. Since the last decade of the nineteenth century, membership in exchanges has been in

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15. *Ibid.*

16. Art. 17 of 1929 agreement. *Hearings* at 299.

17. Agreement of March 1, 1931, between Carboloy and Firth-Sterling Co. *Hearings* at 303.

18. Art. 8. *Hearings* at 305.

19. A letter from Carboloy Co., Inc., to Fansteel Products Co., Inc., dated Aug. 1, 1933, mentioned "Mr. Harold Norberg of the Carboloy Co." *Hearings* at 320.

20. RABEL, *DAS RECHT DES WARENKAUFS* (1936) 36.

21. An agreement between Hartford Empire Co. and Owen-Illinois Glass Co. in which the two companies purported to settle between themselves questions of patent priority in order to control the patent pool in the manufacture of glass illustrates further a utilization of arbitration to support large concerns to the detriment of those less powerful. See Brief for the United States, pp. 84-7, *United States v. Hartford Empire Co.*, U. S. Sup. Ct., Docket Nos. 2-12 (1944 Term). See *infra* p. 58.

many instances restricted to persons who could be expected to conform to prevailing policy, and especially to those belonging to formal buyer-seller organizations or trade associations. The exchange ceased to be merely an agency for the collection of orders for purchase or sale and, particularly in regard to products traded in international markets, became the meeting place of these buyer-seller organizations. Max Weber correctly describes these changes<sup>22</sup> in referring to the English Cotton Trade Association and the Corn Trade Association as exclusive clubs having absolute autonomy in regard to the principles of common law applicable to the business transactions in their field.<sup>23</sup> Of the many conditions required for membership most notable has been the enforced acceptance of the jurisdiction of the arbitration tribunal established either within the exchange institution or within the affiliated trade associations. Still proclaiming their function to be standardization, these tribunals helped the associations of the new exchange institutions to establish themselves as supreme arbiters of the trade and to maintain rigid restrictions beneficial to controlling groups or cartels.<sup>24</sup>

Tribunals, as a result of this development, now not only promulgate rules regulating the activities of all who deal in products within the scope of the exchange institution, or trade association, but serve as "courts" entitled to the rule of *stare decisis* in all matters subject to their jurisdiction. And this jurisdiction has grown most extensively. The basic arbitration agreement of the International Bulb cartel gives to its permanently established tribunal the power to dispose of all questions arising out of both the original contract, of which the arbitration agreement is part, and any amendments made thereto pursuant to the by-laws of the cartel.<sup>25</sup> The only matter with respect to tribunal jurisdiction left open to question is apparently the essential validity of the original contract.

In the capacity of disciplinary agencies, tribunals exact loyalty to the orders and regulations of trade associations. A rule established by the Diamond Center and recently imported to the United States from Antwerp<sup>26</sup> provides that "the penalty for non-compliance with a decision or

22. Weber, *Die Ergebnisse der deutschen Boersenenquête* (Germany, 1901) 43 ZEITSCHRIFT FUER HANDELSRECHT 83.

23. *Ibid.* at 101.

24. The latter was accomplished by means of the charters, rules and by-laws of the exchange. See, e.g., *Merrifield, Ziegler & Co. v. Liverpool Cotton Ass'n*, 105 L. T. R. (N. S.) 97 (Ch. 1911); *infra* p. 43.

25. Meinhardt, *Die rechtliche Gestaltung internationaler Kartelle, insbesondere der Gluehlampenvertrag* (Germany, 1928) 2 ZEITSCHRIFT FUER AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT 460, 466 *et seq.*

26. *Diamond Industry Keeps Out of Court* (1943) 1 ARBITRATION IN ACTION, No. 2 (Feb.) 18.

award renders the member liable to expulsion and termination of membership." 27 Those in control of the Diamond Center must be presumed to know that even the threat of such a penalty for non-compliance may work substantial injury.<sup>28</sup> In another instance, tribunal awards have been enforced by securing from members of an organization an accepted bill of exchange, which becomes the subject of suit if the drawee fails to comply with an arbitral decision.<sup>29</sup>

The rule of loyalty is in no way mitigated by the fact that awards may issue from a foreign tribunal, particularly a foreign exchange tribunal, as was demonstrated in *Merrifield, Ziegler & Company v. Liverpool Cotton Association*.<sup>30</sup> In that case a British dealer selling American cotton in Germany had agreed to arbitration in Bremen. A controversy arose under the sales contract; the British dealer, ordered by the German tribunal to pay damages to the German purchaser, refused to comply with the order. At the request of the German exchange, the Liverpool Association expelled Merrifield, Ziegler & Company from its membership and thereby effectively from the trade.<sup>31</sup> Although an appeal may be taken from a disciplinary ruling of this kind, it has merely a supernumerary function since relief may be sought only from those in control of the organization or subject to its command. Similarly, in the event of dissatisfaction with an award the parties may appeal only to a committee chosen by the executive members of the organization.<sup>32</sup> That there is no real opportunity for presentation of controversies to disinterested persons is demonstrated by the fact

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27. *Ibid.* This device seems so similar to the Young system that few business firms in the United States could have learned much of significance from the Belgian diamond merchants. See also *War Brings Diamond Center and Its Own Arbitration System to America* (1943) 1 ARBITRATION IN ACTION, No. 3 (March) 10.

28. For the organization of the international diamond cartel see PLUMMER, INTERNATIONAL COMBINES IN MODERN INDUSTRY (1938) 93.

29. See Meinhardt, *supra* note 25, at 469-70.

30. 105 L. T. R. (N. S.) 97 (Ch. 1911).

31. Compare *Gilbert v. Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931), for court enforcement of foreign exchange awards. The plaintiff and defendant, both citizens of New York, contracted for the sale and delivery of a quantity of zinc concentrates to the plaintiff in the United States. The contract provided that all differences arising thereunder should be "arbitrated in London pursuant to the law of Great Britain." As a result of such an arbitration proceeding an award was made against the defendant and enforced by a New York court. See *infra* p. 46.

32. The report of the Fortieth Conference of the International Law Association designated the following rules of the Incorporated Oil Seed Association as typical: "I. Any dispute arising out of a contract embodying these rules shall be referred to arbitration in London, each party appointing one arbitrator, who shall be a member of the Association or a partner in a member's firm, or a director of a company represented by a member . . . whose decision is to be final. . . . III. In the event of one of the parties refusing



that, although parties may ordinarily select their own arbitrators, the rules of most exchanges limit the choice to members of the institution.<sup>33</sup>

The experience gained by exchange institutions and affiliated trade associations has motivated cartel organizers to utilize the arbitration device for their own purposes,<sup>34</sup> making use of the three basic functions of tribunals—legislative, judicial and disciplinary.<sup>35</sup> The effectiveness of a cartel depends upon the extent to which the obligations of its members to sustain price and to remain within the market assigned to them can be enforced, and also upon the extent to which members' customers can be made subject to cartel rules. A "controlled" arbitration tribunal having jurisdiction over all litigation between cartel members and over all disputes relating to the cartelized product offers more than adequate opportunities to secure the ends desired by the cartel management. The Supreme Court has acknowledged this fact in the statement: "It may be that arbitration is well adapted to the needs of the . . . industry but when under the guise of arbitration parties enter into unusual arrangements which unreasonably suppress normal competition, the action becomes illegal."<sup>36</sup>

*The International Chamber of Commerce.* Representative of the final type of organization utilizing arbitration, the International Chamber of Commerce,<sup>37</sup> unlike exchange institutions and trade associations, promotes

to appoint an arbitrator, or neglecting to do so for seven days after notice in writing of such an appointment by the other . . . or in case the arbitrators shall not within seven days after their appointment agree to an award or appoint an umpire, or in case after the appointment of such arbitrators or umpire they or he or any of them shall die, . . . then upon application by either of the disputing parties, and provided the applicant pays at the same time to the secretary of the Incorporated Oil Seed Association the sum of £2 2 s., the Executive Committee shall appoint an arbitrator or arbitrators or an umpire who shall be members . . . of the association to fill the vacancy or vacancies so arising. . . . V. In case either party shall be dissatisfied with the award a right of appeal shall lie to the Committee of Appeal of the Incorporated Oil Seed Association. . . . VI. The appeal shall be determined by a Board of Appeal consisting of four members of the Committee of Appeal of the Association in accordance with the Regulations of Association for the time being of the Incorporated Oil Seed Association." INTERNATIONAL LAW ASS'N, REPORT OF THE FORTIETH CONFERENCE, 1938 (1939) 273-4.

33. *Ibid.*

34. See Friedlaender, *Arbitration in International Cartel Agreements* (1939) 3 *ARB. J.* 271 *passim*.

35. See Meinhardt, *Das Schiedsgericht des Internationalen Gluehlampenvereinigug* (1928), 2 *JAHREBUCH* 166.

36. *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30, 43 (1930).

