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Modern Developments in the Practice and Law of Commercial Arbitration

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MODERN DEVELOPMENTS IN THE PRACTICE AND LAW OF COMMERCIAL ARBITRATION

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Lawyers need no introduction to arbitration. At least they are familiar with it in a general way as being a process whereby parties to a dispute chose some third person to decide their particular case instead of litigating the matter in court.

If the addition of the term "commercial" makes the term "arbitration" seem a bit strange, it may be noted that the adjective is added merely to indicate a selected class of controversies which are submitted to arbitration. As distinguished from the arbitration of those disputes which arise between employer and employee concerning conditions of employment, and as distinguished from the arbitration of those disputes which arise between nations concerning what may be termed, non-technically, as political questions, commercial arbitration comprehends the arbitration of disputes which arise between business men out of the various transactions which are involved in the production and distribution of goods. In short, it embraces the arbitration of those disputes which arise out of sales, bailments, leases, credit transactions, agreements for business organization, such as articles of partnership, and commercial contracts generally.

While commercial arbitration is at least as old as our first-reported cases and lawyers are familiar with it as it appears in the many volumes of reported court decisions, doubtless some are less acquainted with it as it is practiced in modern American associated business. While the law books abound in reports of arbitrations of commercial disputes and the many legal regulations of them which have been adjudged by the courts, it will be recalled, that almost every one of those reported cases is the story of an arbitration of a casual dispute between the particular parties which almost always arose out of an isolated transaction between them. Business men of the past have arbitrated their disputes with each other *sometimes;* their dispute has usually arisen out of the one and only transaction which the particular parties ever entered into. They agreed upon arbitration rather than litigation only for the particular case. They agreed to arbitrate only after the controversy had arisen, and oftentimes, indeed, only after litigation in court had been commenced.

Today, as we know, business and commerce are carried on under exceedingly intricate schemes of organization. Business men carry a multiple membership in a network of trade associations and business mens' organizations. As a modern business practice commercial arbitration is to a large extent the policy and practice of these associations. It is provided for in the by-laws or articles of membership of these associations. It has thereby become the contract of the thousands of members of these organizations. It is inserted into the great number of standard contracts under which associated business is conducted. It is also being provided for in the articles of membership of the chambers of commerce, local, state, national and international.

At the present time more than fifty (50) national or interstate trade associations have an arbitration clause for each of the many different contracts of their thousands of members and maintain physical facilities and committee management for the arbitration of any disputes which may arise between the members of their respective associations. More than one hundred (100) such associations have like facilities and management, and although they do not use arbitration clauses in their several contracts, they have some other provision for arbitration such as regulations by by-laws or articles of membership to which reference has been made. Similar development is taking place in chambers of commerce and local business mens' associations, such as local merchants' organizations.

In this use of commercial arbitration lies the important distinction between its modern and ancient practice. It is not resorted to in merely isolated cases, and only after the parties have become involved in a controversy. By contract it is fixed as a policy of trade association members with common interests. These members thereby *agree in advance* to arbitrate their business disputes which may arise out of their future dealings.

In order to indicate the variety of business organizations which are using commercial arbitration in this new way, I will read the following names:

The Association of American Bottlers of Carbonated Beverages.
American Wholesale Grocers Association.
American Fruit and Vegetable Shippers Association.
Institute of American Meat Packers.
Interstate Cotton Seed Crushers Association.
The Grain Dealers National Association.
National Association of Real Estate Boards.
American Institute of Architects.
National American Wholesale Lumber Association.
American Railway Association.
New York Stock Exchange.
Motion Picture Distributors and Exhibitors of America, etc.

In addition to the associations which have actually adopted the practice, such national organizations as the American Bankers' Association, the American Society of Certified Public Accountants and the National Credit Men's Association have actively promoted the adoption of commercial arbitration. In additon, the American Arbitration Association, a New York membership corporation, with more than 1,500 individuals, firms, business and professional men's associations as members, serves as an executive headquarters for the movement. It serves as a clearing-house for information on the practice; it directs research in the subject and provides its own arbitration tribunal not only to promote the use of arbitration of commercial disputes, but also for instructional and experimental purposes. It also maintains a standing national panel of arbitrators which at present numbers more than five thousand (5,000) individuals. These persons are available throughout the different parts of the United States to serve as arbitrators in any case in which they may be chosen by the parties.

