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## THEORY OF THE ARBITRATION PROCESS

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### I

#### SUMMARY

It is the thesis of this article that the arbitration process is voluntary and consensual in origin, that it is the judicial organ of systems of law not of universal application which have emerged in our complex, industrial society but the existence and significance of which have not yet been fully realized, that the proper function of arbitration is to adjudicate and not to create rights, that the nature and role of an arbitration proceeding is determined by the character of the system of social relationships in which it takes place, and that until these basic facts and their implications are realized the full social potentialities of the arbitration process will not be achieved.

### II

#### THE ARBITRATION PROCESS AS AN EXTENSION OF CONTRACT

##### A. Definition of the Arbitration Process

The process of arbitration involves (i) an identifiable dispute or controversy between parties (ii) which by agreement of such parties (iii) is referred or referable to one or more persons for final decision. It is "an arrangement for taking and abiding by the judgment of selected persons in some disputed matter."<sup>1</sup>

##### B. Fundamental Legal Assumption of the Arbitration Process

An arbitration derives its existence and validity in law from "the will and consent of the parties litigant."<sup>2</sup> Its fundamental legal assumption is that it is an allowable extension of the sphere of contract. For if parties may contract concerning the affairs of their daily lives, save only in the forbidden domains of illegal and criminal enterprises, they may by the same token settle their disputes through contract. And if they should be unable to reach agreement as to the resolution of their dispute,

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<sup>1</sup> *In re Curtis*, 64 Conn. 501, 511, 30 Atl. 769, 770 (1894).

<sup>2</sup> *Reily v. Russell*, 34 Mo. 524, 528 (1864).

they may instead agree to call upon third parties to decide their dispute with finality. In that manner, the organized political force of the state may be brought to bear to ensure not only that promises involving social relations shall be kept but also that decisions of disputes by non-judicial bodies shall be binding upon parties who have appropriately consented thereto. Moreover, experience as well as logic is said to dictate the acceptance of the arbitration process as a valid social instrument, for it is a custom hallowed by centuries of social usage reaching even into recesses of Greek mythology.<sup>3</sup>

### C. Arbitration and Contract Contrasted

Yet there is a fundamental fallacy in the tenor of the foregoing thesis, for, while an arbitration agreement has the formal aspects of a contract, by its very nature it assumes the absence of any agreement between the parties with respect to a dispute other than on the mode of settlement. Arbitration is a means, a method, a procedure, rather than an agreement. Its fundamental assumption is that customary procedures towards arriving at agreement between the parties have broken down or may break down. Negotiation, and its facilitating procedures of mediation, fact finding, and the like, seek to arrive at agreement or contract. The law assumes that contracts thus hammered out on the anvil of negotiation will justify resort to the force of the state to ensure that their expectations shall be met. An arbitration agreement, however, looks not to the creation of such social relationships as normally fall within the sphere of contract but to repairing the breakdown of those relationships after contract has established them. For the safeguards incident to arms-length negotiation of contracts is substituted the will of the arbitrator. To ensure that his decision will be enlightened, rather than arbitrary, reliance must be placed on the procedures of the arbitration process itself.

## III

### ROLE OF CONTRACT IN SOCIETY

Contract is the end-product of the process of negotiation. The nature of that process has elsewhere been briefly discussed by the author.<sup>4</sup> It is here pertinent to say that negotiation seeks new relationships, accommodation, adjustment between persons and corporate groups. It is a channel of communication in which the parties involved seek new ideas and hypotheses pursuant to which complementary, interacting relationships may be established between them. Such relationships may be relatively short-lived or they may be of indefinite duration. While they exist, the activities of the parties in question are coordinated to a common end. It is this consensus concerning common ends and the means to such ends that characterizes the concept of contract. Negotiation is the process by which that consensus is arrived at while law seeks to ensure that the relationships thus envisaged shall remain a social fact.

<sup>3</sup> E.g., the arbitration of the royal shepherd Paris upon the competing claims of Juno, Pallas Athene, and Venus for the prize of beauty. See Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. OF PA. L. REV. 132 (1934).

<sup>4</sup> Carlston, *The Elements of Peace*, 1 J. PUB. L. 11, at 29-32 (1952).

If the significance of the concept of contract in modern society is to be fully appreciated, we cannot stop here. We must examine in closer detail the relationships between persons and groups which constitute the subject-matter of contract and seek to arrive at a fuller understanding of their social aspects. With such an understanding, and with an appreciation of the varied aspects of the arbitration process itself, we will then be in a position to evaluate the allowable limits of the arbitration process.

#### IV

##### THE INSTITUTION AND THE ROLE OF CONTRACT THEREIN

One fruitful avenue of inquiry towards arriving at a better understanding as to the nature of the relationships with which contract is concerned lies in the fact that the central characteristic of social action is that it is group action and that the activities of the individual in society are principally structured into group activities. That form of group cooperation which is most suggestive for analytical purposes is the institution. Here is meant something more than "a cluster of social usages,"<sup>5</sup> something more than "institutional behavior" in the sense of "behavior which frequently, repeatedly, usually, occurs,"<sup>6</sup> and something more than a "unit act."<sup>7</sup> The institution is a group of individuals comprising a system of relationships. It is distinguished by the distinctively purposeful character of its activity. The continued performances of the system of relationships comprised in the group is directed to produce effects within the group (e.g., the family) as well as outside the group (e.g., a department store). Such effects we term the purposes of the group. The group has a relative permanence derived from the significance, to those participating in the group and affected by it, of the ultimate purpose or purposes of the group. It has an internal structure characterized by the existence of:

- (a) a directing personnel who (i) coordinate and direct the activity of the members of the group (this directing personnel will be separated from other members of the group with varying degrees of preciseness, depending upon the complexity of development and size of the group), and (ii) safeguard the continuance of the group, including the establishment and maintenance of bases of interaction with other groups and protection against their aggressions; (b) means of communication within the group, which will increase in complexity as the group increases in size; and (c) internal norms of conduct and inducements and sanctions therefor designed to induce conformity to such norms and to prevent or punish departures therefrom.

Finally, it controls and uses certain definite apparatus to achieve and express its ultimate purpose.

The importance of selecting the institution as thus defined as our basic analytical

<sup>5</sup> 8 ENCYC. SOC. SCI. 84 (1932).

<sup>6</sup> Moore and Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L. J. 703, 707 (1929).

