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JUDICIAL REVIEW OF ARBITRATION: THE JUDICIAL ATTITUDE*

Frances T. Freeman Jalet†

The best law is a quiet agreement, made either by themselves, betwixt whom the suit is, or by an umpire. If this do not proceed (succeed) they come into court.1

Arbitration is one of the oldest modes of settling disputes. It is a procedure derived in the main from the Roman law,2 but time has not lessened its effectiveness. Its use is commonplace today and is increasing.3 Nevertheless, there are those who decry the “extra-legal practices”4 of arbitration tribunals and find in arbitration proceedings “the danger of the emergence of a new legal system” opposed to the basic legal principles that have long governed communities.5 But such a view, although it should not pass unnoticed, seems incompatible with the fact that arbitration, like the adjudication of administrative

* While Mrs. Jalet is a member of the legal staff of the State of New York Law Revision Commission, the views expressed herein are her own.
† See Contributors' Section, Masthead, p. 558, for biographical data.
1 Amos Comenius, Educator A.D. 1592-1670. Characterized as Comenius' plea for voluntary arbitration before an umpire. 1 Arbitration in Action, Nos. 7-8, p. 1 (1943).
2 Judge John Bassett Moore states that the ancient origin of arbitration derives from the Roman Law where there was developed a system of law without professionally trained judges. This was substantially true of republican Rome where the trial of specific issues was referred to persons (judices) chosen from a panel of laymen. 1 Moore, International Adjudications Historical and Legal Notes, pp. xxxviii-xxxix (1929).
But Professor Nussbaum traces arbitration even further back, mentioning the possibility that an arbitration clause was contained in the treaty concluded between two city states of Mesopotamia (Lagash and Umma) in the fourth millennium B.C. (approximately 3100 B.C.) which, he says, “would make arbitration one of the most venerable institutions of mankind. . . .” Nussbaum, A Concise History of the Law of Nations 2 (1954).
3 A relatively new development is the “The Nationwide Inter-Company Arbitration Agreement” which has been signed by over 270 insurance companies. In discussing it, Robert J. Demer says, “The Agreement provides, in essence, that the signatory companies will forego the right to bring lawsuits against each other to collect property damage claims which they pay as a result of automobile collisions. Instead of using the courts of law to settle their disputes the companies have adopted a system of arbitration.” Demer, “270 Insurance Companies Arbitrate Inter-Company Claims,” 64 Case and Com. 34, 35 (1959).
4 Kronstein, “Business Arbitration—Instrument of Private Government,” 54 Yale L.J. 36 (1944). In this article Dr. Kronstein, an authority on international trade, views modern business arbitration as “incompatible with general concepts of positive law” and even as attacking in principle the practical mandates of the Constitution of the United States. He regards the inclusion of arbitration clauses in contracts as a device for achieving by extra-legal means the application of “rules suited to the demands of dominant commercial and industrial interests” which set up a new and separate law governing national and international commercial transactions—one unhampered by legal tradition or restrictions.
agencies, does not take place wholly on its own, but may at some juncture be subject to judicial supervision.

THE CONCEPT OF JUDICIAL REVIEW

Judicial review is the power vested in the courts to pass upon the actions or decisions of other governing bodies, whether they be a part of the executive department, the legislature, an administrative agency, or some lower court; this authority also is applied to individuals or a panel of persons known as arbitrators. "Judicial review" is a term in common usage today, yet it is not defined in the leading law dictionaries. Perhaps it speaks for itself, but exposition would prove helpful as it is not always given the same meaning by its users. The title of a recent book, Judicial Review in the English Speaking World, would seem to indicate a broad study of this topic's many phases. Actually, it is limited to interpretations of the constitutions and legislative enactments of various countries by their highest tribunals. It is in this realm of judicial control over legislative action, however, that the concept of judicial review first gained foothold in this country. Chief Justice Marshall's decision in Marbury v. Madison marks this beginning. Its extension to include judicial supervision of decisions of administrative agencies came about naturally; administrative bodies, although sometimes termed a "fourth branch" of the government, are in reality an extension of the legislative arm,
for they function under authority delegated to them by the legislature.13

