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COMMERCIAL ARBITRATION AND THE LAW

By HARRY S. WOLLHEIM*

IN THE past ten years there has grown up in the commercial world a resentment at what laymen term *the law's delay*. Wherever lawyers congregate it is a matter of common discussion, and at city, county, state, and even American Bar Association meetings the subject is one frequently argued pro and con. Speakers of note have addressed lawyers everywhere on this all important subject. If the lawyers are thus conscious of this ever growing evil that has crept into the practice of the law, the leaders of industry and commerce whose capital investments are frequently seriously handicapped by the *law's delay* are even more conscious of it and what first appeared to be only a slight murmur of protest has almost grown to a roar. Now the leaders in the law of business and the leaders in the law of government; the forward thinking lawyers, who do not look upon precedent alone for guidance have united their efforts and are supporting the solution of this mixed problem of law and business; *commercial arbitration*.

What then, is this panacea, which will relieve congested court calendars of many of the cases having no place there; will permit lawyers to quickly marshal facts and present them before a tribunal well qualified to pass upon them quickly and do justice between the disputants cheaply and expeditiously, yet permit them to leave the courtroom after receiving the award of the arbitrator as friends well satisfied to continue profitable business relations. It is *commercial arbitration*, which is defined as, "a regular and recognized method, sanctioned and governed by law, for the determination of rights and the enforcement of remedies, by which a party aggrieved may ascertain and obtain all that he is entitled to have from his opponent, without instituting an action in the courts of law."

Commercial arbitration must not be, in any sense, confused with ordinary type of labor arbitrations which deal with the relations of employer and employee, capital and labor, and working hours and wages. It is entirely separate and distinct and deals with the common problems which arise in everyday commerce between shipper and consignee, manufacturer and jobber, wholesaler and retailer, importer and distributor. It is a practical remedy for the solution of the ordinary commercial disputes which arise from the interpretation of the common subjects of price, quality, quantity, consignment, etc. It is not new or untried; its bibliography goes back to the Bible; it has been employed in the grain chambers of commerce for many years and within the last ten or fifteen years an ever growing demand for relief in America has

* Affiliated with the American Arbitration Association.

brought an ever growing use of *commercial arbitration* by trade groups, chambers of commerce, and well informed lawyers.

In October, 1916, the American Judicature Society sponsored the publication of *A Report on Commercial Arbitration in England*. This publication covered a seven months' study made in 1915 by Samuel Rosenbaum of the Philadelphia Bar. The report covers sixty printed pages. Permit me to quote just a paragraph appearing on page eight of the report, as follows: "The advantages of arbitration over litigation are mainly to be found in the intelligent discussions of questions of fact. In addition to this one must consider: (1) that arbitration is more convenient because hearings can be set to suit the convenience of business men so that they need not waste time waiting in court-rooms; (2) it is more expeditious, a case can be finished in a few days; (3) it avoids irritation, there being no publicity, and no such staging of a trial as in open court where the parties face each other as enemies." Mr. Rosenbaum presents an exhaustive study of the subject in fifteen chapters. There is an appendix containing the *Rules and Regulations of the Commercial Arbitration Bureau of the Chicago Association of Credit Men* at whose request the survey was made.

In New York City is located the American Arbitration Association, a merger of three separate and distinct organizations that for a number of years did the pioneer work in the study and analysis of *commercial arbitration*. This association is now the nucleus from which the *commercial arbitration* movement is developing. It numbers on its board of directors and advisory council the leaders of banking, commerce and industry, also members of the judiciary, notable members of the bar, statesmen of unimpeachable ability, and deans of law schools. It maintains facilities for the conduct of arbitrations. It has a large home-office staff, court room facilities for the conduct of arbitrations, and official lists of arbitrators from which can be selected one to arbitrate almost any dispute that can arise in the broad and comprehensive field of business. The American Arbitration Association was largely instrumental in securing the passage of the United States Arbitration Law, signed by President Coolidge on February 12, 1925, and effective January 1, 1926.¹ It has been of great help in the passage of the Arbitration Act, now in force in the states of New York (1920), New Jersey (1923), Oregon (1925), and Massachusetts (1925). There has been prepared a Draft State Arbitration Act⁷ which is being introduced into the legislatures of the various states and which has the indorsement of such notable organizations as:

- The American Bankers Association.
- American Society of Certified Public Accountants.
- Motion Picture Producers and Distributors of America.
- National Association of Credit Men.

¹ Act No. 401, 68th Congress.