<sup>7</sup> TALCOTT PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 737 (2d ed. 1949).

unit is that it furnishes us with an analytical concept which is congruous with social activity, which permits of further and more precise analysis by the segregation of desired specific relationships within or between groups, and in which end, means, and norms all have a definite and common structure.<sup>8</sup>

The individual has his role or function within the group ascertainable by that behavior of his which repeatedly occurs. The ascertainment of such behavior is not purely a causal analysis, a determination of common stimuli-response patterns of conduct, though such an analysis affords a fruitful method of determining whether the individual's conduct is in the sphere of administration or policy, for to the degree that such patterns become complex, varied, and hence unpredictable, to that degree we move from administration to policy in a system.<sup>9</sup> But such a purely behavioristic approach fails because it affords no clue by which the social meaning of the behavior in question may be seen. If we move from behavior analysis to the analysis of relations and if we view those relations in the setting of the institution, then we can weigh and evaluate conduct from the standpoint of social purpose. For we can then determine how individual behavior contributes to the common purpose or purposes of the group and, through the group, of society.

In western society the institution is largely autonomous, in so far as state control and direction is concerned. The autonomous free institution functioning under law, endowed with the power of contract to ensure the achievement of its ends and with the right of property to ensure the control of its apparatus or capital equipment in the performance of its functions, is the salient characteristic of the social organization of the western democratic state. Contract is the instrument for bringing about the performance of the various functions comprised in the group (*e.g.*, the employment contract and the collective bargaining agreement) or the performance of those external relationships necessary to the continued functioning of the institution (*e.g.*, contracts of purchase and sale). In short, contract primarily deals with either internal or external relationships of the institution.

## V

### INSTITUTIONAL SIGNIFICANCE OF THE ARBITRATION PROCESS

Similarly, arbitration deals with internal and external relationships of institutions, for disputes, whatever their subject matter may be, necessarily are a product of social action and accordingly each has its particular institutional setting. The submission eventuates from institutional relationships and the award has its impact upon institutional relationships. Each of the elements of the arbitration process as defined at the outset of this article has an institutional significance which must be appreciated if the nature of the process in social life is to be understood and its allowable limits are to be defined. Such significance will be indicated in further detail during the course of this article but some aspects of that significance may now briefly be noted by way of introduction.

<sup>8</sup> Cf. *id.* at 737-738.

<sup>9</sup> Feely, *An Analysis of Administrative Purpose*, 45 AM. POL. SCI. REV. 1069, 1080 (1951).

### A. Arbitration as a Creature of the Parties

The statement that arbitration is a creature of the parties, that its occurrence, form, and scope are dependent on the will and consent of the parties, is but part of the truth. Although the arbitration agreement, as any agreement, is consensual, within its limited compass, it is also in varying degree, depending on the law of the particular jurisdiction, a delegation of the power of the state to private parties for their private ends. That delegation proceeds on the assumption that the attainment of those ends will also subserve public interests with a sufficiently high degree of incidence to justify such delegation. The basic assumption is, as we pointed out in the preceding section, that arbitration is an allowable extension of the sphere of contract. Yet the fact that it is consensual profoundly affects the nature of the award and the values sought to be served by the award and hence the determination of the ends to the attainment of which the power of the state will be brought to bear.

### B. Arbitration as an Award

The fact that the arbitration process involves a delegation of the power of the state also must be considered in the evaluation of the process, for the exertion of this power will channel conduct within or between institutions, as the case may be, and thus have consequences with which society must be concerned.

### C. Arbitration as a Settlement of a Dispute

Arbitration, as we noted in the preceding section, is the aftermath of contract. Contract is the law of the parties; it is special rather than general or universal law. The general legal norm is that contracts are binding. The specific, concrete norms are found in the terms of the contract and become, through the delegation of the power of the state, the law of the parties. Yet issues arise as to the scope and meaning of the norms of the contract and as to whether specific conduct is privileged under those norms. In some of those issues it is found that neither the contract, as an existing statement of consensus between the parties, nor further negotiation, as a search for a new unifying concept or norm of coordination, can resolve the dispute. The relations envisaged by the contract can no longer or will no longer be carried out by the parties under the existing fact situation. To resolve the resulting frustration arbitration provides the commands of the award.

### D. Arbitration as a Procedure before a Tribunal

Arbitration has been characterized as "a judicial investigation out of court,"<sup>10</sup> as "a substitution by consent of the parties of another tribunal for those provided by the ordinary processes of law."<sup>11</sup> As such it has its own life and vitality and place in the institutional order. It becomes the judicial organ of the administrative law of the institution, *viz.*, labor arbitration. It becomes a specialized procedure for resolving intra-institutional and inter-institutional conflicts, in which both its

<sup>10</sup> *People ex rel. Bliss v. Board of Supervisors*, 15 N. Y. Supp. 748, 750 (1891).

<sup>11</sup> *Boyden v. Lamb*, 152 Mass. 416, 419, 25 N.E. 609, 610 (1890).

technique and criteria for decision commend the process to the parties instead of the regularized procedures of the law courts.

#### E. Diverse Nature of the Arbitration Process

It will be evident from the foregoing that one of the fundamental propositions of this article is that it is erroneous to assume that the arbitration process remains the same and is uniform wherever the elements of its structure appear. It is erroneous to assume that arbitration is purely a structural concept, definable by the occurrence of the elements noted in the definition at the outset of this article. An individual may be identifiable by the presence of a typical sentient anatomical structure. The personality of an individual, however, emerges when he is viewed in a social context.<sup>12</sup> Similarly, the nature of an arbitration becomes revealed when it is viewed in its social context. For arbitration is a chameleon word, assuming varying significance as the social setting in which it takes place varies. We have said that a possible useful approach for understanding and evaluating the arbitration process as a social instrument is to consider it in its institutional setting. It is to that task that we shall now address ourselves.

### VI

#### ARBITRATION OF DISPUTES ARISING OUT OF INTRA-INSTITUTIONAL RELATIONSHIPS AS PART OF AN EMERGING SYSTEM OF ADMINISTRATIVE LAW

##### A. Labor Arbitration—Contractual or Institutional?

The most important form of arbitration dealing with intra-institutional disputes we term labor arbitration. It is a product of the collective bargaining agreement and hence is subsumed under contract. It is here contended, however, that the concept of contract has in fact been utilized as an instrument for creating a system of administrative law for our institutional life, characterized by law-making agencies, judicial organs, and procedures of recourse for its subjects.