37. See MAGNIER, *LA CHAMBRE DU COMMERCE INTERNATIONAL* (1928) c. 7 *passim*; Dietler, *Der Schiedsgerichtshof der Internationalen Handelskammer seine Organisation und Verfahren* (Switzerland, 1935) SCHWEIZERISCHE VEREINIGUNG FUER INTERNATIONALES RECHT DRUCKSCHRIFT, No. 33. For similar organizations see Macassey, *supra* note 8, at 179.

no particular product or trade, but seeks rather to join varied commercial interests—Morgan, Westinghouse Electric International Company, Bankers Trust Company of New York,<sup>38</sup> to name several American firms—in the common purpose of facilitating international commerce. The Chamber takes jurisdiction of all members' controversies provided they are of international character, a fact determined by a central committee composed of—until the outbreak of the war—representatives of twenty different nations.<sup>39</sup>

The unique feature of the Chamber is the appointment of arbitrators by national committees of countries specifically designated by the central committee. A nation such as Switzerland, for example, liberal in its treatment of cartels,<sup>40</sup> may be intrusted with the task of appointing arbitrators.<sup>41</sup> Subsequently the central committee may send these "liberal" arbitrators to a foreign country to render their decision—even to the domicile of the party against whom the award is to be made.<sup>42</sup> The reason for this mobility of arbitrators becomes apparent in the light of the rule that an arbitrator is free to choose whether his decision is to be bound by municipal law; he may choose—providing the opposing party does not object—to act merely as an *amiable compositeur*, in which case he is not bound by the law of the land, or as *arbiter*, in which case he is. If he declares himself bound, then whether it is by the law of the forum or some other law will depend either upon his own discretion or upon the terms of whatever contract is in controversy.<sup>43</sup> At the conclusion of his deliberations the decision is returned

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38. See Magnier, *op. cit. supra* note 37, at 15-6.

39. Among the members of the committee these names appear: Rene P. Duchemin, the president of the Confederation Générale de la Production Française, and Guiseppi Cuccoli of Banque Française Italienne pour l'Amérique du Sud. See (France, 1929) 1 INTERNATIONALE WIRTSCHAFT, ZEITSCHRIFT DER INTERNATIONALEN HANDELSKAMMER 124, 129-130.

40. See Meinhardt, *op. cit. supra* note 25, at 464, 466, *et seq.*

41. Up to 1940 the Swiss committee appointed exclusively personnel of cartelized industry or high finance closely connected with cartel interests. Dietler mentions the following persons appointed by the Swiss committee: Dr. H. Kurz, member of the administrative board of the Swiss Credit Bank; Mr. Galoy, delegate of the board of management of the Swiss Bank Corporation; Mr. Laroche, president of the Swiss Bankers Association; Dr. Wischer, Secretary of the Bankers Association; Dr. Zoelly, general manager of the Federal Bank; Dr. Stoss, general manager of the chemical enterprise Sandoz, a member of the pool Ciba-Sandoz-Geigy and member of the European dyestuff cartel. Dietler, *supra* note 37, at 829. For cartel connections of firms with which these arbitrators have been associated, consult BERGE, CARTELS: A CHALLENGE TO A FREE WORLD (1944) *passim*. The close interrelation between the International Chamber of Commerce and cartels seems to explain why the international steel cartel chose for its tribunal the arbitration tribunal of the International Chamber of Commerce. See Hexner, THE INTERNATIONAL STEEL CARTEL (1943) 106.

42. See Dietler, *supra* note 37, at 10.

43. See *id.* at 11, 16.

to the central committee which determines whether the award shall be left to enforcement by courts or treated as a case "outside the law." Like the operations of exchange institutions, a loose procedure of this kind seems only too easily to lend itself to the exercise of cartelized power. On behalf of the commercial interest which it undertakes to protect the central committee may at its discretion utilize the municipal law which proves to be the most advantageous and the most expedient.<sup>44</sup>

#### "EXTRA-TERRITORIAL" ARBITRATION

In order to provide for the decreasing number of occasions when arbitration cases come into court, pro-arbitration groups have sought to foster a receptive judicial attitude toward foreign arbitration decisions. The "extra-territorial jurisdiction"<sup>45</sup> of arbitration, *i.e.*, the international attainment of this objective regardless of the municipal law of the forum,<sup>46</sup> has been noticeably extended as a result of two important American cases. In *Gilbert v. Burnstine*,<sup>47</sup> an action on a contract made in New York and performed in the United States and involving two American litigants, the defendant refused to appear before an English arbitration tribunal in derogation of the contract, believing that he could defend his case in the American courts even though he might be required to pay "damages." The New York court, however, declared that the decision of the English arbitration tribunal was final. Besides holding as a general rule that, where a foreign tribunal has once assumed jurisdiction and made an award, the decision must not be disturbed by any court, the opinion seems to adopt the view that two American firms, and by logical inference either an American firm and a foreign firm or two foreign firms, may in their mutual dealings free themselves from the restrictions of American law and the jurisdiction of American courts to which they would otherwise have been subject; that the acts of an arbitration tribunal established abroad are valid providing they are valid under the law of the "situs" of the tribunal; and that the decision of a foreign tribunal is binding on the

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44. Although the American Arbitration Association does not operate for the most part within the scheme here suggested, since it is largely concerned with labor-management problems and with arbitration between individuals where the decisions do not effect third parties, the Association is very active in propagandizing the entire field of arbitration.

45. INTERNATIONAL CHAMBER OF COMMERCE, FIRST CONGRESS, BROCHURE No. 13 (1921) 20.

46. This concept appears to have been suggested by the traditional definition of extra-territorial jurisdiction in international law which is given as: "The exercise of jurisdiction by the United States over its nationals in foreign countries to the exclusion of the customary jurisdiction of authorities of those countries." 2 HACKWORTH, DIGEST OF INTERNATIONAL LAW (1941) 493.

47. 255 N. Y. 348, 174 N. E. 706 (1931).

parties even if one of the parties did not appear in the proceedings before the tribunal, provided that this was in accordance with the law of the "situs." In the *Silverbrook* case,<sup>48</sup> where arbitrators were removed into a foreign country for the sole purpose of rendering their award,<sup>49</sup> a federal court similarly concluded that it could not "direct and otherwise supervise and conclude an arbitration to be held in London, or . . . vacate, modify, or correct any award that might be made . . . [or] reform, or modify the terms of the contract by ordering an arbitration elsewhere or otherwise than agreed upon by the parties."<sup>50</sup> In assuming this position, therefore, these cases<sup>51</sup> would appear to have immunized foreign arbitration awards against any interference and made possible indiscriminate enforcement.<sup>52</sup>

The legal reasoning basic to these two decisions, moreover, seems highly specious and susceptible to a consistent explanation only on the most abstract level of conflict-of-laws theory. Under the *Burnstine* rule foreign arbitrators have the status of agents of the parties to the original contract with power of attorney revocable only by consent of the litigants. In the *Silverbrook* case, on the other hand, arbitrators are regarded as agents of the state in which the tribunal has its "situs."<sup>53</sup> This inconsistency, although explainable by the rationale that, on the one hand, an arbitration agreement is substantive and therefore governed by the law of the place

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48. The *Silverbrook*, 18 F. (2d) 144 (E. D. La. 1927).

49. *Id.* at 146.

50. *Id.* at 147.

51. The opinion in neither case seems to have considered the question of the public interest.

52. While the law on the enforcement of foreign judgments in the United States is rather uncertain at the present time, it can be stated that the principle of *Johnston v. Compagnie Générale Transatlantique*, 242 N. Y. 381, 152 N. E. 121 (1926), is to be considered the prevailing rule:

"After having sought the jurisdiction of the foreign tribunal, brought the defendant into that court and litigated the question there, he now seeks to impeach the judgment rendered against him. The principles of comity should give conclusiveness to such a judgment as a bar to the present action. Dacey on Conflict of Laws (3d ed., p. 455), states separately the rule as to foreign judgments pleaded as a defense as follows: 'A valid foreign judgment *in personam* if it is final and conclusive on the merits (but not otherwise) is a good defense to an action for the same matter when either (1) the judgment was in favor of defendant or (2) the judgment being in favor of the plaintiff has been satisfied.'

"The law of the state of New York remains unchanged, and the French judgment should be given full faith and credit." *Id.* at 383, 152 N. E. at 123-4.

*Hilton v. Guyot*, 159 U. S. 113 (1895), requiring reciprocity in the country where the judgment was rendered, governed the federal courts. However, the case lost its significance (with the possible exception of the District of Columbia) because of *Eric R. R. v. Tompkins*, 304 U. S. 64 (1938).

53. It is somewhat startling that an act of an arbitrator, hitherto owing allegiance only to the private parties who secure him, must be treated as an act of a foreign state.

where the contract was made,<sup>54</sup> while, on the other hand, the actual "arbitration" and the award is a procedural matter referable to the law of the forum,<sup>55</sup> nevertheless seems to underscore the facility with which theories may be manipulated to advance the principle of "extra-territorial" arbitration. *Parry v. Bache*,<sup>56</sup> a Florida case in which a federal court enforced an arbitration agreement—inconsistent with the law of Florida—on the ground that "arbitration goes to the remedy," may well be matched with *Nippon Ki-Ito Kaisha, Ltd. v. Ewing Thomas Corporation*,<sup>57</sup> where a Pennsylvania court enforced a New York arbitration agreement because of its contractual character which required the substantive law to govern.

Among the foreign contributions to the principle of "extra-territorial" arbitration are the Geneva protocols of 1923 and 1927, the former guaranteeing recognition of agreements which provide for foreign arbitration,<sup>58</sup> and the latter the enforcement of foreign arbitral awards.<sup>59</sup> Following in the spirit of these protocols, however, the courts of most commercial nations appear to have gone further and adopted the rule of the *Silverbrook* case, as decisions of the German Reichsgericht<sup>60</sup> and the Swiss Bundesgericht<sup>61</sup> attest, while English and French courts<sup>62</sup> have

54. For the effect of this principle of conflict of laws compare NUSSBAUM, *DEUTSCHES INTERNATIONALES PRIVATRECHT* (1932) 420.

55. PILLET AND NIBOYET, *MANUEL DE DROIT INTERNATIONALE PRIVÉ* (1924) 721, n. 3. Arbitration tribunals acting in accordance with local arbitration laws are usually considered "forums" in the same manner as are courts. Compare reasons for the *Silverbrook* rule, 18 F. (2d) 144 (E. D. La. 1927).

56. 125 F. (2d) 493 (C. C. A. 5th, 1934).