Modern commercial arbitration, however, is not exclusively a practice and policy of trade associations and chambers of commerce. As business men are becoming acquainted with it in their trade associations and as educational work which is promoted by the American Arbitration Association progresses and as lawyers become familiar with it, arbitration clauses are being inserted into a great many different types of contracts where the parties may have no other common interests than their relations in the particular transaction.

This development in the modern use of commercial arbitration by American business has taken place within the past decade. It has been in progress only since about 1920. A few business organizations, however, have had a longer experience with its use; notable among these is the Silk Association of America the Grain Dealers' National Association, the American Spice Trade Association, the Chamber of Commerce of the State of New York, the New York Stock Exchange, and several of the produce exchanges throughout the country. In some instances their experience date back prior to 1900.

In this development in the use of arbitration by modern associated business, it is interesting to note how perhaps its chief obstacle has been and is being met. It appears that many trade associations are not organized to embrace the producers and distriutors, buyers and sellers of the particular commodity. The membership of these associations is often horizontal, that is, manufacturers and distributors, buyers and sellers of the same commodity are members of different associations. As a consequence the buyers, for example, have been reluctant at times to agree to an arbitration of a dispute with a seller where the arbitration was to be conducted under the regulations of the seller's association. In so far as this has been a difficulty it has been and is being met by the establishment of joint arbitration machinery. For example: The *Tanners'* Council of America, the National Boot and Shoe *Manufacturers* Association, the National Association of Shoe *Wholesalers,* and the National Shoe *Retailers'* Association have made such provisions. Other interallied trades which have likewise provided joint arbitral machinery are the Dried Fruit Association of California, New York, Chicago, and St. Louis, and the National Canned Food Association, the Dried Fruits Brokers' Association, and the National Wholesale Grocers' Association.

That commercial arbitration has become extensively established in modern associated business no one will deny. Indeed, by way of summary, it may be said that the business trnsactions involved in the production and distribution of more than twenty-five (25) basic commodities are entered into and carried out under arbitration agreements.

Since this development has taken place so recently and rapidly it may be well to cite a precedent. It should be noted that the same practice has been similarly integrated into the business and commerce of England and the Continent for many years. I will quote the following from the report of Mr. Samuel Rosenbaum, of the Philadelphia Bar, which was made after he had made an extensive study of law administration in England. This report was published by the American Judicature Society in 1916 and is as follows:

> "A very large proportion of the business disputes of England never come into the courts at all, but are adjusted by tribunals established within the various trade associations

and exchanges. This is especially true of the vast wholesale distributing trades which are responsible for a great part of the immense volume of imports and exports constantly flowing through the ports of England, and give them the commanding position they occupy towards the sea-borne trade of the world. Disputes over the quality and condition of consignments of grain, cotton, sugar, coffee, fruit, rubber, timber, meats, hides, seeds, fibres, fats, and countless other articles of commerce, as well as every conceivable variety of dispute that can arise out of a contract for sale and delivery, such as questions of delays, quantities, freights, interpretation, etc.—all these are passed upon by business arbitrators selected by reason of their familiarity with the customs of the trade and with the technical facts involved, and not submitted to juries whose ignorance would usually be equally comprehensive.

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

With this sketch of the modern development of commercial arbitration, question naturally arises why it is becoming so popular; what, if anything, is the trouble with the courts and court trials. I will briefly enumerate the reasons which are most frequently assigned for resorting to this policy of arbitration which looks, as concededly it does, to the elimination of lawsuits in the courts.

First: The congestion of court calendars, especially in commercial centers, necessitates too long delays between the date of filing a case and its trial. Productive capital is tied up in the meantime, contingent liabilities must be set up which will be reported by such agencies as Bradstret and Dun, witnesses die or move away, and bankruptcies intervene.

Second: Many a business man has complained that when, as a party litigant, he appears at the courthouse at the time set for trial, rarely does the case proceed promptly—even if it is not formally postponed. In the meantime his time and attention has been distracted from his business without results and his suspense and irritation aggravated.

Third: The ritual of pleadings and the law of evidence sound strange and threatening to the layman, though he is of average intelligence.

Fourth: Appearances of arrogance on the part of some lesser officials at the courthouse are generally irritating.