##### B. Role of Labor Arbitration in Institutional Relationships

###### 1. *Institutional structure of society as raising problems in the control of power.*

A basic freedom of man in western democratic society is the freedom to participate. Perhaps the most significant difference in the position of man in the states of the western world as compared with man in the totalitarian structure of society in the

<sup>12</sup> The concept of *role psychology* is most illuminating in this connection. Thus Gardner Murphy states: "In summary of our thesis regarding roles, we have attempted to show (1) that society, with its system of mores, and with the self-maintenance mores more or less central in the pattern, does not merely 'mold' people, but requires from them the enactment of specific roles in accordance with their place in the system; (2) that not all roles are easily accepted, but that many require effort, and indeed frequently put a strain upon the individual; (3) that a given person must enact several different roles (sex, class, etc.) at once, and that their integration is no obvious or mechanical matter; (4) that roles derive not merely from primary obligations, but also in response to the roles of others (there is not only melody but counterpoint); (5) that in consequence of all this the individual develops balancing or complementary roles, so that he is a complement both to others and to himself; and (6) that it is thus a long way from the simplest economic determinism to a realistic role psychology based ultimately upon the recognition of self-maintenance factors." GARDNER MURPHY, *PERSONALITY: A BIOSOCIAL APPROACH TO ORIGINS AND STRUCTURE* 794 (1947).

eastern world is that his choice as to the roles which he shall assume in his daily life is relatively free from state force and direction. In all societies man becomes individual, achieves personality, and derives satisfactions by virtue of his relations with others. Those relations are principally structured in group action or institutions. For each day in the life of the individual involves a series of institutional roles. Almost no action can be taken which does not involve some phase of group action. A salient fact of the system of institutions comprised in the modern industrial state is the massive size to which its institutions have grown. As a consequence, the impact of group decisions, group action, upon man raises issues in power—the abuse of power and the control of power—the central problems of law itself.

In a recent article the author reviewed the problems of power with which the antitrust laws are fundamentally concerned—namely, the consequences of the delegation by the state of the power of contract and right of property to the modern corporate institution in all its vastness of size.<sup>13</sup> The basic social problem was there seen to be one of controlling the conduct of economic institutions, whether manifested in contract or otherwise, so as to preserve certain basic freedoms for the institutions themselves to the end that the freedom of choice of individuals in their social role of buyers should be preserved. That article dealt with relationships *between* economic institutions as raising issues in the distribution of power in society, affecting what might loosely be termed the right of the individual to buy in a free market. We are here concerned, however, with emerging rights of the individual *within* the economic institution and means for the protection of those rights. The problem of power with which we are here concerned is a problem arising in the work-life of the individual within the institution. Unfortunately, since the law has resorted to the technique of the collective bargaining agreement as a means for solving this particular problem in power, it has raised a *new* Frankenstein of power which in turn demands new solutions in law—namely, the modern industrial union and its relations with its members.<sup>14</sup> “Collective bargaining does not alter the amount of power which is exerted over the individual. It only shifts its source.”<sup>15</sup>

2. *The collective bargaining agreement as creating a system of administrative law within the economic institution.* The collective bargaining agreement may be viewed both as a statement of norms of conduct for those within the economic institution and as a statement of the regularized patterns in which power will be exerted within the institution. Order and system must exist within the institution

<sup>13</sup> Carlston, *Antitrust Policy: A Problem in Statecraft*, 60 YALE L. J. 1073 (1951). Also pertinent in this connection is Carlston, *The Elements of Peace*, *supra* note 4, at 13-15.

<sup>14</sup> A most penetrating analysis of the problem of contract with which we are here concerned will be found in Chamberlain, *Collective Bargaining and the Concept of Contract*, 48 COL. L. REV. 829 (1948). For an illuminating discussion of the problems raised by relationships between a union and its members, see Summers, *Union Powers and Workers' Rights*, 49 MICH. L. REV. 805 (1951); also *The Right to Join a Union*, 47 COL. L. REV. 33 (1947).

<sup>15</sup> Summers, *Union Powers and Workers' Rights*, *supra* note 14, at 816.

if it is to function successfully. Norms for conduct must be established and stabilized. Means must be established for controlling deviations from those norms. It is to an examination of the role of the collective bargaining agreement as creating a system of administrative law for the economic institution that we shall now address ourselves.

The process of ordering the system of relationships comprised within an institution is termed management. Norms for individual conduct of an increasingly concrete and fixed character emerge as one moves from the area of management to the area of labor. Policy decisions diminish as sequences of individual behavior become of narrower and narrower scope and increasingly uniform in their repetition. However, to analyze the institutionalization of behavior in a purely behavioristic, individualistic context is to lose sight of its meaning or function within the institution. Only by viewing behavior in a normative context, in which norm is a product of function and relation, does it assume meaning and significance.

Each norm as it emerges in the successive steps of the management function must be accepted and performed by those to whom it is directed. The acceptance of the norm may be motivated by command, force, and discipline, when the institution is said to be authoritarian in character, or it may be motivated by attitudes of loyalty, self-interest, and understanding. When established procedures exist towards accommodating the content of the norms of the institution to the demands and expectations of those who are to be subject to such norms we term the institution democratic in character. The resultant norms become *accepted* as well as *enforced* rules for conduct. In a democratically organized institution, management, instead of being solely charged with the decision-making process, shares its function with those who will be affected by such decisions to the end that acceptance of command will be whole-hearted rather than constrained by force. Such a sharing of the decision-making function requires the establishment of channels of communication between the groups in question both in the formulation of norms and in their enforcement.

As we move to the institutional role of the worker, *i.e.*, those members of the institution whose norms for conduct are highly concrete and specific, we find that such norms apply to many instead of few. To create and sanction these norms as law through contract becomes impossible as a matter of individual, person-by-person negotiation. There cannot be a multitude of disparate employee contracts, each having a different normative content, when workers are all performing essentially the same function, are all occupying similar relationships, and hence are all subject to essentially similar norms.

Representation of employees accordingly becomes necessary if channels of communication between management and labor in the formulation and enforcement of norms are to be established. The union of workers, a separate, autonomous institution functioning partly within and partly without the economic institution, accordingly emerges. The first channel of communication between management and

union is in the negotiation of the collective bargaining agreement. Within its scope management shares its decision-making function with others and ceases to have exclusive control of that function. Management must bargain collectively, *i.e.*, bargain with the designated majority representative of labor.<sup>16</sup> The worker as well as management becomes bound by the norms of the resulting collective bargaining agreement. The workers thus bound include not only those who have voted with the majority and have thus given their consent to representation but also those in the minority who have not so consented.<sup>17</sup> Hence the extraordinary situation in law of the creation through contract of third-party *obligations*. For if the logic of the contract analogy were rigorously followed, no universal system of law for the institution, binding on all its members, could be created. The circumstance that they may be in a minority, so far as union representation is concerned, is wholly irrelevant in considering their position in the functioning of the economic institution. Union and non-union workers alike are common members of the institution and must all equally be subject to its internal system of law.

The ends of the union, however, are not necessarily identical with those of the institution within which it functions. The union is subject to different pressures. Its significance to its members and hence its existence as an institution is dependent upon its continued success in producing more and more rewards from the economic institutions in which it represents, *i.e.*, acts for, its members. Attitudes of hostility and divisiveness are often fostered as a means to that end. Hence contract, in the form of the collective bargaining agreement, while serving the function of coordinating institutional activity to common ends, at the same time often remains an uneasy and temporary treaty of peace between unlike institutions having different ends. In any event, however, while it endures, the normative content of the collective bargaining agreement becomes the internal administrative law of the economic institution, dealing with such basic interests as who shall work, wages, shop rules and discipline, disabilities, and pensions.