Judicial review of arbitration, however, is a less natural phenomenon and one that has given rise to charges of judicial interference and hostility, on the one hand, and to countercharges of lawlessness and attempts to side-step judicial strictures, on the other. The question to be pursued in this study is the underlying basis for these charges. This basis for dissatisfaction can, perhaps, best be discovered by first examining the nature of arbitration, and then seeking to determine the extent to which the umpire designated by the contestants to render a decision is permitted to do so, and the degree to which the arbitration process is allowed to operate in its own way, free from judicial interposition.

THE NATURE OF ARBITRATION AND ITS RELATION TO JUDICIAL REVIEW

Arbitration has been defined as "a simple proceeding voluntarily chosen by parties who want a dispute determined by an impartial judge of their own mutual selection, whose decision, based on the merits of the case, they agree in advance to accept as final and binding."4 It is an extra-judicial proceeding in which the arbiter may be a lay person.

The very nature of arbitration tends to limit the extent to which its proceedings and its concluding award should be subject to review by the courts. It is conducted informally by persons not necessarily trained in the law.5 The evidence heard need meet none of the technical evidentiary requirements imposed by courts of law.6 Seldom is

13 Id. at 65. "[A]ll administrative authority is conferred (directly or by implication) by a statute." See generally chapter II, "Legislative and Executive Control of Administrative Action."

14 Elkouri, How Arbitration Works 2 (1952). Compare this 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." Carlston, "Theory of the Arbitration Process," 17 Law & Contemp. Prob. 631 (1952).

15 Persons chosen as arbitrators are often experts in their field and courts are reluctant to disturb their determinations. In Arlington Towers Land Corp. v. John McShain, Inc., 150 F. Supp. 904 (D.D.C. 1957), the court found that the arbitrator was to place his own fair and reasonable value upon certain work to be performed and the mere fact the court's viewpoint of valuation differed was not a basis for setting aside the award. This case is discussed infra at text accompanying note 85.

16 Compania Panemena Maritima v. J. E. Hurley Lumber Co., 244 F.2d 286 (2d Cir. 1957). In an action to enjoin arbitrators from proceeding further it was held that there could be no application to the district court to review rulings of arbitrators on admissibility of evidence regarding fraud while the arbitration was in process. The party must wait and attack the award when made. Accord: Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359 (S.D.N.Y. 1957). Respondent sought to make use of the federal discovery rules by serving notice on the other party as to the taking of depositions. He was denied this privilege, for "respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial
there raised even a question of due process as is so common in the review of administrative actions, since it is not the state that is deciding the issue, but individuals selected by the parties as a result of mutual agreement. Still another important factor affecting judicial review is the ordinary absence of a written opinion by the arbitrator (labor cases have become an exception to this rule) upon which judgment can be passed. There is no record before the court unless the parties have chosen to go to that expense. It can readily be seen why arbitration is advocated as saving time and money. Controversies can be brought to a much speedier conclusion than is possible when court procedures must be pursued. Furthermore, arbitration normally may proceed as soon as the parties are ready and have selected their umpire, rather than waiting its turn on crowded dockets as do ordinary determinations.” 20 F.R.D. at 361. The opinion outlines with clarity the differences between arbitral and court procedures.

But consider the warning word of Solia Mentschikoff in “The Significance of Arbitration,” 17 Law & Contemp. Prob. 698, 704 (1952):

[T]o the extent that rules of procedure or evidence are adapted to the rational process of disputation, they are as much a part of the arbitration process as they are a part of the legal process. The difference lies in their mechanics of application and in the nature of the deflecting factors. The basic question is not whether rules of procedure or evidence are used in arbitration, for they clearly must be; the question is whether the ones used in arbitration are geared to the production of a better, in the sense of a more just, result, than those used in the court process.