57. 313 Pa. 442, 170 Atl. 286 (1934). Since 1923 the New York courts have had no opportunity to assert their position in regard to the problem of appearance of New York residents before arbitration tribunals in a foreign state. In *Meachem v. Jamestown F. & C. R. R.*, 211 N. Y. 346, 105 N. E. 653 (1914), and in *In re Interocean Food Products, Inc.*, 206 App. Div. 426, 201 N. Y. Supp. 536 (1st Dep't 1923), the New York court refused to issue such an order.

58. See Nussbaum, *supra* note 7, at 221-2. The protocol of 1923 was ratified by the following countries: Albania, Austria, Belgium, Brazil, Czechoslovakia, Denmark, Estonia, Finland, France, Germany, Great Britain (including India and other colonies and dependencies), Greece, Italy, Japan, Luxemburg, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Roumania, Sweden, Switzerland, Siam and Spain. See 1 *INTERNATIONAL YEAR BOOK ON CIVIL AND COMMERCIAL ARBITRATION* (Nussbaum, ed.) (1928) 239, n.

59. *Ibid.* The convention on the execution of foreign arbitral awards was ratified by the same countries ratifying the protocol with the exception of Albania, Brazil, Japan, Monaco, Norway and Poland. Both treaties were prepared by the League of Nations. For foreign legislation see note 7 *supra*.

60. See, e.g., (1927) 116 *ENTSCHEIDUNGEN DES REICHSGERICHTS IN ZIVILSACHEN* 193.

61. See, e.g., *Goldschmitt v. Arn* (1931), [1931] *ENTSCHEIDUNGEN DES SCHWEIZERISCHEN BUNDESGERICHTS* (hereinafter cited B. G. E.) I 295.

62. See (1931) 58 *JOURNAL DU DROIT INTERNATIONAL* (Clunet) 90.

supported the *Burnstine* rule.<sup>63</sup> In *Vita-Food Products, Inc. v. Unus Shipping Company*<sup>64</sup> the House of Lords permitted the parties to evade a specific statutory prohibition of Newfoundland by mere agreement that the contract should be governed by English law, though neither persons nor transaction were subject to English jurisdiction. In reaching this conclusion, Lord Wright looked for guidance to the English practice in arbitration "which imports English law as the law governing the transaction . . . even where the parties are not English and the transactions are carried on completely outside England."<sup>65</sup> A stronger indication of the growing power of "extra-territorial" arbitration seems hardly needed; European decisions of this nature would not have been possible before the

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63. Although the International Chamber of Commerce attributes the success of the arbitration movement to the Geneva treaty of 1927 [see Palewski, *L'Arbitrage en matière commerciale et la jurisprudence de la Cour de Cassation* (1933) 60 JOURNAL DU DROIT INTERNATIONAL (Clunet), 849-51] and assumes responsibility for its promulgation, the *Burnstine* and *Silverbrook* rules appear to have had considerably greater significance in securing enforcement of awards. To some extent these rules transcend even American state and federal arbitration laws, since the former take effect whether arbitration statutes are in force or not. Their advantage is particularly evident in their procedural operation. In the absence of an arbitration statute, a cause of action at law in derogation of an arbitration agreement can be reduced to a nullity by securing a more rapid termination of the arbitration proceedings than is possible for the simultaneous court proceeding. Thus a defendant is enabled to put in a defense of a foreign tribunal award that will prove fatal to a complaint as long as the defense is not raised later than court procedure will allow. Only in this latter event does lack of an arbitration statute prove disadvantageous to practical arbitration; for under state and federal statutes as well as under the Geneva treaties arbitration agreements are enforced by interposing stay orders in court proceedings until the tribunal decision has been reached, the ensuing award then being enforced by court order made on the motion of the successful party. See 43 STAT. 883, 885 (1925), 9 U. S. C. §§ 3, 9 (1940).

64. [1939] A. C. 277 (P. C.). Plaintiff claimed damages in the courts of Nova Scotia for damages to cargo resulting from negligent navigation. Although the bill of lading issued in Newfoundland exempted defendants from liability for negligence, under the law of Newfoundland such clause is void. The defendants relied on the express provision of the contract that English law and not the law of Newfoundland should govern. The courts of Nova Scotia and the Judicial Committee of the Privy Council declared the ship owner not liable.

65. *Id.* at 290. A decision of the Hungarian Curia, P. II 8496 (1926) [Szász, *Das internationalrechtliche Problem der inländischen Anerkennung und Vollstreckbarkeit ausländischer schiedsgerichtlicher Urteile* (1935) 50 ZEITSCHRIFT FÜR INTERNATIONALES RECHT (Neimeyers) 34, 35, n. 1], agreed that arbitration decisions were a stronger force than judgments made under the exclusive jurisdiction of Hungarian courts. Limitation on the exclusion of municipal law is to be found in the law of the Duchy of Liechtenstein (FÜRSTLICHE JURISDIKTIONS-NORM, art. 53) which requires public certification of agreements providing for foreign arbitration tribunals. See SCHNITZER, HANDBUCH DES INTERNATIONALEN PRIVATRECHTS (1937) 345, n. 1.

last war.<sup>66</sup> That this development has come with the expansion, through cartels, of private government regardless of and beyond the borders of political frontiers is shown in the opinions of the French Court of Cassation.<sup>67</sup> In declaring binding an agreement between two Frenchmen which provided for arbitration in London, the Court virtually admitted that its decision was founded not so much upon any theory of law as upon the practical necessity of submitting to the dictates of powerful interests in the trade; the world market would be lost to Frenchmen if they were barred from arbitration in the English Corn Products Exchange.<sup>68</sup>

The extent to which "extra-territorial" arbitration may upset even the domestic law of the United States is indicated by a decision which compelled a resident of one state to appear before a tribunal situated in another state. In the *Nippon* case,<sup>69</sup> the Pennsylvania court issued a decree compelling a party domiciled in Pennsylvania to appear before an arbitration tribunal in New York, since such a measure was the only means of enforcing the contract. Yet, even a superficial study of the principles of specific performance demonstrates the reluctance of American courts to give positive instructions to persons to perform acts outside jurisdictional boundaries. The Pennsylvania court seems to have regarded the arbitration tribunal as a public court of equal authority.<sup>70</sup> Indeed, the arbitration tribunal was perhaps placed in a preferential position, since there is no record of similar injunction in a case involving the jurisdiction of a foreign court.<sup>71</sup>

In circumventing the dangers arising from "extra-territorial" arbitration as disclosed in the foregoing exposition, the argument usually made is

66. Reference should be made especially to the decision of the Reichsgericht (Nov. 8, 1882) in which an arbitration tribunal wherever situated is considered bound by the law of the country which would have jurisdiction were there no arbitration agreement. See also Neuner, *Zum Problem der auslaendischen Schiedssprueche* (Germany, 1929) 3 ZEITSCHRIFT FUER AUSLAENDISCHES UND INTERNATIONALES PRIVATRECHT 37.

67. See (1931) 58 JOURNAL DU DROIT INTERNATIONAL (Clunet) 90.

68. This decision is not based on the Geneva treaty since the latter affects only subjects of different nations. See, however, an Italian decision in which a court of appeal (Turin) refused to permit agreements between Italians providing for submission to foreign arbitration. (1932) 59 JOURNAL DU DROIT INTERNATIONAL (Clunet) 1145.

69. *Nippon Ki-Ito Kaisha, Ltd. v. Ewing Thomas Corp.*, 313 Pa. 442, 170 Atl. 286 (1934). See *supra* p. 48.

70. The opinion gives the impression that the court considered that the relations between itself and the permanent arbitration tribunal of the Silk Association of America, Inc., were the relations of two courts, not of a court and private persons authorized by private agreement to "decide litigation."

71. Judge A. N. Hand, in *In re Letters Rogatory out of First Civil Court of City of Mexico*, 261 Fed. 652, 653 (S. D. N. Y. 1919), points out: "[No] American or English court has by an order directing the service of process aided a foreign tribunal to acquire jurisdiction over a party within the United States." It can be assumed that where there is no service of documents requesting the party to appear, there is no compulsion to appear.

that they may be met successfully by the "public policy" defense in a suit to enforce a foreign award.<sup>72</sup> Yet the facts show that with respect to the enforcement of even a foreign judgment the "public policy" defense has been successfully employed but once and then only in a case not involving a commercial transaction.<sup>73</sup> In no instance has an American court refused to enforce a foreign arbitration award because of its inconsistency with public policy. Pro-arbitration groups, however, fearful that the courts may become aware of the real developments and may take a position favorable to the "public policy" defense, have advanced the suggestion that nations "provide for the recognition of all arbitration agreements and awards in all cases except where it would be considered as offending against the common conscience of civilized nations."<sup>74</sup> It is not improbable that this program was drafted with the American anti-trust legislation principally in mind; in any event the adoption of such a program would tend to nullify the "public policy" defense.<sup>75</sup>

Pro-arbitration groups have attempted, moreover, to proselytize legislative bodies as well as courts by employing the technique of contrasting the superior arbitration system of foreign countries with those of the United States and vice versa. In 1921 the two reports of the International Chamber of Commerce<sup>76</sup> attempted to convince European legislators of their "reactionary"<sup>77</sup> attitude in not accepting the "American system" of

72. See NUSSBAUM, PRINCIPLES OF PRIVATE INTERNATIONAL LAW (1943) 239-8.

73. *De Brimont v. Penniman*, 7 Fed. Cas. 309, No. 3715 (C. C. S. D. N. Y. 1873).