Fifth: Trial practice, of which the average business man knows nothing, seems strange, absurd, technical and treacherous, and not infrequently to involve bickering, bartering and compromise.

Sixth: The jury system, in so far as the system imposes upon the parties, as it does all too often, a bootblack and a grocery clerk to hear and decide a case concerning a complicated, technical question arising out of a modern business transaction seems equally obsolete. Similar inconsistency often prevails in the scheme of submitting such a case to a judge learned in Blackstone and Kent and the statutes, but necessarily unacquainted with the technical details of modern business transactions.

Seventh: The case becomes a matter of public information, with possibility that its publicity will reflect upon the credit and trade position of one or both of the parties.

Eighth: Established dockets at established courthouses scarcely can operate to the special convenience of the particular parties.

Ninth: A lawsuit rarely restores friendly business relations between the parties litigant. In a lawsuit one beats the other in a game which generally generates personal prejudices.

Modern commercial arbitration, on the other hand, contemplates the choice of one or more (but ordinarily not a dozen) persons specially qualified to decide the particular case because of their experience and training. There is no delay unless the parties wish it. There is no ritual of pleading and no trial under technical rules of the law of evidence. The parties informally tell their side of the case. Each party in the presence of the arbitrators and of each other, cross-examines, in his own way, the adverse party and his witnesses as he desires. The hearing is in private and at such time and place as satisfies the convenience of the parties and arbitrators. There are no pompous or yawning clerks. Experience also indicates that an arbitral adjustment of a business controversy leaves the parties amenable to further business relations with each other. Even of more importance, perhaps, experience shows that the modern use of agreements in contracts or aricles of membership to arbitrate disputes which may arise in the future induces the parties thereto to settle their own misunderstandings before they become formal controversies. In other words, the modern practice of commercial arbitration aids to eliminate not only litigation but also formal arbitrations.

With this summary of the modern development of commercial arbitration and the reasons most frequently assigned for its recent and rapid progress let us turn to some of the more important legal questions which have affected its progress.

You recall that in Vynior's case, decided by the English courts in 1609, Lord Coke is reported to have remarked that "a man cannot

by his act make such authority, power or warrant not countermandable, which is by the law and its own nature countermandable." With this utterance of a remarkable truism started the Anglo-American common law doctrine of revocability of agreements to arbitrate. You recall that this doctrine received its most popular formula in the case of *Kill vs. Hollister,* decided by the English courts in 1746, to the effect that such agreements are against public policy and are therefore revocable because otherwise they would "oust the courts of jurisdiction." We recall from our common law cases that an agreement to arbitrate is said to be revocable when either of two questions are raised concerning them: (1) when issue is made whether a party can sue in court notwithstanding he has made an agreement to arbitrate the case; (2) where issue is made whether by notice he can revoke the power of arbitrators, or prevent the effective appointment of arbitrators, provided he has given such notice before an award is rendered. We also recall that the common law rules of our equity courts have been the same as those of our law courts concerning revocability of arbitration agreements and also that our equity courts will neither order specific performance of agreements to arbitrate, nor appoint arbitrators when a recalcitrant party refuses to do as he had agreed. Indeed, you will recall that Section 7197 (3) of the Compiled Laws of North Dakota expressly perpetrates this common law equity rule by providing that "an agreement to submit a controversy to arbitration cannot be specifically enforced." At the most, the aggrieved party has some nominal recovery for the revocation of the agreement by an action for damages. Lastly, we know that when, and if, the parties perform their arbitration agreement, and an award is rendered, that unless the losing party voluntarily performs the award, it is necessary for the successful party to bring a lawsuit to recover on the award. In short, our common law and equity courts have offered little inducement or sanction for the faithful performance of agreements to arbitrate and in these cases have kept the path to litigation wide and open.