To view the resultant norms as contractual and, therefore, rigid, fixed, and with their breach subject to the penalty of damages,<sup>18</sup> is to lose sight of the fact that those norms are the living law of the institution which must be flexibly administered in a constantly changing social milieu so as to achieve the ends of the institution itself. So long as the collective bargaining agreement is viewed as a compromise between hostile, divided groups, termed management and labor, instead of a democratically formulated statement of the ways in which the work-life of the institution shall be ordered so that the institution shall make its highest contribution to the public interest and welfare, just so long will frustration instead of harmony characterize industrial relationships. For management and labor are not disparate groups but members of a common institution performing within it different functions toward the attainment of a common end.

<sup>16</sup> 29 U. S. C. A. §158(a)(5) (Supp. 1951).

<sup>17</sup> *Id.* §159(a).

<sup>18</sup> 61 STAT. 156 (1947), 29 U. S. C. A. §185 (Supp. 1951).

3. *Legislative and judicial aspects of the system of administrative law of the economic institution.* We have characterized the process of the negotiation of the collective bargaining agreement as the first important channel of communication between management and labor. Here groups having both common and separate interests confer, compromise, and adjust to the end of reaching common agreement. If the consequences of that agreement were binding only upon the participants in the process, we would have the familiar category of contract. But we have seen that they extend beyond the participants to all workers similarly situated and that non-union as well as union members become subject to the law of the agreement. Management and union representatives thereby become, in the negotiation of the collective bargaining agreement, the legislature for the enactment of the administrative law of the institution.<sup>19</sup>

Following the formulation of the general norms contained in the agreement, the process of their concretization begins. The content of the norms must be particularized as concrete instances of friction and grievance arise. Unfortunately, not all friction and grievance arising in the life of the shop can be brought within the compass of the current collective bargaining agreement. Hence, the legislative process must again be brought to bear in the negotiation of an amendment or even a new agreement. To the extent, however, that problems in the administration of the norms of the current collective bargaining agreement are presented, a need for additional channels of communication between management and labor arises. Grievances and disputes must also be resolved democratically. The grievance procedure accordingly becomes a means of effectuating communication between management and labor directed to the end of settling disputes through mutual adjustment. Significantly, the law here creates third party rights for non-union members, for the logic of contract must not be carried to the point of denying them recourse to the grievance procedure of the union's collective bargaining agreement.<sup>20</sup> If they are to be subject to the system of law created by the agreement, they must be accorded equal access to the means of recourse available under the contract. They cannot be denied the right to be heard on the ground of their non-membership in another institution, the union, when union and non-union members are all equally members of the economic institution and subjects of its system of law.

The grievance procedure alone cannot effectually resolve all disputes. There will always be cleavages which mutual, voluntary adjustment alone cannot bridge. The need is for a process of adjudication of disputes which will be keyed to the institution, and arbitration, rather than the courts, satisfies that need. No rules of

<sup>19</sup> "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents." *Steel v. Louisville & Nashville R. R.*, 323 U. S. 192, 202 (1944).

<sup>20</sup> 29 U. S. C. A. §159(a) (Supp. 1951); *Hughes Tool Co. v. N.L.R.B.*, 56 N.L.R.B. 981 (1944), *order modified and enforced*, 147 F.2d 69 (5th Cir. 1945): The Board of Inquiry established by the State of New York to make recommendations for peace on New York City's waterfront recently made the recommendation that individual union members be granted access on their own initiative to a permanent arbitrator. *Business Week*, Feb. 2, 1952, p. 30.

evidence hamper the scope of its investigation. Those rules, as an instrument of jury control, are here inappropriate. No stranger to the realities of the particular institutional order acts as investigator and judge. The arbitrator is an appointee of the parties and is chosen for his skill and expertness in the field of inquiry. The facts with which the labor arbitrator must deal are facts concerning institutional life and the ends which he must seek to serve are institutional ends. To the degree that he is skilled in the perception of such facts and appreciates the relevance of the particular relations with which he is confronted to the attainment of institutional ends, to that degree will his award be respected and accepted. For he is dealing with no temporally and spatially isolated incident viewed as a "case"; he is dealing with continuing relationships within the institution, which are constantly changing, which the environment of the institution is constantly affecting, and which, in turn, in their performance, react upon the institution. Thus it is that there is no place for precedent within labor arbitration, except precedent developed within the same institution, for labor arbitration seeks a rule solely for the parties before it whereas the established court seeks a rule not only for the parties litigant but for all the citizenry.<sup>21</sup> This is not to say that there may not be a similarity in awards dealing with common problems in institutional life. Absenteeism, altercations, dishonesty, drunkenness, incompetency, loafing, and similar activities injurious to the institutional order cannot be countenanced in any institution and usually only raise issues as to the appropriateness of the particular disciplinary measures applied.<sup>22</sup> However, even such decisions should not assume the status of binding or even persuasive *precedent* in another arbitration involving similar issues but arising in a different institutional context.

So conceived and understood, labor arbitration represents an additional channel of communication between management and labor which becomes the judicial organ of the system of administrative law of the institutional order.

## VII

### EMERGENCE OF SYSTEMS OF ADMINISTRATIVE LAW IN ANALOGOUS INSTITUTIONAL ORDERS

An examination of certain analogous systems of work-life will reveal that, while moving from different assumptions and utilizing different approaches, there has in each such system emerged rules governing the administration of authority within the life of the institution and that, colored by its particular background, legal and otherwise, arbitration or some other form of judicial body has tended to emerge in each such system.

#### A. Civil Service in the United States

From a purely authoritarian concept of the civil service, based on the assumption that by virtue of its sovereignty the government must unilaterally determine the rights and obligations of its workers, we are today moving to an increasing recog-

<sup>21</sup> McPherson, *Should Labor Arbitrators Play Follow-the-Leader?*, 4 *ARB. J.* (N.S.) 163 (1949); Carlston, *Arbitration: An Institutional Procedure*, *id.* at 248; Note, 62 *HARV. L. REV.* 118 (1948).