74. INTERNATIONAL LAW ASS'N, *op. cit. supra* note 33, at 213.

75. There have been some indications, however, of growing unrest even among arbitration groups. Several nations including Holland, Belgium and Germany [see I GROSSMANN-DOERTH, RECHT DES UEBERSEEKAUFS (1930) 41] have sought the protection of the public policy defense against the intrusion of the policies of the London Corn Exchange into the affairs of continental trade associations, particularly with respect to transactions with American and Canadian firms. JOEHLINGER-HIRSCHSTEIN, PRAXIS DES GETREIDEGESCHAFTES (3d ed. 1925) 313.

76. See note 5 *supra*.

77. See the Sub-Commission report: "In European countries, pervaded as they are by individualistic traditions, organized institutions that curtail and limit the liberty of their citizens for the common good, encounter an insuperable resistance, and even in the fields of industry and commerce the spirit of association is not much in evidence, and with difficulty submits itself to the discipline and to the restrictions which would be imposed by the public interest upon the liberty of individuals." INTERNATIONAL CHAMBER OF COMMERCE, FIRST CONGRESS, BROCHURE No. 13 (1921) 15.

This should be compared with the report of the Federal Trade Commission on the operation of the Export Trade Act: "In seeking business abroad American manufacturers and producers must meet aggressive competition from powerful foreign combinations, often international in character. In Germany, Italy, Switzerland, Holland, Sweden, Belgium, Japan . . . businessmen are much freer to combine than in this country. They have developed numerous comprehensive combinations, sometimes aided by their Governments, which effectively unite their activities both in domestic and foreign trade." GILBERT AND DICKINS, TNEC REP., EXPORT PRICES AND EXPORT CARTELS (WEBB-PUMPERENE ASSOCIATIONS) Monograph 6 (1940) 115.



arbitration, advocated by Mr. Young, which in fact did not become a functioning reality in the United States until some years later. Similarly, a joint Congressional committee preparing federal arbitration legislation was told that commercial arbitration had existed in France for 360 years,<sup>78</sup> whereas France in reality was the last of the nations to adopt arbitration of an organized commercial nature.<sup>79</sup> Again, in 1943 in connection with war contract termination legislation,<sup>80</sup> the Senate was erroneously informed that other nations, particularly France, were agreeable to the submission of the national government to arbitration tribunals.<sup>81</sup> Much point has been made also of the fact that arbitration is inconsistent with the principles of totalitarianism,<sup>82</sup> but even a superficial survey of German cases between 1933 and 1942 reveals that this inconsistency is merely theoretical.<sup>83</sup> Moreover, judicial nullification of the amendment of the German Civil Procedure Act of 1933,<sup>84</sup> one of the few domestic statutes of any nation designed to curb the exploitation of economic power through arbitration, illustrates National Socialism's advocacy of "controlled" arbitration.

#### BREAKDOWN OF LEGAL RESTRAINTS

The success with which cartels and international commercial interests have exploited "extra-territorial" arbitration necessarily engenders a com-

78. Statement by W. W. Nichols, president, American Manufacturers Export Association. *Joint Hearings before the Sub-Committee of the Committee on the Judiciary on S. 1005 and H. R. 646*, 68th Cong., 1st Sess. (1924) 32-3.

79. The commercial courts have been and are parts of the ordinary court system. Appeal may be taken in the ordinary way.

80. *Hearings before a Sub-Committee of the Senate Committee on Military Affairs on S. 1268*, 78th Cong., 2nd Sess. (1944) 437.

81. See Arnaud, *La Clause d'Arbitrage en France* (1935) 62 *JOURNAL DU DROIT INTERNATIONAL* (Clunet) 720, 721.

82. See note 80 *supra*. Cf. Cohn, *Commercial Arbitration and the Rule of Law, A Comparative Study* (1940) 4 *U. OF TORONTO L. J.* 1, 27.

83. A study of the KARTELL RUNDSCHAU shows the very broad application of the arbitration device in Germany.

84. The amendment, [1933] *REICHSGESETZBLATT* I 787, adding § 1025 II to the CODE OF CIVIL PROCEDURE, declared arbitration agreements to be "without any effect if any party to the agreement exploits its economic and social superiority for the purpose of compelling the other party to enter an arbitration agreement by virtue of which the compelling party would obtain a stronger position [than the other contractees] with respect to arbitration procedure, especially in the appointment or rejection of arbiters." The Kammergericht, however, subsequently ruled that these provisions were not applicable to cartel arbitration agreements, since market regulation by cartels was considered of greater importance than the purposes for which the amendment was enacted. See HEDEMANN, *DEUTSCHES WIRTSCHAFTSRECHT* (1939) 345. See also Decree against the misuse of economic power, Nov. 3, 1933, [1933] *REICHSGESETZBLATT* I 1067; Law on arbitration agreements in cartel contracts, Dec. 18, 1933, *id.* at 1081.

mon interest between nations in the character of their individual municipal law, since the law of one nation governing arbitration may now be imposed upon that of another. The failure of most legal systems, however, to recognize the ascendancy of arbitration as means of national and international market regulation, and to shape its operations in accordance with the demands of the public interest, has resulted in the yielding of successive judicial powers to arbitration tribunals. Only a few courts have resisted the trend, and those with little success. Everywhere, in the capitalistic world at least,<sup>85</sup> legal restraints upon arbitration have been relaxed.

*Independence of Tribunals.* A distinctive feature of the increasing power of arbitration tribunals is their independence of municipal law. In England<sup>86</sup> and the states of this country which have adopted the Uniform Arbitration Act,<sup>87</sup> conformity between the law as applied by arbitration tribunals and as applied by the courts has generally been believed to be assured by the right of the parties, in a proceeding pending before a tribunal, to have the case "stated" to a court for its binding legal opinion. However, in a recent English case, *E. E. & Brian Smith, Ltd. v. Wheatshaf Mills, Ltd.*,<sup>88</sup> the court largely overthrew this rule. The technical legal question of whether a buyer may ask for damages after requesting judgment entitling him to reject the goods was returned by the court to the arbitral tribunal for decision; the group of businessmen was deemed better equipped to interpret the "customs" and "habits" of trade than was the court. By reason of this precedent it is difficult to conceive either when "custom" purposefully evolved by an association would not succeed in place of the law of the land, or what legal rule is not included in this definition of "custom."

In those states of the United States which have not adopted the Uniform Arbitration Act, arbitration tribunals are not considered bound by the law of the land. In *Bryson v. Higdon*,<sup>89</sup> a North Carolina court stated simply that arbitrators are a "law unto themselves."<sup>90</sup> In other countries the development is moving in the same direction. In French, Belgian, Italian, certain South and Central American and some Portuguese courts (the so-called Latin group), as well as in the courts of a number of Swiss

85. Compare arbitration proceedings between the Russian government corporations and business organizations of capitalistic states under the German-Russian treaties of Oct. 12, 1925. See Wertheimer, *Das Deutsche-Russische Abkommen zur schiedsrichterlichen Erledigung Privatrechtlicher Streitfalle* (1926) ZEITSCHRIFT FÜR DEUTSCHEN ZIVILPROZESS 358.

86. The Arbitration Act, 1934, 24 & 25 GEOR. V., c. 14, § 9.

87. *E.g.*, Nevada, North Carolina, Utah, Wyoming. See *supra* note 7. For states adopting arbitration statutes of the New York type, see also *ibid.*

88. [1939] 2 K. B. 302.

89. 222 N. C. 17, 21 S. E. (2d) 836 (1942).

90. *Id.* at 19-20, 21 S. E. (2d) at 837.

cantons, arbitrators have, in the past, been considered "bound by the rules of law."<sup>91</sup> This principle, however, has been nullified by an interpretation which raises the presumption that whenever merchants agree to arbitrate they actually intend to subject themselves to *amiables compositeurs*, not *arbiters*.<sup>92</sup>

*Tribunals Adjudicate Validity of Contracts.* A second illustration of the courts' relaxation of controls over arbitration tribunals is the manner in which tribunals have been permitted to assume the prerogative of passing upon the validity of the very contract by which they have been established.<sup>93</sup> Cartel organizers formerly were concerned by the fact that the concept of freedom of contract alone did not completely immunize arbitration agreements from judicial interference,<sup>94</sup> arbitration tribunals could render awards enforceable in the courts only if the contract submitting controversies to the jurisdiction of the tribunal was valid in accordance with the rules of conflict of laws.<sup>95</sup> A means of overcoming this limitation upon the "extra-territorial" function of arbitration was devised by Heinrich Ehlers,<sup>96</sup> draftsman of international cartel agreements between American, British, and German manufacturers of low tension machinery. He sought to protect the cartel agreement and the awards made thereunder against challenges based on the anti-trust legislation of the United States. Excision of the arbitration clause from the cartel agreement proper and its inclusion in a special agreement, supposedly endowed by the parties with an independent existence, was the simple means to this end. Thus, it could be argued that the arbitration agreement remained in force even if the cartel agreement was judged void. In this scheme, Ehlers merely adopted the doctrine of separability developed by the Swiss courts, and thereby succeeded in making the arbitration tribunal the final judge of the validity of the cartel agreement itself.<sup>97</sup>

By employing two discrete pieces of paper, therefore, or merely by stating the intention that the arbitration clause contained in the principal agreement is to be considered distinct from the remainder of the contract, a tribunal may obtain power to decide whether the contract by which it was established is legal. The English courts, at least by dicta, have em-

91. Cohn, *supra* note 82, at 3-4, 13-4.

92. *Id.* at 4, 14. See *supra* p. 45.

93. See Hamburger, *Zur Frage der Kompetenz-Kompetenz der Schiedsgerichte in Zivil-, Handels-, und Arbeitssachen* (1931) 3 JAHRBUCH 152, especially 164.

94. See Meinhardt, *supra* note 25, at 460 and *passim*.

95. See *id.* at 466. The Geneva Protocol of 1923 as interpreted in *Goldschmitt v. Arn*, [1931] B. G. E., I 295, adopted this principle.