It is true that arbitration statutes have been long standing in almost every state of the United States. In general, however, these statutes do not displace common law arbitrations nor the rules of law to which we have just referred. Indeed, such is the holding of the Supreme Court of North Dakota in the leading case of *Johnsen vs Wineman* (34 North Dakota 116) as set forth in a thorough opinion written by Mr. Justice Fisk, while chief justice of the court. In general, these statutes provide that if an agreement to arbitrate is executed with the formalities prescribed by the statute, and, in many statutes, if it is filed in a designated court, and if the arbitral hearing is conducted pursuant to the statute, which may regulate those proceedings in more or less detail, then an award duly rendered according to the statute can be entered in some court by some summary procedure such as a motion, and judgment is required to be entered thereon and execution issues forthwith unless cause is found to vacate or correct and modify the award as provided in the statute. (This, you will recognize is also a general outline of the proceedings prescribed by the twenty-one sections of the North Dakota Arbitration Statute as set forth in Chapter 40 of the Compiled Laws.) In some states an agreement to arbitrate which is entered into pursuant to one of these older statutes is made irrevocable at least to the extent that an action in court cannot be maintained on the dispute which the parties have agreed to arbitrate.

(You may recall, however, what the situation is in this respect under the statute in North Dakota Compiled Laws, Sec. 8346.) These older statutes rarely, if ever, provide for the specific enforcement of an agreement to arbitrate, and there are almost no provisions that a court shall appoint an arbitrator if a party refuses to do so.

The most significant aspect of these older statutes, however, especially in view of the modern practice of commercial arbitration which we have reviewed, is that they comprehend only agreements to arbitrate existing controversies. They do not change the common law rules of revocability and non-enforceability of agreements to arbitrate future disputes. This is not surprising when it is remembered that these statutes were enacted long prior to the modern practice of commercial arbitration by associated business.

With the modern practice comes the demand for legislation which will abrogate the common law rules of revocability and non-enforceability of agreements to arbitrate future as well as existing disputes, and the demand that there be a minimum of formalities required for such agreements. Irrevocable and specifically enforceable agreements to arbitrate future disputes are the future *legal* support of the policy of preventing not only litigation but also even formal arbitrations.

It may be interesting briefly to note in passing that many trade associations are providing substitute sanctions for their own arbitration agreements pending legislation which will abrogate the common law rules of their revocability. For example, the National Boot and Shoe Manufacturers Association authorize publication in its official paper the name of any member who refuses "without justifiable cause" to arbitrate a controversy which an adverse party has offered to submit to arbitrators. Other associations are making membership contingent upon willingness of the members to arbitrate. Article VI, Section 17 of the Rules of the Grain Dealers' National Association, provides as follows:

> "Neglect or refusal to submit the subject matter of a controversy to arbitration, or failure to comply with an award of an Arbitration Committee, shall be deemed uncommercial conduct, and the penalty therefor shall be expulsion."

These sanctions, however, are in a sense negative. They do almost invariably induce hesitating members to arbitrate. If, however, the recalcitrant party will sustain the penalty, their agreements and awards are apparently left subject to common law rules.

To meet the unanimous demands of the time the New York legislature in 1920 enacted a new arbitration statute providing for the irrevocability of written future disputes clauses, as well as written agreements to arbitrate existing disputes. It also provides that such agreements shall be specifically enforceable by motion to the court for an order that a recalcitrant party proceed according to his agreement and for the appointment of an arbitrator by the court if such party refuses to comply. Since that date the same provisions have been enacted in New Jersey, Massachusetts, Territory of Hawaii, Oregon, it is supposed, and in Pennsylvania, California, and Louisiana. The United States Arbitration Act, which became effective January 1, 1926, also enacts the same rules for agreements to arbitrate matters

of dispute arising out of transactions in interstate and foreign commerce and admiralty. The United States Arbitration Act was drafted by the Committee on Commerce Trade and Commercial Law of the American Bar Association and was approved by the American Bar Association. Credit for the enactment of the United States Arbitration Act is, in a large measure, due to the American Bar Association and its Committee on Commerce Trade and Commercial Law.

Although this policy concerning future-disputes clauses as well as agreement to arbitrate existing disputes has been enacted in these seven states and the Territory of Hawaii and by the Congress of the United States, a different arbitration statute has been recommended to the state legislatures by the National Conference of Commissioners on Uniform Laws. This statute has been adopted in Nevada, Utah, Wyoming and North Carolina. Like the older arbitration statutes to which we have referred, the Commissioners' Act embraces only written agreements to arbitrate *existing* disputes. Agreements to arbitrate future disputes presumably are left subject to common law rules of revocability and non-enforceability.