<sup>22</sup> Note, *WASH. U. L. Q.* 71 (1949).

nition of the need for employee participation in determining the conditions of even civil service employment. Public employees at first sought through lobbies to influence the enactment of civil service acts and regulations whereby such matters as conditions of employment, promotion, tenure, wages, and protection against certain types of arbitrary action on the part of administrative supervisors would become subject to legal control. The public service union and the collective bargaining agreement, however, now have become increasingly the means for the regulation of the work-life of the civil servant as the recognition spreads that collective bargaining and arbitration can be organized so as not to injure basic interests of the state. While public service unions have rarely been granted the role of exclusive bargaining agent, a great number of collective bargaining agreements have been established. Administrators acknowledge that the public service is improved by union negotiation and joint consultation on such matters as grievance settlement, discipline, determination of status, and wages. Godine has shown that the preservation of the requisite degree of sovereign power does not necessarily imply that the government shall unilaterally determine all details of everyday administration or even all administrative policies.<sup>23</sup>

#### B. Civil Service in France

In France, the concept of authoritarianism was by the early twentieth century carried to the point of such extreme absolutism, with accompanying disregard of the welfare of the civil servant, that there developed as a reaction an agitation for a radical syndicalism. The latter's concept of the fundamental autonomy of each public service would have left little place for the state as an ultimate unifying organ. To ameliorate the absolutism of the state and to offset somewhat the danger of the threatening syndicalism of the civil servants, a system of statutes guaranteeing certain rights to functionaries was instituted in the early twentieth century. Such a compromise solution, however, satisfied neither the need for flexibility in administration nor the demands of democracy. It is understandable that in practice, therefore, the syndicates of functionaries continued to exist and to exert pressure. Although consistently descried by public officials, condemned by theorists, and declared illegal by the courts, the syndicates had achieved wide unofficial recognition by French administrators by the time the Second World War broke out.<sup>24</sup> Suppressed by the Vichy Government, the syndicates emerged full-blown after the Liberation and gained recognition in the law of 19 October 1946.<sup>25</sup>

By that law the French functionary is declared to be in a situation determined by statute and regulation. Rarely and perhaps never does he have a typically contractual relation to the government.<sup>26</sup> But the law provides that functionaries participate through the intermediary of their syndicates in the reform of both the

<sup>23</sup> M. R. GODINE, *THE LABOR PROBLEM IN THE PUBLIC SERVICE, A STUDY IN POLITICAL PLURALISM*, CC, 3, 4, 6, 9, 10 (1951).

<sup>24</sup> Gazier, *Le syndicalisme dans la fonction publique*, 11 *DRIT SOCIAL* 274 (1948).

<sup>25</sup> 46 *SIREY*, *COLLECTION COMPLÈTE DES LOIS, DÉCRETS* 487 (1946).

<sup>26</sup> MARCEL WALINE, *TRAITÉ ÉLÉMENTAIRE DE DROIT ADMINISTRATIF* 304-308 (1950).

organization and the methods of the public service. Three bodies establish channels of communication between the syndicates, as representatives of the functionaries, and the policy-making and administrative organs of government. Joint administrative commissions are permitted expression of opinion on each individual decision touching the career of a functionary. Joint technical committees discuss not only questions of method, but also general questions of the statute for functionaries and the organization of the public service. Finally, a joint superior council of the public function acts as a supreme jurisdiction for administrative commissions and technical committees and as an advisory organ to the minister in charge of the public function. Through this council syndicates are guaranteed the opportunity to discuss, on a basis of equality with the administration, all problems vital to the service.<sup>27</sup>

It is not surprising that this revolutionary reorganization of governmental policy has, like the Preamble of the Constitution of 1946, been found in practice to be more an ideal than an actuality. A competent French observer has pointed out that the significant services of the syndicates remain in part what they were before the syndicates attained legal recognition—namely, the solution through personal contact with immediate supervisors of daily problems in applying generally accepted administrative rules. This does not usually involve the ponderous machinery of commissions, committees, and councils. For the rest, and when it comes to matters of policy-making, administrators are still reluctant to admit that any but themselves have responsibility for this important task. The syndicates, in such a situation, rely upon their extra-legal but *de facto* authority of force evidenced in the strike.<sup>28</sup>

The task of the civil service of France is to develop the existing channels of communication, which are essentially of a consultative character and are limited to issues for the most part of a grievance nature, to a maturely developed system, such as that of the United States, in which negotiation, the public-law contract, and arbitration, become the indicia of a system of administrative law of the public service institution.

### C. International Civil Service

International administrative law is principally a product of the past three decades beginning with the founding of the Secretariat of the League of Nations, though of course a number of international institutions were already then in existence. The initial assumption in the evolution of international administrative law was that public administration is hierarchical in structure. In the case of the League, moreover, the powers of the Secretary-General in matters of personnel policy were not formally defined or limited but were left to his administrative discretion. Such a condition, long since challenged and radically qualified in national administration, was understandable in the first few months of the League's history. The degree of legal independence the League would come to have, the tasks that would be

<sup>27</sup> Gazier, *supra* note 24; Trouvé, *The French Civil Service Office*, 11 PUB. ADMIN. REV. 180 (1951).

<sup>28</sup> Gazier, *supra* note 24, at 277.

given it, and the organization that would best suit its needs were not yet adequately envisaged. It was difficult to specify in detail the personnel policies it should adopt and impossible to declare fully the legal status that would be conceded the international functionary. Nor did it seem especially important to proceed at once to a clarification of these matters. It was at the beginning considered that it was neither likely nor desirable that anyone should make a career of international public service and thus be vitally and personally affected by the absence of clarity regarding his rights.<sup>29</sup> Much of the subsequent development of administrative law for the Secretariats of the League of Nations and of the United Nations is consequent upon a reversal of these views.

Experience soon made it clear that sound functioning of international public service requires, even more than does national public service, a delimitation of administrative prerogative in matters of personnel policy and the establishment of a number of conditions of employment for at least a considerable number of employees such as permanence of tenure, specified opportunities for promotion, and a pension system. These conditions are now formally prescribed in a considerable body of administrative law, including the basic Staff Regulations and a subsidiary body of Staff Rules. The League's Assembly did not establish the "Provisional Statutes for the Staff of the International Secretariat" until June of 1921, and the first definitive edition of the permanent Staff Regulations did not appear until January, 1932.<sup>30</sup> Utilizing the experience of the League, the United Nations General Assembly was able to adopt a set of Provisional Staff Regulations during the first part of its first session when it also submitted to the Secretary-General for his consideration draft provisional staff rules.<sup>31</sup> Permanent Staff Regulations, accepted by the General Assembly and effective March 1, 1952, were presented in final form on February 1, 1952, at the General Assembly's sixth session.<sup>32</sup>

The League of Nations found that the establishment of the Staff Regulations and Rules was only the first step in the creation of a system of administrative law. A judicial tribunal for enforcing the rights of employees under the rules thus established was seen to be needed. The Assembly of the League accordingly established an Administrative Tribunal to decide disputes involving breaches of the Staff Regulations and letters of appointment.<sup>33</sup> A similar tribunal was established by the United Nations effective January 1, 1950, under a statute adopted by the General Assembly November 24, 1949.<sup>34</sup>

<sup>29</sup> RANSHOFEN-WERTHEIMER, *THE INTERNATIONAL SECRETARIAT* 300 *et seq.* (1945).

<sup>30</sup> *Id.* at 256.