96. See Ehlers, *Praktische Gesichtspunkte fuer Schiedsabreden bei internationalen Dauervertraegen* (1931) 3 JAHRBUCH 215, especially 218.

97. See Nussbaum, *The "Separability Doctrine" in American and Foreign Arbitration* (1940) 17 N. Y. U. L. Q. REV. 609 *passim*.

braced this latter theory. In *Heyman v. Darwins*,<sup>98</sup> Lord Porter made the following statement: "If two parties purport to enter into a contract and a dispute arises whether they have done so or not, or whether the alleged contract is binding on them, I see no reason . . . if at the time when they purport to make the contract they foresee the possibility of such a dispute arising, they should not provide in the contract itself for the submission to arbitration of a dispute whether the contract ever bound them or continues to do so. . . . it may be true to say that such a contract is really collateral to the agreement supposed to have been made. . . ." <sup>99</sup> Thus, another judicial threat to the independence of action of arbitration tribunals is removed.

Although *foreign* tribunal decisions determining the validity of the principal contract containing an arbitration clause would appear to be enforceable in the United States under the *Burnstine* rule,<sup>100</sup> the question ruled upon by Lord Porter has not yet been raised in United States courts of higher instance, nor has the separability practice of employing two distinct documents received outright approbation.<sup>101</sup> A change of this character in the relation of arbitration to substantive law may have an important effect upon the relation between arbitration and governmental agencies normally charged with the control of certain contractual relationships. In *Kramer v. Uchitelle*,<sup>102</sup> a controversy arose concerning the compliance of a sales contract with an OPA order forbidding future delivery of "cotton gray goods" at a price exceeding the maximum "regardless of any . . . [prior] commitment." The seller refused to comply with the buyer's request for arbitration, maintaining that the contract, including the arbitration clause, was void if inconsistent with an OPA order. Chief Judge Lehman, urging in a minority opinion the right of an arbitration tribunal to decide the "effects of [the OPA rule] . . . upon the obligations assumed by the buyer and seller," declared that ". . . it seems clear

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98. [1942] A. C. 356.

99. *Id.* at 392. The Swiss Bundesgericht in *Goldschmitt v. Arn*, [1931] B. G. E., I 295, went so far as to rule, contrary to conflict-of-laws doctrine as declared in the Geneva treaty of 1923, that a German arbitration tribunal had the power to determine the validity of a contract made in Switzerland.

100. Since foreign tribunal decisions are enforceable if made in accordance with the law of the situs of the tribunal, foreign tribunal decisions affecting the validity of the principal agreement would be enforceable in this country.

101. Nussbaum has expressed the opinion that New York is adopting this practice. See *supra* note 97, at 615. He makes the further comment: "In discussing the separation practice, generally speaking, trade associations may develop a certain arbitration policy in order to counteract adverse legislative measures and to immunize the trade association." *Id.* at 613. In *Kulukundis Shipping Co. v. Amtorg Trading Co.*, 126 F. (2d) 978 (C. C. A. 2d, 1942), Judge Frank considers the possibility of an arbitration clause "sufficiently broad to call for arbitration of the dispute as to the existence of the charter party." *Id.* at 986.

102. 288 N. Y. 468, 43 N. E. (2d) 493 (1942).

that by agreement of the parties any controversy concerning the existence, scope or effect of the obligations assumed under the contract is a controversy 'arising under' the contract and also 'in relation' to the contract, and that such a controversy must be 'settled by arbitration' in accordance with the contract made by the parties."<sup>103</sup>

The majority, in giving judgment for the seller, however, did not uphold the arbitration clause, since there were no disputed arbitral facts in issue but merely the question of contract validity. The fact that a government agency was the limiting factor with respect to the contract may have influenced the court's decision, particularly in view of the difficulties raised by the similar circumstances of a German case decided in 1939.<sup>104</sup> There the Oberlandesgericht Muenchen was confronted with the decision of a cartel arbitration tribunal which had ordered a member to pay a fine for failure to comply with a cartel price rule; the rule in turn could be obeyed only by violating a regulation of the price commissioner. The court decided against the cartel member on the ground that the arbitration tribunal, while necessarily having knowledge of the price commissioner's regulation, did not by its finding establish any inconsistency between administrative and cartel rules. Doubtless it was not the court's intention to deprive the commissioner of the power to interfere in a cartel price-fixing scheme violative of his regulations, but, in respect to the relations between cartel parties, the court left the final decision on the effect of the price statute to the arbitration tribunal. At all events, it seems hardly material whether this principle of separability is ultimately adopted in the United States since, in view of the "extra-territorial" function of arbitration, the foreign practice upholding the principle will be enforced as the law of the land.

*Tribunals Take Jurisdiction of Public Instruments: Patents, Trademarks, Corporations.* One of the most conspicuous fields in which arbitration tribunals have usurped judicial control—and even control by government agencies—is in the realm of patents and trademarks, and, to a lesser extent, of corporation law. The supervision of these legislatively established instrumentalities, situated strategically for purposes of control in the public interest, has long been lodged with the courts. As long as courts with proper jurisdiction remain in a position to declare a patent void or unprotected against infringement, cartels or other monopolistic agreements using patent monopolies to exclude outsiders and patent licenses to control members must break down. Cartel organizers, therefore, sensing this threat and observing the truth of the statement that a patent is "little more than a certificate which gives its holder the right to go into court and sue for infringement,"<sup>105</sup> have sought to bring infringement

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103. *Id.* at 474, 43 N. E. (2d) at 497.

104. 14 KARTELL RUNDSCHAU 288. The decision is dated February 13, 1934.

suits, as well as litigation involving priority and validity of patents, under the jurisdiction of arbitration tribunals. Wedded to arbitration, the patent takes on a new regulatory significance. Cartel members may agree among themselves, and with customers or other contractees of their members, that litigation referring to certain patents is to be submitted *exclusively* to the cartel tribunal. It is true that an award by a tribunal affecting the validity of patents binds only the parties to the case, together with those who, under pertinent contractual obligations or the provision of by-laws, are bound to recognize such a decision. This means that, while the "public-at-large" is not bound, the entire trade constituting the cartel is so obligated. Although an award growing out of an interference proceeding before a tribunal does not bind the Patent Office, it is questionable who would have standing to contest an arbitration decision if all the principal parties in interest were already before the tribunal.

Organizers of national and international cartels have reason to regard tribunal patent decisions as enforceable and a guarantee of the continued use of patents as instruments of cartel control. The decision in *Cavichi v. Mohawk Manufacturing Company*<sup>106</sup> is indicative in this respect. The parties had agreed that certain patent litigation which might arise should be decided by arbitrators. When one of the parties refused to comply with the tribunal award adjudicating him an infringer, a bill for enforcement of the award was filed under Article 84 of the New York Civil Practice Act. The defendant objected that a decree granted upon such a bill would interfere with the provision of Article I, Section 8 of the Federal Constitution, giving the United States exclusive jurisdiction in patent matters. The Supreme Court, following the decision of the New York court,<sup>107</sup> ruled that the issue was not a patent but an arbitration problem and that the states had jurisdiction in all arbitration matters within their own boundaries, whatever the substance of the case decided by the arbitration tribunal. Although it is not at all certain that the court would have come to the same conclusion in a bill for the specific performance of the arbitration agreement had the defendant not appeared before the tribunal,<sup>108</sup> this decision

105. HAMILTON, TNEC REP., PATENTS AND FREE ENTERPRISE, MONOGRAPH 31 (1941) 129.

106. 308 U. S. 522 (1939).

107. 281 N. Y. 54, 22 N. E. (2d) 233 (1939).

108. See Robb, *The Arbitration of Patent Controversies* (1942) 6 ARB. J. 217. Mr. Robb comments: "I may say that I believe that Sec. 2 and 3, 43 Stat. §§3 [9 U. S. C. §§ 2, 3] . . . afford ample ground for compelling enforcement of arbitration agreements affecting patents irrespective of the manner in which the courts have heretofore interpreted this section of the Statute." *Id.* at 225. But see O'Brien, *Enforcement of Arbitration Agreements in Infringement Disputes* (1940) 22 J. PAT. OFF. SOC. 289. Mr. O'Brien believes that under the present federal statute, agreements to arbitrate controversies affecting the validity and infringement of patents are beyond the scope of arbitration agreements that otherwise may be specifically enforced. *Cf. Zip Mfg. Co. v. Pep Mfg. Co.*, 44 Fed. (2d) 184, 185 (1930).

has become the basis of present active propaganda<sup>109</sup> in favor of wide adoption of arbitration in patent disputes between two or more industrialists. Moreover, the case indirectly opens the way for arbitral decision as to the validity of the patent, since this is a determination inherent in a suit for infringement.<sup>110</sup>

Cartel interests have even attempted to employ arbitration in an effort to deprive the Patent Office of its traditional function of determining priority among inventions. In *Hartford Empire Company v. United States*<sup>111</sup> the defendant glass manufacturers, Hartford Empire Company and Owen-Illinois Company, agreed to resolve any patent controversy among themselves. Ostensibly to consider evidence of priority, two arbiters were appointed, but, as stated in the brief for the United States, "while thus acting as a private tribunal for the settlement of their conflicts by negotiation designed to obtain the strongest patents for the pool, rather than by arbitration, Hartford and Owens informed the Patent Office that they intended to arbitrate the pending interferences in order to show that the 'Owens-Hartford controversies are not being settled without a consideration of the evidence in each case.' Another reason was to conceal the fact that Hartford and Owens were using the ostensible arbitration proceeding to settle interferences in a manner most beneficial to them, regardless of the evidence of priority."<sup>112</sup> As a result, out of 138 interferences only 8 were decided through award of priority as established by evidence available to the Patent Office.

