LAW AND CONTEMPORARY PROBLEMS

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FOREWORD

During the past decades commercial arbitration has firmly established itself in this country and abroad, both in common and civil law jurisdictions, as a method for handling and settling certain types of disputes, many of which might otherwise have been tried in the regular courts. The courts, themselves, at times reluctantly and only after considerable statutory prodding, have finally, to a large extent, recognized the general validity of the arbitration process, and now lend their aid to the enforcement of the contract clauses and procedures of arbitration. It is not, therefore, the purpose of this symposium,[1] which is, for the most part, limited to commercial as distinguished from labor arbitration, to reopen any of the formerly much debated issues growing out of judicial hostility and distrust of arbitration because of its alleged ousting of the jurisdiction of the courts.

Having acquired statutory, judicial and commercial sanction, arbitration today faces new and difficult problems, some of which this symposium attempts to explore. For example, how useful might arbitration be in areas of commercial law other than those of private contracts between individuals? Might it reduce the often appalling expenses, complexities, and delays in patent infringement proceedings? Would it offer a fresh and helpful approach to the thus far largely unsolved problems of enforcing and policing the many antitrust decrees which in effect are regulations of various aspects of the far-flung operations of a national industry, such as the distribution of moving pictures? What about introducing arbitration into contracts between the government and its suppliers? What are the legal and policy objections which have thus far prevented its use in such contracts, even in periods when the government, as in World War II, is the largest single purchaser, directly or indirectly, of the products of our economy? Is the "Disputes" article and procedure of the standard government contract as satisfactory as modern arbitration?

Other problems arise from the increasingly nationwide and world-wide use of arbitration in commercial agreements. To what extent will or must American state courts recognize and enforce either arbitration agreements or awards (including judgments thereon) which have been made or are to be carried out beyond the jurisdiction of these courts? What are the requirements, if any, of due process and full faith and credit here? What happens when the award is made or is to be

[1] This symposium is being published in two parts, the second of which will appear in the Autumn, 1952, issue.

executed in a foreign country? How will the courts of that country treat American arbitration clauses and awards and what recognition will American courts give foreign clauses and awards? What has happened to arbitration in Great Britain, which, at least at one time, was generally believed to lead the world in the development of systems of commercial arbitration?

How adequate are the arbitration statutes in force today in this country? In particular, is the Federal Act, virtually unchanged since its adoption many years ago, still satisfactory, or does it need amendment, judicial or legislative, to broaden its scope and coverage beyond those transactions involving maritime matters and commerce and to clarify its relation to modern collective bargaining agreements?

What about the actual drafting of arbitration clauses for contracts? How satisfactory are the various standard forms now so widely used?

Finally, granting the merits of arbitration, two fundamental questions continually arise. First, how determine when to use arbitration, and when to use other methods, judicial or administrative, for the settlement of future or present disagreements? Are there any criteria that are helpful in making this decision? Second, to what extent does arbitration represent but one phase or step in a potentially much more significant tool for our modern economy—namely, the regulation and policing of an industry or social group, not directly by the state through an administrative agency with manifold rules and regulations, but instead by the industry or group itself, organized and functioning with the approval and under the general supervision of the state? The experience of the SEC with over-the-counter trading of securities, described in one article in this symposium, is an excellent example of this. Arbitration has been called a system of self-government. Might it not be utilized by the state, with proper safeguards, to obviate through proper self-policing by the group itself the need, in certain cases, for state regulations and controls?

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