The American Arbitration Association is sponsoring an educational program to carry the message of *commercial arbitration* to the business men and lawyers of America. Speakers are sent to address conventions and all other types of business congregations. Already what will soon become a library of *commercial arbitration* books has been started. Several of these books have already been published. Among these are *Year Book on Commercial Arbitration in the United States*¹ and *Suggestions for the Practice of Commercial Arbitration in the United States*.² Further additions to the library will appear from time to time and will cover a study of international relations in the employment of *commercial arbitration*. In 1918 Julius Henry Cohen, an eminent member of the New York Bar, published a one volume work which is a very complete analysis of the legal interpretation of *commercial arbitration* practices.³

It is true that laws dealing with *commercial arbitration* have been on the statute books of most of the states.⁴ However, like the old blue laws they were in many cases dormant and ineffective because of their lack of application to modern business methods. The reason for this condition was that most of the statutes enacted in the United States up to ten years ago providing for *commercial arbitration* did not contain a provision making an agreement to arbitrate "irrevocable," that is, once having been entered into by both parties to the dispute, neither one can withdraw from the arrangement during the pendency of the arbitration or revoke the agreement to arbitrate the dispute upon any grounds other than the fraud of the arbitrator. In such foreign countries as England and Holland where *commercial arbitration* has been functioning successfully for many years such clauses are included in the arbitration statutes. This practice has been followed very closely in the United States in the past ten years. The provision that the agreement be irrevocable supplies the very backbone of the statute.⁵

A new field of practice will be opened to the lawyers of the United States; representing clients in *commercial arbitration*. The opportunities are great and the lawyers who first realize and appreciate them, and who inform themselves on the law and the practice governing *commercial arbitrations* will be the ones who will reap the benefits. The author has heard lawyers argue that the employment of *commercial arbitration* is but another step to take away the lawyers' bread and butter, to encroach on his chosen field of endeavor, and to deprive him of the revenue brought to him through litigation. Such arguments are

² 1927, Oxford University Press, 1170 pages, \$7.50.

³ 1928, Oxford University Press, 247 pages, \$1.75.

⁴ *Commercial Arbitration and the Law*, 1918, Appleton & Co.

⁵ Read Bill No. 413 S, April 23rd, 1929, creating Wis. Stat. 257.01 to 257.06 relating to tribunals of conciliation.

unsound in theory and in fact. Since it is the duty of all lawyers to be officers of the court and since anything which will expedite the administration of justice is a partial discharge of this duty on the part of every lawyer, and since *commercial arbitration* is a recognized legal method of relieving trial courts of much of the commercial litigation which is crowding their calendars and delaying the administration of justice; in addition to this *commercial arbitration* is recognized as a method of disposing of disputed questions of fact without a jury, saving time, energy, money for all concerned, and furnishing a furtherance of the principle of doing justice between all parties, it should be the joy of every forward thinking lawyer to further the progress of this movement, to absorb its underlying principles and practices, to advise his clients to employ arbitrations where they appear to be practical and to serve those clients in their arbitrations for proper and reasonable compensation. *Commercial arbitration* is truly a handmaiden to the courts in the facilitation of their duties.

The author has spent nine years in the study of the subject, merely as a matter of interest and because of his love of the orderly procedure of justice; has addressed national conventions of trade groups and luncheon clubs, all without any thought of reward other than the satisfaction of passing on for the benefit of others what he honestly believes to be a real blessing. This paper is now submitted to the readers of the MARQUETTE LAW REVIEW in the hope that those who know not whereof the author speaks may learn, that those who already are acquainted with the subject be inspired to seek further knowledge thereof, and that those who may frown or scoff, or who may have prejudices formed by a real lack of intimate knowledge may be brought to an appreciation of the values and possibilities of *commercial arbitration*.

Commerce and law now march hand in hand. Ancient prejudice must be forgotten; antiquated precedent must give way to modern practice; obsolete ethics to practical ethics; the backward looking lawyer of the past must yield the forum to the forward looking lawyer of the present and future, and all must join hands in the effective, speedy, economical, and practical administration of justice, a step toward it being the universal adoption of *commercial arbitration* as a nostrum for the *law's delay*.

And so, ladies and gentlemen of the bar and the judiciary, a layman rests his case with you, knowing that the combined wisdom which you possess will produce a verdict, if you sit as a jury, or a finding, if you sit *en banc* as a court, from which there should not and will not be an appeal.

⁶New York Times of Sunday April 28, 1929 pages XX9, "Business Arbitration Checked by Courts."

⁷Read proposed "Wisconsin Arbitration Act" Bill No. 422A, March 4, 1929. Introduced by Mr. Edwards by request of Jas. T. Drought.

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