International cartel organizers and the friends of domestic patent arbitration<sup>113</sup> profess to believe that the public interest is sufficiently protected by the mere possibility of an infringement suit or other court proceeding brought by or against persons outside the cartel organization. The relevance of public interest to private patent suits and the objection to the solution of any patent case by purely private tribunals on grounds of public interest becomes clear in Judge Jerome Frank's dissenting opinion in *Aero Spark Plug Company, Inc. v. B. G. Corporation*.<sup>114</sup> "As we said recently in *Picard v. United Aircraft*,"<sup>115</sup> stated Judge Frank, "there is more at stake [in a patent case] than the issues between the two parties. The decision of my colleagues relieves appellee but leaves appellant free

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109. The Arbitration Association has taken a prominent part in this respect. See (1943) 1 ARBITRATION IN ACTION, Nos. 7-8 (July-Aug.) 3.

110. See Deller, *The Use of Arbitration in Patent Controversies* (1938) 2 ARB. J. 399, 402.

111. 46 F. Supp. 541 (D. Ohio 1943).

112. Brief for the United States, *supra* note 21.

113. See Deller, *supra* note 110, at 409.

114. 130 F. (2d) 290, 292 (C. C. A. 2d, 1942).

115. 128 F. (2d) 632, 641 (C. C. A. 2d, 1942). See also *Radtke Patents Corp. v. Coe*, 122 F. (2d) 937 (App. D. C. 1941).

to sue others as alleged infringers, putting them to the expense—notoriously great in patent suits—of defending themselves. It is well-known that threats of such suits, because of that expense, often induce alleged infringers to accept licenses on onerous terms rather than to engage in litigation. As the exercise of a patent monopoly is publicly injurious when an invalid patent remains at large, the public interest is therefore deeply involved. And as, under the existing patent statute and decisions, no one on behalf of the public can institute a suit to have a patent declared invalid we should, I think, avail ourselves of this opportunity to wipe out the patent. . . . An invalid patent masquerading as a valid one is a public menace.”<sup>116</sup> In the *Morton Salt* case<sup>117</sup> the Supreme Court fully realized the scope of the public interest properly intrusted to courts in patent matters. Under the rule of this case a patentee may base no complaint upon a patent if it is used beyond the authorized grant. The rule is applicable not only where a party to the suit has been damaged by such violation, but equally where damage has occurred either to any other individual or to the public at large. Arbitration agreements relating to patents would seem to frustrate the effect of this decision no less than they frustrate control by the courts.<sup>118</sup>

In the trademark field manipulation of tribunal decisions to the detriment of court and government control has been largely the same as in the field of patents. Cartels seek to defend trademarks<sup>119</sup> employed as certificates of cartel membership,<sup>120</sup> as well as the trademarks of their leading members, against the allegation that such trademarks are of generic character and therefore not within trademark law. A German case<sup>121</sup> illustrates the extent of this protection. The Reichsgericht ruled in 1931 that the trademark “Naehrbier” registered by a German brewery was generic and should be stricken from the register. Subsequently the defendant continued to employ the term “Naehrbier” and included it among his regis-

116. 130 F. (2d) 290, 292 (C. C. A. 2d, 1942).

117. *Morton Salt Co. v. Suppiger Co.*, 314 U. S. 488 (1942).

118. In patentee-licensee agreements arbitration has also been used to effect the same purpose. In *Galion Iron Works & Mfg. Co. v. Adams Mfg. Co.*, 128 F. (2d) 411 (C. C. A. 7th, 1942), the court impliedly declared valid the contractual provision “that the arbiter should be vested with sole authority and power to receive, consider and decide upon any complaint presented by either party claiming violation of the licensed contract with respect to prices, terms of sale and payment of royalties. If the arbitrator should find that the contract had been violated in any of these respects he was authorized to assess as liquidated damages and not as a penalty less than 100 per cent or more than 500 per cent of the total royalty payments payable.” *Id.* at 413. For the effect of price restrictions imposed by licensee agreements of this kind see Meyers and Lewis, *The Patent Franchise and the Anti-Trust Laws* (1941) 30 GEO. L. J. 117.

119. See Diggins, *Trademarks and Restraints of Trade* (1943) 32 GEO. L. J. 113, 114.

120. See, e.g., *Crofter Harris Tweed Co. v. Veitch*, [1942] 1 All Eng. 142, 145 (H. L.).

121. See (1934) 34 MITTEILUNGEN DER DEUTSCHEN PATENTANWAELTE 285. The word “Naehrbier” means beer with food value.



tered trademarks. Other brewers followed suit, using the trademark in accordance with the promulgation of the Reichsgericht. By 1934 all German brewers, including the plaintiff and the defendant, had become members of an association whose by-laws contained a general arbitration clause. The plaintiff in the earlier case now brought before the arbitration tribunal of the association a new suit against a brewer who used the word "Naehrbier," seeking a declaratory judgment to the effect that the term "Naehrbier" was not generic and that defendant be enjoined from using it. The tribunal, comprising well-known persons in the brewery industry, decided in favor of plaintiff, thus reviving the trademark extinguished by the Reichsgericht. It seems plain, therefore, that as long as any potential party at interest was bound by the "law" of the organization, the refusal of state authorities to register the trademark lost any practical significance. Had the defendant brought suit in the courts for annulment of the arbitration decision, he might have met with success, but his relations with his association would have been jeopardized.

The facility with which arbitration has tended to undermine control by courts and governmental agencies in patent and trademark problems, may serve as some warning of a similar evolution in the field of corporation law. The corporation, though the nerve center of private business on the one hand, is subject, as an entity created by the state, to legislative restrictions which give it in part the character of a public instrumentality similar to a patent. Although there have been too few cases to clarify the position of American courts, historical precedent has shown that legislation designed to control corporate activities may be nullified through the use of arbitration and the substance of corporate law changed to the detriment of the public control of corporations. This was the fate of the so-called Bubble Act<sup>122</sup> in England during the eighteenth century. According to Mr. DuBois,<sup>123</sup> its restrictions on corporate business following a period of disastrous speculation were entirely abrogated by practices such as that used by the South Sea Company in adhering to its own board of arbitrators, a system so successful "that the business corporation appeared in the courts relatively infrequently. . . . Legal issues were decided by counsel opinions or by submission of disputed points to arbitrators."<sup>124</sup>

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122. 6 GEO. I, c. 18 (1719). Cf. 3 MAITLAND, COLLECTED PAPERS (1911) 90.

123. DUBOIS, THE ENGLISH BUSINESS COMPANY AFTER THE BUBBLE ACT (1938) 2 *et seq.*

124. *Id.* at 125. It should be noted, however, that in the same period the East India Company regarding itself as a public body expressed the view that "Arbitration, though in general it may be suitable in disputes between individuals, yet is certainly not well calculated for public bodies and least of all, for the East India Company, if we consider the solemn obligation entered into by the directors. . . . To assign the power of such decisions to others, would be assigning away the rights of the proprietary and acknowledging the directors to be unequal to the trust imposed in them. . . . The company has generally, and from an early period . . . systematically resisted the interference by arbitration or otherwise of extraneous persons in their affairs." *Id.* at 204, n. 287.

A trend in this direction may be indicated in a New York case<sup>125</sup> involving the balance of power between stockholders. Two plaintiffs and defendant, the sole stockholders of a small firm, had agreed to retain one another in a position with the company for life provided faithful service was rendered, and to arbitrate any disputes according to the rules of the American Arbitration Association. When the plaintiffs, representing a majority of the board of directors, discharged the defendant, he appealed to the arbitration tribunal which by reason of several complications for which the parties were not responsible was unable to complete the arbitration. A new demand for arbitration was interposed by the defendant, but the plaintiffs sought redress in the courts, declaring the arbitration clause void and inconsistent with public policy. They reasoned, apparently, that arbitration used in this connection was contrary to the legislative sanction establishing and controlling corporations and, moreover, that the creditors of a corporation had an interest in good management which could not be protected by a tribunal established solely by three stockholders. In finding the arbitration clause nevertheless valid and enforceable, the court seems to have passed over a self-evident fact: that creditors, representing the public, have an inherent interest in any transaction governing the conduct of a corporation. And this seems no less so in the case of a small corporation than in a large one, since in both instances actual management is in the hands of a few. The natural consequence of decisions of this kind may be the evasion of the public responsibility of corporate organizations through the medium of arbitration. An even bolder approximation of this end is indicated in the English case, *Beattie v. L. F. Beattie, Ltd.*,<sup>126</sup> in which the court declared lawful provision in the "articles of association" that "a dispute between the company and a member shall be referred to arbitration."<sup>127</sup>

*Principle of Revocability of Arbitration Agreements Overthrown.* The limiting principle that arbitration agreements are revocable is everywhere subject to attack even in the case of common-law arbitration. Arbitration is effective as a tool of trade associations or cartels only where persons agreeing to arbitrate are bound to submit future as well as present controversies to arbitral tribunals. To achieve a degree of moral and legal persuasiveness in attaining this end, advocates of arbitration advance the theory that negotiation with respect to *future* controversies is a contractual matter clothed with the sanctity of "freedom of contract," and that decisions based upon agreements arising therefrom have the authority of the *stare decisis* rule. Although this type of negotiation may have the appearance of contract, the appearance is deceptive since true contractual relations postulate the absence of economic duress, a condition

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125. *Martocci v. Martocci*, 42 N. Y. S. (2d) 222 (Sup. Ct. 1943).

126. 159 L. T. R. (n. s.) 220 (Ch. 1938). See (1938) 82 SOL. J. 521.