<sup>31</sup> RESOLUTIONS ADOPTED BY THE GENERAL ASSEMBLY, JAN. 10 TO FEB. 14, 1946 (A/64) 15, IV, 10 (Church House, Westminster, London, 1946). For text of Provisional Staff Regulations, see *id.* at 18-19.

<sup>32</sup> PERMANENT STAFF REGULATIONS OF THE UNITED NATIONS (U. N. Doc. A/2108) 11 *et seq.* (Feb. 1, 1952).

<sup>33</sup> LEAGUE OF NATIONS OFFICIAL JOURNAL (SPEC. SUPP. No. 53) 27-29 (1927). Resolutions and Recommendations adopted by the Assembly during its Eighth Ordinary Session.

<sup>34</sup> FOURTH SESSION, VERBATIM RECORD OF THE 255TH PLENARY MEETING (U. N. Doc. A/PV 255) 16-40 (Nov. 24, 1949). For text of statute, see REPORT OF THE FIFTH COMMITTEE (U. N. Doc. A/1127) (Nov. 22, 1949).

Channels of communication between the staff and the Secretary-General, intended to give the staff a voice in matters such as personnel policies, disciplinary action, and termination, were established in the League of Nations through the Staff Committee, Judicial Committee, and Administrative Committee, but these turned out to be of little practical importance.<sup>35</sup>

The Staff Organization of the United Nations is, however, a most vigorous body and its Staff Council zealously contends for an ever-increasing effectiveness of staff opinion in the several spheres where under the Staff Regulations they have a right to be heard. Article X of the Regulations permits the Secretary-General to establish administrative machinery with staff participation to advise him in disciplinary cases. Article XI provides specifically that the staff shall participate on the board that advises the Secretary-General with regard to appeals against disciplinary action or against administrative decisions alleged to violate staff rules or regulations or the terms of employment of any staff members. Finally, Article VIII permits the Staff Council to make proposals to the Secretary-General for improvements in working or living conditions of the staff and specifically provides ways through which the staff may make suggestions regarding personnel policy and propose amendments to the Staff Rules or Regulations. It is particularly to be noted that the Appeals Board set up under Article XI is said by the Secretary-General to exercise conciliatory as well as advisory functions.<sup>36</sup>

#### D. French Labor Law

The system of labor law found in the United States, though relying on state authority for much of its strength and vitality, appears to be as yet relatively free from state direction and intervention but, nevertheless, to be consistently moving towards a system of administrative law as the hitherto governing contract analogy breaks down in practice. The trend is from contract to legislation, with a consequent lessening of the autonomy of labor and management in the institutional order. In France, however, we find a system which is strongly authoritarian in character, with reliance primarily on legislation rather than contract as means for control, but in which the trend is toward increased institutional autonomy and resort to contract.

French employers have not been prone to share with workers their control over the conditions of work. Though their authoritarian approach has today become less absolute, especially as a result of the wave of strikes in the mid-thirties, there has never been an acceptance of unions to the degree recently manifest in the American industrial scene.<sup>37</sup> France has not developed collective bargaining, conciliation and arbitration to the degree known in the United States.<sup>38</sup> This intransigent attitude on the part of employers toward measures curbing their tradi-

<sup>35</sup> RANSHOFEN-WERTHEIMER, *op. cit. supra* note 29, at 262-264.

<sup>36</sup> U. N. Doc. A/2108, *supra* note 32.

<sup>37</sup> Lorwin, *France*, in *COMPARATIVE LABOR MOVEMENTS* 313, 343 (Galenson ed., 1952).

<sup>38</sup> Sturmthal, *Collective Bargaining in France*, 4 *INDUSTRIAL AND LABOR RELATIONS REV.* 236, 247 (1951).

tional exclusive control over conditions of work is opposed by a syndicalist movement of workers which is predominantly revolutionary in character and which regards as treasonable to the union movement any attempt to obligate itself through even the most reasonable collective bargaining agreements.<sup>39</sup> Yet the labor movement as a whole suffers from an extraordinary disinterest on the part of many workers, from a continual flux and shift in membership among those who are interested, and from preoccupation with philosophical and political issues which often have no bearing on the immediate strength of the movement.

In such a situation it is only too easy for the government to intervene with regulatory legislation. Law and administration do in fact establish most of the relations between employer and employee.<sup>40</sup> The degree of state control has increased rather than decreased since 1936,<sup>41</sup> which marked a high-point of interest in collective bargaining save perhaps for 1950. The law of 11 February 1950<sup>42</sup> represents a genuine attempt to establish collective bargaining practices and to curb the tendency toward statism.<sup>43</sup> Under this law the approval by the government of collective bargaining agreements,<sup>44</sup> theretofore required in the period 1946-1950, was eliminated.

Collective bargaining is typically national or regional in scope,<sup>45</sup> partly because the parties themselves represent such areas and partly through the power of the Minister of Labor to extend an agreement to larger areas if he sees fit.<sup>46</sup> The intervention of the state is even more manifest in the nationalized industries. Governing councils were there established which were supposed to establish wages and working conditions through a procedure akin to collective bargaining. In fact, however, the state's interests are so great and its power so vast that it leaves little resembling a free bargaining process.<sup>47</sup>

French law and juristic thought have made a number of successive interpretations of the collective bargaining agreement since 1919. Immediately following World War I the agreement was conceived to be purely consensual in nature. The courts, rather than Minister of Labor, dealt with the agreement. Such an analysis was quickly seen to be inadequate, particularly since it failed to accommodate the fact that such agreements could be made binding on third persons. The power of the Minister of Labor to extend an agreement to larger areas has previously been noted. The agreements affect members of the signatory organizations as well as the organizations themselves, and the obligations thus imposed are public rather than contractual in nature, since any contrary provisions in individual contracts are impossible.<sup>48</sup> The collective bargaining agreement is not itself a contract of labor

<sup>39</sup> Sturmthal, *Quelques réflexions sur les relations industrielles en France et aux Etats-Unis*, 14 DROIT SOCIAL 387, 388 (1951).

<sup>40</sup> *Id.* at 387-388.

<sup>41</sup> Savouillan, *Pour l'étude de l'arbitrage obligatoire*, 14 DROIT SOCIAL 96, 97 (1951).

<sup>42</sup> Journal Officiel, Feb. 12, 1950, with rectifications in *id.* Feb. 22, and Mar. 14, 1950.

<sup>43</sup> Sturmthal, *supra* note 38.

<sup>44</sup> *Id.* at 243.

<sup>45</sup> Sturmthal, *supra* note 39, at 389.

<sup>46</sup> Sturmthal, *supra* note 38, at 243.

<sup>47</sup> *Id.* at 247-248.