Judging by the records of the proceedings of the Commissioners, some of them appear to have concluded that the business associations do not desire that agreements to arbitrate future disputes shall be made irrevocable and enforceable contrary to common law, at least some commissioners reported to the Conference that the Chicago Chamber of Commerce did not. Secondly, some of the Commissioners said that they thought it was dangerous policy to provide that future disputes agreements should be made irrevocable and enforceable specifically, for at the time the parties enter into them they do not know what disputes may arise, and also that such agreements are "jug-handled," that is, they are slipped into contract documents by one party and the other party is caught unawares. The attitude of the Commissioners is also significant in that they induced the American Bar Association to approve their Act and, at least in form, to expressly repudiate the position which it had taken concerning agreements to arbitrate future disputes in promoting the United States Arbitration Act.

Concerning this divergence of opinion regarding the statutory regulation of future-disputes clauses certain observations seem free from challenge:

(1) Most of the trade associations desire that future-disputes clauses as well as agreements to arbitrate existing disputes shall be irrevocable and specifically enforceable. Their standard contracts and their substitute sanctions of publishing members' names and providing for expulsion from membership of members who refuse to arbitrate have already been cited. The attitude of business men of Chicago seems scarcely so unanimous and certain as some of the Commissioners seem to have indicated in their proceedings. It is significant that the following organizations from Chicago supported the promotion of the United States Arbitration Act:

Western Fruit Jobbers Association of America, Chicago.
National Poultry, Butter and Eggs Association, Chicago.
Live Poultry & Dairy Shippers Traffic Association, Chicago.
American Fruit & Vegetable Shippers Association, Chicago.

I will also refer you to the Year Book on Commercial Arbitration for a record of the many local trade associations in Chicago, such, for example, as the Dried and Canned Foods Associations of Chicago, with its active membership of some sixty Chicago firms of wholesale grocers, dealers and brokers in canned and dried fruits, whose members do business in Chicago under agreements to arbitrate their future disputes.

(2) The Commissioners of six states voted against the act. Commissioners of twenty-three states voted in its favor. No participation is reported for Commissioners of nineteen states.

(3) The American Bar Association had 23,450 members at the time of its annual meeting in 1925. Eighteen hundred thirty-nine members were present at that meeting. Of that number 175 voted in favor of the Commissioners Act, 26 voted against it. The same relatively insignificant quorum and vote expressly repudiated the position of their Association and the work of its Committee on Commerce, Trade and Commercial Law in connection with the United States Arbitration Act.

(4) It is also in point to note that the Commissioners Act is inconsistent with the English Arbitration Act of 1889, and apparently inconsistent with the law of almost every other country in the world, (Brazil is excepted). It is likewise inconsistent with the following Protocol on arbitration clauses submitted by the fourth assembly of the League of Nations to the member nations for adoption on September 24, 1923:

> "Each of the Contracting States recognizes the validity of an agreement *whether relating to existing or future differences between parties* subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matters capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject."

(5) The Commissioners Act is inconsistent with the judgment of the Supreme Courts of Colorado and Washington. Both have recently held that future disputes are at least irrevocable. They take the position that if the practice of arbitrating is worthy there is no reason why parties cannot contract irrevocably for the remedy.

(6) The Commissioners Act is inconsistent with the judgment of every American judge, who, in recent years, has expressed an opinion concerning the common law rules of revocability of agreements to arbitrate. They are unanimous in expressing regret for being bound by the doctrine of *stare decisis* in this particular instance.

As a result of this departure in the Commissioners Act, the American Arbitration Association has drafted and submitted to the legislatures of the several states a substitute Uniform State Act which is patterned after the United States Act and the new statutes of such states as New York. It was adopted by California and Pennsylvania in 1927 and by Louisiana during the current year.

I will pass over the various provisions in the two classes of arbitration statutes which govern in more or less detail the manner of proceeding to an arbitral hearing; such matters, for example, as the appointment of time and place of hearing, subpoenaing of witnesses and documents, taking depositions and postponements and adjournments of hearings. I will also omit discussion of the requisites concerning the conduct of the hearing, such, for example, as regulations concerning quorum, hearing of counsel and receiving evidence. I will also omit reference to the details of the two types of statutes which govern the rendering of awards. I will also pass by the matters of cause and procedure to vacate, and to correct or modify awards and the procedure to enforce awards. While the two classes of statutes vary in many particulars, their differences seem comparatively unimportant.