127. 159 L. T. R. (n. s.) 220, 222 (Ch 1938).

inimical to the aims of cartel organizers. Moreover, characterization of arbitration agreements of this type as solely a matter of "freedom of contract," is incompatible with the traditional reluctance of English courts to permit persons to agree to "keep out of court."

Pro-arbitration groups, however, buttress their position by suggesting that the traditional English dislike of arbitration agreements<sup>128</sup> has its origin not in any legal arbitral defect but in the desire of judges to prevent loss of income, since decisions disfavoring irrevocable agreements to arbitrate and the dictum from which they sprang<sup>129</sup> were decided at a time when salaries were still largely derived from fees.<sup>130</sup> Another explanation, offered by Judge Frank,<sup>131</sup> is that the courts shortly after Coke's day succumbed to the "hypnotic power" of the phrase "oust the jurisdiction."<sup>132</sup>

128. The early English history of arbitration is somewhat obscure. See COHEN, *COMMERCIAL ARBITRATION AND THE LAW* (1918); Sayre, *Development of Commercial Arbitration and the Law* (1927) 37 *YALE L. J.* 595; Jones, *Development of Commercial Arbitration* (1927) 12 *MINN. L. REV.* 240, 243-4. From the seventeenth to the nineteenth centuries, the courts showed little favor to irrevocable agreements for submission of disputes to arbitration. While revocable agreements were permitted, their enforcement was first secured by a bond and later by damages. This type of enforcement did not have the same effect as an irrevocable agreement, since the courts ultimately permitted the recovery of only nominal damages, the theory being that no injustice could be done in forcing submission to the King's courts. See Lorenzen, *Commercial Arbitration—International and Interstate Aspects* (1934) 43 *YALE L. J.* 716, 716-8; Opinion of Judge Jerome Frank in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. (2d) 978, 982-4 (C. C. A. 2d, 1942).

129. *Vynior's Case*, 8 Co. 80a-83a (1609), 1 *Brownlow & Goldesborough* 64, 2 *Brownlow & Goldesborough* 290. A bond was given for the faithful performance of an arbitration agreement. Lord Coke permitted the plaintiff to recover on the bond upon breach of agreement, but observed that "a man cannot by his act make such authority, power, or warrant [to arbitrate] not countermandable which is by the law and of its nature *countermandable*" (emphasis supplied). See Cohen, *op. cit. supra* note 128, at 84-170; Lorenzen, *supra* note 128, at 716.

130. See Judge Frank in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. (2d) 978, 983 (C. C. A. 2d, 1942). Judge Frank's suggestion is derived from comments by Lord Campbell in *Scott v. Avery*, 5 H. L. Cas. 811, 853, 25 L. J. 308, 313 (Ex. 1856), overruling the dictum of *Vynior's case*. Compare dictum in *Park Construction Company v. Independent School District No. 32*, 209 Minn. 182, 185, 296 N. W. 475, 477 (1941): "The historical and only basis for the opinion that executory agreements to arbitrate all issues to arise under a contract are void, as against public policy, is open to serious question. There is eminent authority . . . that the rule was a product of judicial jealousy rather than judicial reasoning." See also COHEN, *op. cit. supra* note 128, at 253 *et seq.*; Sayre, *supra* note 128, at 609.

131. See *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F. (2d) 978, 984 (C. C. A. 2d, 1942).

132. In explaining the traditional position against arbitration, of which he disapproved, Lord Campbell stated: "Where an action is indispensable, you cannot oust the Court of its jurisdiction over the subject, because justice cannot be done without the exercise of that jurisdiction. That is all, and there is no doubt about that. This is the foundation of the

Appeal to historical example is often tenuous, but even in the particular instance chosen, *Vynior's* case,<sup>133</sup> no theory of judicial rapaciousness is necessary to explain Coke's dictum; it merely conforms with the law of the period.<sup>134</sup>

Nevertheless, such has been the success of these arguments that few modern cases support the older English view.<sup>135</sup> In *Park Construction Company v. Independent School District No. 32*<sup>136</sup> the court declared that a Minnesota statute containing an arbitration clause which covered future litigation only within a specified scope should be interpreted as permitting unlimited scope to such clauses. "It is enough," stated the opinion, "that the legislature has declared for arbitration, both statutory and common-law. That fixes the policy of this state for, rather than against, arbitration."<sup>137</sup> This decision indicates even with respect to common law the final removal of the means by which courts may curb the execution of agreements designed to submit all forms of litigation to arbitration. Far from inhibiting the growth of arbitration by succumbing to the "hypnotic power" of legal phrases, the present-day courts have been more inclined to respond to the hypnotic power of "independent arbitration."

*Principle of Impartiality Weakened.* Arbitration tribunals have also sought escape from judicial restraint by attempting to attenuate the established principle of "impartiality of judges." In the famous case of *Dr. Bonham*,<sup>138</sup> Lord Coke rebuked the censors of the Royal College of Physicians for imprisoning a physician who had practiced his calling without a license. "The censors were to receive one-half of the fines," states the opinion, "and therefore are not only judges but parties in any case that comes before them. It is an established maxim of common law that no man can be judge in his own case."<sup>139</sup> In startling contrast appear the words of a modern court of review in *First National Bank v. Clay*<sup>140</sup>: "All

doctrine that the Courts are not to be ousted of their jurisdiction." *Scott v. Avery*, 5 H. L. Cas. 811, 853, 25 L. J. 308, 313 (Ex. 1856). For use of this doctrine see, *c.g.*, *Kill v. Hollister*, 1 Wils. 129 (K. B. 1746).

133. 8 Co. 80a-83a (1609).

134. Under Roman and canon law from which the English tradition in arbitration seems to have been derived, the forfeiture of a bond because of a condition broken through *revocation* of an agreement to arbitrate would appear to be the rule as well as in *Vynior's* case. See Sayre, *supra* note 128, at 597. For discussion of arbitration in Roman law see BUCKLAND AND McNAIR, *ROMAN LAW AND COMMON LAW* (1936) 316, 327.

135. One of the few cases is *McKenna Process Co. v. Blatchford Corp.*, 304 Ill. App. 101, 25 N. E. (2d) 916 (1940).

136. 209 Minn. 182, 296 N. W. 475 (1941).

137. *Id.* at 187, 296 N. W. at 478.

138. *Bonham's Case*, 8 Co. 114a (1610).

139. Thorne, *The Constitution and the Courts: A Reexamination of the Famous Case of Dr. Bonham* in READ, *THE CONSTITUTION RECONSIDERED* (1938) 15, 19-20.

140. 231 Iowa 703, 2 N. W. (2d) 85 (1942).

authorities agree that any person whosoever may be chosen to fill the position of arbitrator. . . . It may not be the wise thing to do, but no legal reason suggests itself to us why the two parties may not choose a third person to act with them as a board of arbitration. Choosing arbitrators wholly disinterested is an admirable standard to aspire to, but the parties seldom do that, and if all awards were set aside in which it was not done, few awards would stand."<sup>141</sup> Thus, the theory of separability of documents finds its counterpart in the theory of the separability of a man's mind: the separation of his judgment from his commercial interests. In *Seaboard Surety Company v. Commonwealth*,<sup>142</sup> a Pennsylvania court considered as well-established "the practice of making a state or municipal official arbitrator of a controversy arising between state or municipality and a contractor." The next logical step came in the English case, *Smith, Ltd. v. Wheatsheaf Mills, Ltd.*,<sup>143</sup> where the House of Lords expressly approved the London Corn Trade Exchange practice of establishing for the final decision of litigation an appeal committee composed of members of the exchange. Indicative of the trend in the same direction is a decision of the German Kammergericht<sup>144</sup> holding a person a proper member of a cartel arbitration tribunal notwithstanding the fact that he was also a member of the cartel management. The basis for the decision was that the functions performed in cartel management were exercised not by the individual per se but in his capacity as a member of the corporation board to which the management had been entrusted.<sup>145</sup> The president of a German cartel, experienced in the actual operation of organized arbitration and viewing in 1925 such decisions with alarm, appealed to public and government alike to remedy this kind of "impartiality" which, if unchecked, would place in jeopardy the public faith in justice.<sup>146</sup>

*Self-Enforcement of Awards.* Although it is usually assumed that the recipient of an arbitration order is *legally* free to disregard its directions until forced to submit by decision of a court,<sup>147</sup> the emergence of a self-enforcement policy in connection with tribunal orders represents the final breach between arbitration and the law. A recent writer claims that because of differences in national legislation international commercial arbitration must rely "upon moral rather than upon legal sanction."<sup>148</sup> It

141. *Id.* at 716, 2 N. W. (2d) at 92.

142. 345 Pa. 147, 152, 27 A. (2d) 27, 29 (1942).

143. [1939] 2 K. B. 302.

144. Feb. 4, 1938, (1938) 18 KARTELL RUNDSCHAU 417.

145. See INTERNATIONAL LAW ASS'N, *loc. cit. supra* note 33.

146. See (Germany, 1926) 31 DEUTSCHE JURISTENZEITUNG 500, 502. For discussion see CALLMAN, DEUTSCHES KARTELLRECHT (1934) 237.