<sup>48</sup> ROUAST AND DURAND, PRÉCIS DE LÉGISLATION INDUSTRIELLE 227-228 (1948).

but is an instrument for determining the conditions of future individual contracts.<sup>49</sup>

It is not surprising, therefore, that in an atmosphere characterized more by statism than by free negotiation arbitration became compulsory during the period of 1936-1939, in which resort was typically made to a "super-arbitrator" appointed by the government.<sup>50</sup> The source of the law for the institution was thus placed outside its structure. Compulsory arbitration was again provided for in the government's 1949 draft of the present labor law. Both labor and management, however, opposed this provision. It was apparently feared that in effect it would reinstate many of the government controls of labor relations which it was the purpose of the new law to eliminate.<sup>51</sup> As a result, the present law makes conciliation compulsory but not arbitration. For compulsory arbitration to many implies a renunciation of the strike. Moreover, failure to accept the ensuing award would involve a breach of the original contract of labor.<sup>52</sup> The importance to labor of the strike is recognized in the Preamble of the Constitution of 1946 which consecrates the right to strike except where prohibited by statute. The device of compulsory arbitration was not to be allowed to restrict the all-important right to strike. Nor could labor afford to be placed in the position of breaking the collective bargaining agreement, for that would involve the loss of a series of basic guarantees and indemnities dependent thereon.

## VIII

### COMPULSORY ARBITRATION AND CONTRACT ARBITRATION

The term "compulsory arbitration" is a misnomer. The structural elements of a procedure consensual in origin and nature, discharging the judicial function in a system of administrative law for an institution or series of like institutions, are here borrowed to serve the function of making law for the parties when the necessary democratic conditions incident to the process of negotiation are for one reason or another ineffective to produce agreement. Compulsory arbitration is lacking in those procedures on which the strength of the collective bargaining process depends and instead involves a delegation by the state to a non-legislative body of the power of legislation. The social problem in "compulsory arbitration" is not the resolution of disputes as to rights under determined and accepted rules for conduct but is the formulation of the rules themselves. This is a task for negotiation or legislation and not adjudication. Compulsory arbitration involves an attempt to mask these social realities and to bring about an acceptance by the parties of a novel procedure essentially legislative in character by cloaking it with an inappropriate and misleading symbol.<sup>53</sup>

<sup>49</sup> *Id.* at 224.

<sup>51</sup> Sturmthal, *supra* note 38, at 244.

<sup>52</sup> Savouillan, *supra* note 41, at 97. See also note by Blondel in 14 DROIT SOCIAL 172 (1951).

<sup>53</sup> "Attention is immediately directed to the fact that no dispute has arisen between the parties to the contract over the terms and provisions of the contract, or any difficulty arising thereunder. . . . The railroad company desires to make a new contract. It desires to reduce wages 10 per cent and seeks arbitration under the Arbitration Law for the purpose of arriving at new terms and agreements as to the rate of wages. No power exists in the courts to make contracts for people. They must make their

<sup>50</sup> Lorwin, *supra* note 37, at 343-344.

While "contract arbitration" is a voluntary rather than a compulsory procedure, it too is concerned with changing the existing legal relations of the parties rather than interpreting and enforcing them and to that extent is analogous to compulsory arbitration. To the extent that contract arbitration is charged with the task of determining norms for the parties which they have been unable to legislate for themselves through collective bargaining, to that extent contract arbitration and compulsory arbitration are alike. In each the award supplants the contract and the force of the state supplants acceptance and agreement. Thus each is in last analysis legislative in character. On the other hand, contract arbitration reaches its greatest strength when it assumes a role analogous to that of an administrative agency. In other words, if the parties lay down in their submission criteria to govern the tribunal in arriving at certain disputed terms of the contract, it being assumed that the parties have reached agreement on the other terms of the contract, then objective standards exist on which there is consensus. In such a case, contract arbitration performs a real function in defining the standards in question in the light of the particular facts of the case.<sup>64</sup>

## IX

### AUTHORITARIANISM AND DEMOCRACY IN INSTITUTIONAL ORDER

The foregoing discussion reveals that the arbitration process assumes the color of the system of law of which it is a part. An institutional structure authoritarian and hierarchical in nature, in which communication by the directing personnel assumes the form of command, has in it no place for voluntary arbitration. It may through state intervention establish compulsory arbitration as an additional device for control, seeking thereby to forestall the anti-hierarchical forces stimulated by such an authoritarian approach. Yet even the authoritarian institution finds in the social struggle for survival that the strength of its system of norms lies not only in force and discipline but also in its acceptance by the governed. For the internal strength of the institution depends in the last analysis upon the measure of its significance to its members. A democratic participation in the formulation of the norms of the institution (collective bargaining) and their enforcement (arbitration) is necessary if the full potentialities of acceptance of norms by those subject to them are to be realized.

The two opposing forces of authoritarianism and democracy are found at work in any institution. In the flux of society there is a constant shifting in the strength of these forces within each institution. There is no one perfect combination of them, for human motivations and judgments are not perfect and, moreover, the environment of each institution varies, requiring the utilization of these forces in

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own contracts. The courts reach their limit of power when they enforce contracts which parties have made." *In re Buffalo & Erie Ry.*, 250 N. Y. 275, 278, 165 N.E. 291, 292 (1929). "... a power to decide *ex aequo et bono* is a power to abrogate or modify existing legal rights, and essentially that is a power to legislate." J. L. BRIERLY, *THE LAW OF NATIONS* 269 (4th ed. 1949).

<sup>64</sup> Handsaker, *The Arbitration of Contract Terms—A Summary of a Conference Session*, 7 *ARB. J.* (N.S.) 2 (1952).

varying proportions in order to insure its strength, growth, and survival. Institutions should not be judged solely by whether they are of an authoritarian or democratic cast for neither of these can be the subject of absolute value judgments. It so happens that in a political world which has been moving from authoritarianism to democracy we have come to assign a negative value judgment to the former and a positive value judgment to the latter. Yet under the menace of threatening aggression in the international scene and the haunting fear of economic depression in the domestic scene the current political tendency has been towards the centralization of power rather than its decentralization. We must remember that the problem of power or authority is a never-ceasing one in society and that a solution of that problem valid under one set of circumstances is not necessarily valid under another. The structure of social action must not become static but must remain fluid if the ends of society are to be served to the highest possible degree.

## X

### NATURE AND ROLE OF COMMERCIAL ARBITRATION

The term "commercial arbitration" implies the arbitration of disputes arising in the life of trade and commerce. A dispute involves a deviational transaction in which an established, customary, expected course of conduct fails to be carried out as anticipated. The particular parties to the dispute may or may not have been involved before in similar transactions. At least one of the parties, however, will have performed many similar transactions in the past so that its behavior will have become institutionalized and there will thus be a pattern of practice or norm against which the deviational transaction can be appraised. The fact that this pattern of practice will usually involve an external relation of a business institution is of little social significance. The significant circumstances to be examined and weighed in determining whether a deviational transaction should be approved or condemned are, first, the nature of the established norm of conduct against which such transaction is to be measured, second, the nature of any general rules of law relevant to such transaction, and, third, the nature of any special rules of law (*i.e.*, contract) established by the parties to govern the transaction.<sup>55</sup> Thus no dispute can be said to be isolated or discrete. The parties may be. But not the institutionalized relationship in the performance of which the dispute eventuates.