Instead, I will take up what is generally considered as the second most important difference between the United States Arbitration Act and the state statutes which are patterned after it and the Commissioners Act. Indeed, even in the statutes of the states which are patterned after the United States and New York Acts as respects future-disputes clauses, there is want of uniformity on the question.

You will recall that it has been uniformly decided by the judges in the common law cases that the arbitrator is empowered to decide both the law and fact of the case under a general submission. Former Chief Justice Fisk concisely states the rule in the case of *Johnsen vs. Wineman,* to which I have referred, as follows: "The parties selected such tribunal, and concededly submitted all matters of difference to it, and under the law the arbitrators were vested with jurisdiction to decide all questions of law, as well as fact."

Only if the arbitrator makes a mistake of law apparent on the record of the submission and award, will the award be set aside in equity. And it is not a "mistake" merely that the arbitrator decides differently from what the court would have decided. Only if he obviously assumes the law to be different from what it is and decides the case on the basis that his assumption is correct—"a mistake on his own principles"—is there a "mistake."

The Commissioners Act abrogates this common law with respect to arbitrations had under its provisions. It provides as follows: "The *arbitrators* may, of their own motion, and *shall* by the request of *a* party to the arbitration:

> "(a) At any stage of the proceedings submit *any question of law* arising in the course of the hearing for the opinion of the court, stating the facts upon which the question arises, and such opinion when given shall bind the arbitrators in making their award.
>
> "(b) State their final award in the form of a conclusion of fact for the opinion of the court on the questions of law arising on the hearing."

The Commissioners Act is the only recently enacted arbitration statute which does not embrace future disputes clauses and at the same time provides for the reference of questions of law to a court.

In so providing for the reference of questions of law to a court it is also a departure from all of the older arbitration statutes in the American states except that of Illinois.

In order to set forth the variations from the common law rule which are enacted by the other English and American arbitration statutes which have been enacted, I will quote from the pertinent sections of the several statutes.

The English Act of 1889 provides that "Any . . . arbitrator *may* . . . at any stage of the proceedings . . . , and *shall, if so directed* by the court or a judge state in the form of a special case for the opinion of the court any question of law arising in the course of the reference." Under this provision *either* party can require the arbitrator to refer *any* question of law to the Court, for if the arbitrator refuses to do so, the court, on application by that party, will order the arbitrator to do so. An English court has held that an agreement by the parties to an arbitration clause not to make an application to have any questions of law referred to the court as authorized in the Act is void for it is said to be an attempt to oust the court of jurisdiction. [28 Com. Ca. 29 (C. A.)]

Under the new Massachusetts Act "any question of law *may*" be referred to a court if the arbitrator desires to do so. He is *required to do so* in such case "upon the request of *all* parties" to the arbitration. However, *any* one party may apply to the superior court to instruct the arbitrator upon "a question of *substantive law*" and the court shall do so "in its discretion."

The Pennsylvania Act provides for the use of the Uniform Declaratory judgments statute, which has been adopted in that state, as follows: "The arbitrators or *the parties* to the arbitration, *with the approval of the arbitrators,* shall have the right to apply to the court, at any time during the arbitration proceedings, for the determination of any legal question in accordance with the terms of the Uniform Declaratory Judgment Act."

The statutes of New York, New Jersey, Territory of Hawaii, California and Louisiana, and the United States Arbitration Act, and the Draft Act (submitted by the Arbitration Association) have no such provisions.

In connection with this last group of statutes the question arises whether both parties can agree to have the questions of law in their case referred to the decision of a court or judge and still invoke the statute. Those statutes by their terms deal with "agreements to settle a controversy by arbitration." For the purpose of those statutes is an agreement that questions of law shall be referred to a court and not be finally decided by the arbitrator an agreement for "arbitration," or, is it merely an agreement for finding facts as in an "appraisal" or an "assessment" of damages or the fixing of a price. The question remains open for future decision under those statutes. Uncertainty also remains concerning what procedure could be used to refer questions of law to a court under those arbitration statutes at least in states which have not adopted a Declaratory Judgment Statute.

It is clear that uniformity in arbitration legislation on this question of the arbitrator finally deciding questions of law as at common law is seriously threatened.