147. See KELLOR, *op. cit. supra* note 7, at 139.

148. RIDGEWAY, MERCHANTS OF PEACE, TWENTY YEARS OF BUSINESS DIPLOMACY THROUGH THE INTERNATIONAL CHAMBER OF COMMERCE, 1919-1938 (1938) 317.

would appear, however, that it is not "moral consideration," but an effective self-enforcement policy that influences the "honest business man" in obeying the orders of the arbitration tribunal. This, indeed, is the basis of Mr. Young's system of "arbitration outside the law," as is well demonstrated in the *Merrifield-Ziegler* case.<sup>149</sup> In dismissing a petition to declare the agreement between the Liverpool Cotton Association and the Bremen Exchange void, an agreement requiring expulsion of the recalcitrant members of either association, the Chancery Division made the following statement:

"[The agreement] . . . is, according to the evidence, the result of attempts to bring Continental associations formed in the interests and for the protection of the cotton trade into line with the association, and to inaugurate between the members of the association and of the Continental associations a code of dealing and conduct similar to that already obtaining between the members of the association *inter se*. The importance of Liverpool, as the controlling centre of the cotton trade in Europe, necessarily results in members of the association being in constant contractual relationship with traders on the Continent, and, experience having demonstrated the difficulties not infrequently arising in enforcing judgments and awards out of the jurisdiction, the association determined to take steps to remove these difficulties and to facilitate the settlement of disputes with foreigners and the obtaining of prompt settlement of claims for payment and damages, and, by making the advantages reciprocal, to secure and retain the confidence of Continental buyers. This policy . . . falls . . . within the powers of the . . . memorandum of association."<sup>150</sup>

This decision leaves to American courts the question of the validity of the Merrifield-Ziegler type of agreement under the anti-trust laws. The closest analogy is to be found in *Paramount Famous Lasky Corporation v. United States*,<sup>151</sup> where the Supreme Court condemned as suppressing normal competition an arrangement whereby the organized motion picture industry obliged its members not to do business with any firm which refused to sign a standard contract. Disregard of arbitration awards was made punishable in the *Paramount* case by requiring the offenders to furnish substantial guarantee funds before permission was granted to resume business relations with members of the industry. Only slight differences appear in the Ziegler type agreement and the motion picture arrangement. In the latter the self-enforcement of awards is a part of the buyer-seller arrangement, whereas in the *Ziegler* case it is conditioned upon

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149. *Merrifield, Ziegler & Co. v. Liverpool Cotton Ass'n*, 105 L. T. R. (N. S.) 97 (Ch. 1911).

150. *Id.* at 104.

151. 282 U. S. 30 (1930).

the actions of participating trade associations not directly connected with the sales contract. From the point of view of anti-trust legislation there is no discernible difference between the two self-enforcement systems. It is not inconceivable, however, that unless the prevailing favorable attitude toward the arbitration device is modified, this slight distinction may serve as grounds for sanctioning the Ziegler type of self-enforcement. American firms need not become direct participants in an expulsive scheme inconsistent with the anti-trust laws. The disciplinary compulsion is accomplished indirectly. In international commerce in raw materials it is sufficient that the *foreign buyer* alone be governed by the rules of an association—as set out in the *Ziegler* case. Whenever he deals with an offending American firm he is immediately expelled from his trade association with the result that American firms which fail to comply with foreign association rules suffer restricted trade relations. An American seller, therefore, is as much subject to conditions dictated by foreign associations as though he were directly within their jurisdiction. To attack this formidable restraint in trade by means of anti-trust legislation presents the gravest difficulties. Yet evasions of this kind are dangers which should not be discounted.<sup>152</sup>

#### CONCEPTS OF LAW UNDERLYING MODERN ARBITRATIVE DEVELOPMENT

Franz Klein, at the beginning of the century, sanguinely envisaged a great expansion of arbitration, ultimately penetrating the law with far-reaching effect comparable to the historical rise of equity.<sup>153</sup> Already arbitration has intruded far into the legal system, but the analogy with equity seems ill-advised. No theory in support of organized arbitration can conceal the essential "lawlessness" of this form of "private government." Equity, on the other hand, originally inspired by the church, strengthened the legal process by drawing it closer to the demands of natural justice. Law and equity together, under the control of persons devoted to the service of the state, became elements of social coordination; organized arbitration, serving no "social justice," has become an element of dissolution. Supporters of arbitration have argued, nevertheless, that social justice may be served through organized groups and tribunals, citing as examples city and feudal tribunals of the Middle Ages. But this contention appears to overlook the fact that in the mediæval hierarchy of organizations duty and obligation played a prominent part, the lower levels of society adhering to upper levels and both reaching the supreme'

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152. See Kronstein, *Industrial Combinations and the Law* (1943) 31 GEO. L. J. 381, *passim*.

153. KLEIN, VORLESUNGEN UEBER DIE PRAXIS DES CIVILPROZESS (1900) 13-6.

object of obedience in the sovereign. In contrast, exponents of modern arbitration are bound only by common commercial interest, and if their policies are consistent with the social or political ideals of a nation it is more likely the result of accident than of design.<sup>154</sup>

Even religious history has been suggested as a source of ideological support for arbitration.<sup>155</sup> Sanction for the avoidance of courts has been found in the fact that not only the Jewish tradition preferred Rabbinical scholars as judges to professional judges, but early Christian doctrine also distrusted secular courts.<sup>156</sup> Nevertheless, these arguments would seem to work against themselves: Christian judges and the scholars of Torah were preferred because they considered themselves *bound* by law whereas pagans and professional jurists often did not.

Divorced from an ideal of social justice and designed to avoid the law, modern arbitration would seem to rest basically upon Kelsen's theory of law.<sup>157</sup> This neo-Kantian view emphasizes the cleavage between the moral and social order, on the one hand, and "the law" on the other. Since there is no relation between the two according to this theory, persons in a position to exert political or legislative power would seem to be justified in creating the kind of law most suited to their needs. Arbitration seems clearly a product of this type of thought. It is questionable, however, whether Kelsen's additional principle that the "law" is identical with the "state"<sup>158</sup> gives adequate protection against abuse by private groups. Such a principle would seem to require an ethical standard of "justice" which Kelsen considers irrelevant in this connection. Left to its own recourse, the "state," in the Kelsen philosophy, becomes as morally without purpose as the "law," and both become neutered instruments of groups in a position to exercise power. Modern realism, on the other hand, encourages accepting as "law" any *effective* rule of society. According to this view, whatever arbitration itself effectively accomplishes, even if accomplished through a system of "private government," must be regarded as the "law." A constructive service might be contributed by realists if this broad approach were encouraged as a means of analyzing the phenomena of socio-legal institutions, but without necessarily requiring acceptance of the ultimately disclosed facts as "law."

However classified, the underlying concept of law which permits the development of the Young system to its present stage is colorless and with-

154. See Nazi utilization of arbitration, note 84 *supra*.

155. For the first reference to this suggestion see PUCHTA, *DAS INSTITUT DER SCHIEDS- RICHTER* (1823) 7.

156. See reference to St. Paul, *ibid*.

157. See Kelsen, *The Pure Theory of Law And Analytical Jurisprudence* (1941) 55 HARV. L. REV. 44.

158. See KELSEN, *STAATSLHRE* (1925) 108.



out aim. Having no task it is a ready tool of those who would make use of it. Although totalitarian nations represent an extreme instance of the unprincipled use of this tool, in substance the distinction between this and present non-totalitarian understanding of the relation between state and law is a matter of degree.

#### CONCLUSION

An instrument of cartels and monopolistic trade associations, modern arbitration appears not only to be incompatible with general concepts of positive law, but even to attack in principle the practical mandates of the Constitution. To effect protection of individuals against the unlawful exercise of "judicial power," the scope of the due process clause must not be limited to acts of formal "judicial" bodies. It must include acts of organizations which attempt to usurp judicial power. To a certain degree the courts have unlawfully exercised judicial power—or failed to exercise it—in condoning this usurpation. Although the difficulty of restoring arbitration to its original function as a device for settling disputes between individuals—a device limited and circumscribed without touching wider interests than those of the parties involved—seems insurmountable in the light of the present highly organized economy, the restoration of arbitration to a function "within" rather than "outside" the law seems a goal of paramount importance. Court procedure must be expanded and made sufficiently effective to serve the public interest as well as justifiable demands of modern business. Until this is accomplished, both by domestic legislation and international convention, the public and the government should be assured that organized arbitration does not violate principles of law, social justice and national interest. Temporarily, it is suggested that the rule enunciated in the *Paramount-Famous Lasky* case be enforced; that government and private parties be permitted the right to appeal to the courts in all arbitration cases provided the public interest is affected;<sup>159</sup> that the right to a declaratory judgment be assured in order to determine whether trade customs under the control of trade associations or monopolistic enterprises are consistent with general principles of law; that licenses be granted by courts to business organizations appearing before foreign tribunals or engaged in complying with foreign tribunal awards or compromises; that the *Burnstine* and *Silverbrook* rules be abolished. Immediate legislative action to prohibit entirely the use of arbitration in connection with patents, trademarks, and the law of corporations is also necessary. A similar prohibition would insure the immunity of government

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159. A sensible exercise of this right depends upon opening files and tribunal sessions to government representatives.

agencies from proceedings before arbitration tribunals,<sup>160</sup> a type of procedure advocated by some as an efficient means of terminating war contracts.<sup>161</sup> Not the least of the tasks confronting government and private research organizations alike is the further examination of the problems touched upon here: the success of the Young system in domestic and foreign business relations, the extent to which it has changed or abrogated common and statutory law, and, lastly, the deficiencies of court procedure which have contributed with manifest success to the development of arbitration "outside the law."

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160. That the government itself is immune from arbitration seems probable from the decision in *United States v. Ames*, 24 Fed. Cas. 784, No. 14,441 (C. C. Mass. 1876), where a government official was not permitted to submit to arbitration for the reason that the Constitution prohibits the vesting of judicial power in any court except one established under Article III. The question as to whether Congress may authorize executive agencies to submit to arbitration appears to have been answered in the negative. *Hearings before a Sub-committee of the Senate Committee on Military Affairs on S. 1268*, 78th Cong., 2d Sess. (1944) 435, 437.

161. See the proposals made by the American Arbitration Association. *Id.* at 437. Congress appears to have been sufficiently persuaded to permit an exception allowing the submission of government agencies to arbitration in war contract cases.