The color or character of a commercial arbitration is to be determined by the social setting in which it takes place. A structure of social action, of which the arbitration process is but one, is purely an analytical concept. It is neither "good" nor "bad." In and of itself it cannot be the subject of value judgments. Whether it is to be approved or condemned, the circumstances in which it may be a valid social instrument, its usefulness and allowable limits, cannot be determined solely by an

<sup>55</sup> Cf. Note, 61 HARV. L. REV. 1022, 1025 (1948): "The controlling factor in arbitration awards seems to be the seriousness of the deviation from the contract terms, judged in the light of the general business atmosphere in which the transaction occurred, and to this extent departs from the strict-compliance rule of the Sales Act."

examination of judicial precedents.<sup>56</sup> Such merit as it may possess is not derived from its structure as such but from its use. It has no inherent mystic quality whereby it "actually destroys the cells that cause the dispute by a final determination of whatever claims these cells of controversy give rise to."<sup>57</sup> Wisdom and knowledge in the use of the process will be required if this result is to be achieved.

Wherever we find institutionalized behavior, we will find law. The behavior may be merely privileged or it may be obligatory, but its relevant legal principles will have in general been marked out by the courts and the legislature. For law is the final instrument of social control; through it order and direction are given to social action. Not all law is formal, found in precedent and statute. Often in mature business systems there will be a strength, for example, in the unilateral oral commitment that is equal to the formal, binding contract in law. One step beyond custom we find contract and agreement as a source of private, less than universal, law. It is from these less-than-universal norms of custom and contract that the arbitration process springs. The law merchant brought forth its own tribunals which were superseded as the common law of England absorbed the law merchant. So it is, though to a lesser degree, with arbitration tribunals. It is not the convenience of the arbitration procedure that has caused arbitration to be a familiar feature of a complex system of institutionalized relationships such are found, for example, in commodity exchanges and boards and in trade associations. Arbitration is more often a product of necessity than of convenience, for it is a necessary part of an emerging system of law internal to two or more business institutions. Commercial arbitration finds its most significant role wherever there is a system of law—either unwritten, informal and customary, or written, formal and contractual in nature—internal to two or more business institutions. The primary source of strength of the arbitration process lies in its relation to such a system of law.<sup>58</sup>

A secondary source of strength lies in the fact that it is a mode of trial, to which the laws of evidence are largely inapplicable because they are a product of the problem of communicating facts to a jury in a reliable manner. The problem of communicating facts to an arbitrator can become enormously simplified, if he be skilled and expert in the field of the controversy. It is his knowledge of the norms of business conduct out of which the dispute arises that will determine whether the trial will be a success and the award a wise solution of the controversy.

Against this background the real significance emerges of the struggle of advocates of the arbitration process to remove by statute the common law hazard of the power of revocation of the agreement to arbitrate.<sup>59</sup> For the force behind the

<sup>56</sup> The classic study of the limits within which arbitration tribunals may be autonomous bodies so far as the courts are concerned is Isaacs, *Two Views of Commercial Arbitration*, 40 HARV. L. REV. 929 (1927). Also valuable is Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590 (1934).

<sup>57</sup> FRANCES KELLOR, *ARBITRATION IN ACTION* 4 (1941).

<sup>58</sup> Tacusch, *Extrajudicial Settlement of Controversies*, 83 U. OF PA. L. REV. 147, 154-157 (1934), Note, 61 YALE L. J. 686, 711-713 (1952), Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L. J. 36, 40 (1944), and Westwood and Howard, *Self-Government in the Securities Business*, 17 LAW & CONTEMP. PROB. 518 (1952), are suggestive in this connection.

<sup>59</sup> *Vynior's Case*, 8 Co. Rep. 79b, 81b, 77 Eng. Rep. 595 (K. B. 1609).

struggle was not so much the desire to strengthen the process itself as it was to give the arbitration tribunal *jurisdiction* and thereby to endow, with the force of the state, inter-institutional systems of law which would otherwise have only a loose and primitive character. Similarly, the struggle to simplify and strengthen the judicial enforceability of the award was a struggle to achieve the autonomy of systems of law in which the arbitration tribunal was the judicial organ. The antagonists in this struggle, those having vested interests in the arbitration process as a social instrument on the one hand and lawyers' groups on the other hand, flung back and forth phrases such as "voluntary arbitration" and "ousting the courts of jurisdiction"<sup>60</sup> and thereby buried the real social problem which was: To what extent shall the modern business institution be autonomous from the state? Already endowed with the "rights" of contract and property, the constitution of the arbitration process under the modern arbitration statutes enabled vast business enterprises to consolidate their own systems of law. This power, carried to excess to foster the interests of the institutions themselves instead of the body politic, created problems of restraint of trade and monopoly.<sup>61</sup> The final step was the utilization of the arbitration process as a means of enforcing the rules of cartels.<sup>62</sup>

If the arbitration process is to become a sound social instrument, resort to it as a means for settling disputes must be made with a great deal more enlightenment and care than have been evident in the past. Bodies such as the American Arbitration Association and the International Chamber of Commerce have formulated admirable rules of procedure to govern the conduct of an arbitration. Their draft arbitration clauses are as airtight as possible. But in the very simplicity of such arbitration clauses lies their greatest source of weakness. For it is very important for the parties to decide in advance just how the questions of jurisdiction and applicable law shall be handled. The usual arbitration clause is a catch-all as to the former and silent as to the latter, except for procedural rules. It is essential for the parties to decide in advance just what types of disputes they will wish to have referred to arbitration. That question in turn cannot be decided until it is determined by what special or private rules of law the arbitrator shall be bound and the extent to which he shall be free to ignore established judicial doctrine. The selection of the arbitrator is also inextricably tied up with the decision to arbitrate, for on his expertness and skill will depend a successful outcome of the arbitration. The arbitrator or arbitrators, therefore, should where possible be named in advance, with appropriate provisions for substitute arbitrators, to ensure that the designation of the arbitrators will not become inoperative. Until these realities are taken into account by businessmen and lawyers in the drafting of agreements to arbitrate, the full potentialities of the arbitration process in commerce will not be achieved.<sup>63</sup>

<sup>60</sup> Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding*, 46 HARV. L. REV. 1258 (1933).

<sup>61</sup> *Paramount Famous Lasky Corp. v. United States*, 282 U. S. 30 (1930).

<sup>62</sup> Kronstein, *supra* note 58.

<sup>63</sup> Phillips, *A Lawyer's Approach to Commercial Arbitration*, 44 YALE L. J. 31 (1934) is helpful on the drafting of arbitration agreements.