The problem, it is submitted, is less a matter of *what types of questions* shall or shall not be finally determined by the arbitrators in all cases and more a problem involving the following questions: (1) Shall an arbitration statute allow the parties expressly to agree that their arbitrator shall finally decide all or only some classes of questions affecting their case and still have the benefits of the Act? (2) If both parties to an arbitration agreement desire to stipulate that *either* party may have recourse to a court on *any* aspect of their case, shall they be allowed to do so and still have the benefits of the Act? (3) If their agreement to arbitrate is silent on any such recourse to the courts shall it be granted unless *both* parties agree thereafter to make such reference to a court? Under the Commissioners Act, although the Arbitration agreement is silent on the matter, *either* party can invoke the court on a "question of law" regardless of the wishes of the other party.

It may also be noted that there is a further difficulty in administering a statute which depends upon a distinction between a "question of law" and a "question of fact." Lawyers are familiar with those categories and the basis of distinction which appear in the reformation and rescission cases, in the pleading cases, in the evidence cases, in the deceit cases, in the estoppel cases, in the cases involving instructions to the jury, in the cases involving appellate review and others. Practical lawyers are also aware that what may be a "question of law" in one case may be a "question of fact" for another. What, then, will be a "question of law" for the Commissioners' arbitration statute or for the arbitration statutes of Massachusetts or Pennsylvania? Will the first question in each instance be whether the question referred to the court is a "question of law" or a "question of fact?" And will that question be a matter of fact or a matter of law?

Lastly, it seems to be an open question how far such statutory provisions concerning the reference of questions of law to a court as are contained in the Commissioners' Act are really designed to bring an arbitral hearing within the technical rules of trial court practice. How far are the technical rules of the law of evidence, the law rules regulating the competency and creditability of witnesses, the legal rules with respect to opening and closing of cases, imposed upon arbitrators by the Commissioners' Act in derogation of common law rules?

It will be recalled that the Massachusetts Act seeks to distinguish between "any questions of law" and "a question of substantive law." The arbitrators are required to refer the former upon the request of *"all* parties," but *"a* party" can require an instruction by the court upon the latter if the *court in its discretion* shall give it. It is inferred that questions of "procedural law," whatever that term may mean, which may arise in a particular arbitral hearing, are *not* referable to a court unless *both* parties so request.

Under the Commissioners' Act "any question of law" shall be referred upon the request of "a party." Indeed, the Commissioners' Act further expressly provides that it shall be cause to vacate an award

"where the arbitrators were guilty of misconduct, in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy" (16 C). Are questions of "sufficient cause," are questions of what is "evidence pertinent and material," "questions of law" to be referred to a court and taken out of the hands of the arbirators if *either* party so desires? And if the court decides in the affirmative, will it decide those questions as they have been decided in cases of actions brought in court? In short, it may be suspected that the Commissioners intended to turn an arbitration into another type of trial court proceeding with all or at least many of the technicalities which surround modern trial practice. Section 9 of the Commissioners' Act adds a little more color to this suspicion. It provides as follows:

> "That no one other than a party to said arbitration, or a person regularly employed by such party for other purposes, or a practicing attorney-at-law, shall be permitted by the arbitrators . . . to represent before him . . . any party to the arbitration."

The following remarks by the Chairman of the Arbitration Committee, in the deliberations upon this section by the National Conference of Comissioners on Uniform State Laws sufficiently indicate the purpose of the section:

> "Mr. Britton (Ind.): Mr. Chairman, I rise to raise the inquiry as to whether Section 9 would prevent a certified public accountant being called in for an expert opinion.
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> "Mr. O'Connell (Mass.): That matter was discussed at our meeting, and a public accountant there thought it would be quite desirable that they be given that permission and other members of the Chamber of Commerce said so, too. I would be inclined to regard a certified public accountant, as a witness. I refuse to elevate him to the dignity of a member of the Bar unless I have to. They are already doing a great bulk of law business that ought to belong to lawyers, and I am not one who is going to contribute to extending that field. That's my feeling in the matter. . . . It was our intention to exclude attorney in fact. In other words, the intention of the committee was to make a practice of this kind a practice for attorneys, unless the man himself wanted to try his own case or had somebody in his regular employment try it for him. In other words, we didn't want to have a school of arbitration develop outside where they were going to handle legal questions when they would not be competent to do so."

The Chairman seems to have forgotten for the instant that the arbitrators are not going to handle "legal questions" under the Act; that if the English authority is followed, even both parties cannot effectively agree that they shall handle them; and that if they do in fact so agree it is also open to question whether the Act will apply to their agreement and arbitration under it.

I have given this extended consideration to these problems involving furture-disputes agreements and the reference of questions of law to a court because they are regarded as the two most important

issues which must be dealt with in any new legislation which may be proposed to meet the modern developments in the practice of commercial arbitration.

Let us now briefly refer to one last topic: the position and attitude of lawyers toward these modern developments in the practice of commercial arbitration. We have noted that the American Bar Association drafted and promoted the adoption of the United States Arbitration Act. During the current year the Commercial Law League of America has formally resolved to further the enactment in each state of any arbitration statute which shall be patterned after the United States Arbitration Act. There is also of record the special services of the Bar Associations of such states as New York, New Jersey and Louisiana in procuring the enactment of the arbitration statutes of those states. There is also the express approval of the practice of arbitrating private disputes generally in the opinions of the justices of the supreme courts of each of the states. More than 1,000 prominent and experienced lawyers are enrolled on the National Panel of Arbitrators which is maintained by the Arbitration Association. Mention has been made of the limited approval by the Commissioners on Uniform State Laws of 23 states who voted to approve the Commissioners Arbitration Act and of the 175 members of the American Bar Association who voted to repudiate the position which that Association had taken with respect to future-disputes clauses. But the modern practice of commercial arbitration with its ideal of preventing not only litigation but also formal arbitrations raises a very practical question for each individual lawyer. It is this: What will become of my practice—my income? It is easy to throw an answer at this question in the form of an emotional appeal to the high ideals of the legal profession. It is easy to mouth the proposition that the legal profession has never predicated its existence on the philosophy that the world owes its members a living by perpetuating opportunity for controversy in order to perpetuate litigation. But let us pass by the philosophical and be a bit more specific.

If the ideal of future disputes clauses as used in the modern practice of commercial arbitration is fully realized in that they come into use in all business transactions and induce all business men with understanding to get together and adjust their trouble without even a formal arbitration is not the practical lawyer going to figure on these questions: What percentage of my yearly net return will be lost to me if commercial controversies no longer come to my office for counsel's advice or even for arbitration? In such a condition of affairs, will clients from whom I now enjoy profitable retainers, find my services unnecessary?

Obviously, there is but one answer to these questions, which is this: That different lawyers will answer them differently. Their answers will vary as a result of the different types of practice in which they are engaged, and as a result of their different conclusions or how fully and universally the ideal of future-disputes clauses will be realized, and also as a result of differences of opinion as to how far the modern business man will ever think it expedient to scrap his lawyer as a general adviser and counsellor. Obviously these different answers will not be arrived at merely by mathematical computations. It may

be noted that even the Commissioners on Uniform Laws do not appear, at least so far as their records show, to have excluded future-disputes clauses from their act for fear that those clauses would impoverish lawyers.

Passing from the aspects of modern commercial arbitration which may or may not be interpreted to be threatening to the income of lawyers, has it any aspects which are unquestionably profitable to the practicing lawyer? With respect to disputes which have already arisen between business men out of their commercial dealings or with respect to a broader class of controversies embracing, in general, any matter which may be made the subject matter of a civil case, can arbitration be used to profitable advantage by the lawyer? I can only remark that practicing lawyers who have informed themselves on the practice do find that arbitration is advantageous. Cases are heard and disposed of promptly and without delays. Fees are earned and received accordingly. Losing counsel is scarcely required to justify the loss of the decision, for his client has lost at the hands of an arbitrator of his own choice and his client has participated in the proceedings in cooperation with his lawyer. Such proceedings are also generally more satisfying to the client than a mere compromise bargained by opposing counsel in the office or courthouse ante-room. The parties have an opportunity to be heard by a third person chosen by them in reliance on his good judgment and impartiality. In short, an increasing number of lawyers today are using arbitration more and more in a large variety of cases because it is a profitable substitute for litigation in court and because it tends to preserve good will and confidence on the part of their clients.