Another writer notes that although the law provides no standard which would give uniformity or regularity to arbitration proceedings, in actual practice “most arbitrators feel that they must conform to some objective standards in procedural matters, vague and indefinite as those standards necessarily are.” Gorske, “Burden of Proof in Grievance Arbitration,” 43 Marq. L. Rev. 135, 179 (1959).


18 “The real reason why in the American system, awards with opinions are unknown and not used at all is the fact that we do not want the courts to go into the matter of awards.” Remarks of Dr. Martin Domke. Quoted from Proceedings of the International Trade Arbitration Conference, March 23, 1955.

It is noteworthy that the N.Y. Civ. Prac. Act § 1460 makes provision that the award “must be in writing,” but says nothing about an opinion. The same is true in the Uniform Arbitration Act § 8.

19 In addition to the award, it is customary in labor cases for the arbitrator to prepare a written opinion explaining his decision. This is an important characteristic of a labor arbitration case as it is seldom the practice of arbitrators in other types of cases to do more than make an award, without rendering an opinion. An arbitrator’s opinion in a labor case, however, is of such significance that without it, much of the usefulness of the arbitration process would be lost. This is because a decision in a labor case too often requires more than a mere judgment on the rights or wrongs of the parties’ past conduct.


20 Elkouri, note 14 supra at 11.

21 An illustration is found in patent cases, where one writer found through experience that the disposition of the arbitrated causes was expeditiously effected with a tremendous saving from the time-consuming and expense standpoints, and ended litigation in a period of twenty days of direct trial work, which litigation might have continued over five to ten years, if the cases had been presented individually in the United States courts.

Arbitration has been strengthened in the past few decades by the enactment of arbitration statutes, both state and federal, which by creating a uniform routine to be followed, and by making specific provision for the enforceability of arbitration contracts (not all enactments afford broad protection to every kind of agreement), have added an element of certainty and predictability that was previously


23 New York State led the way with the enactment in 1920 of the first arbitration law, which has served as a model for other statutes. Its coverage is comprehensive and includes, by special mention, contracts of employment in the labor field. N.Y. Civ. Prac. Act §§ 1448-1469 (Supp. 1959).

24 The United States Arbitration Act, 43 Stat. 883 (1925), codified 61 Stat. 669 (1947), 9 U.S.C. §§ 1-14 (1958), "makes 'valid, irrevocable, and enforceable' only two types of contracts; those relating to maritime transactions and those involving commerce." Douglas, J., in Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 200 (1956). Section 1 of the act defines "maritime transactions" and "commerce" and concludes with this qualification: "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." There is irreconcilable conflict in the federal circuits as to whether collective bargaining agreements are included with the term "contracts of employment" in section 1. The Supreme Court has not authoritatively construed this exclusionary clause. The division of opinion is reflected in Hoover Motor Express Co. v. Teamsters Union, 217 F.2d 49 (6th Cir. 1954), holding that a collective bargaining agreement is a trade agreement rather than a contract of employment and therefore does not fall within the exclusionary provisions of the Act, but for another reason (because the bargaining agreement did not provide for arbitration of the particular controversy involved) the federal act could not be applied; Tenney Eng'rs, Inc. v. United Elec. Workers, 207 F.2d 430 (3d Cir. 1953), holding that collective bargaining agreements are contracts of employment within the purview of the United States Arbitration Act, but that the excepting language does not apply when the workers are engaged not in commerce but in the production of goods for interstate commerce; International Union v. Colonial Hardwood Floor Co., 168 F.2d 33 (4th Cir. 1948), holding that a collective bargaining agreement is a contract of employment and as such is excluded from the operation of the Act. The existing conflict has made it doubtful whether arbitration clauses in collective bargaining agreements are enforceable under the Federal Arbitration Act. This has led management and labor to seek a resolution of their difficulties under the hoped for aegis of § 301 of the Taft-Hartley Law, 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958)—and with a measure of success. See Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), discussed infra at text accompanying note 120.

25 Note, "Predictability of Result in Commercial Arbitration," 61 Harv. L. Rev. 1022 (1948). This article seeks to dispel the fear that because most arbitrators are laymen, substantive rules of law are ignored. An analysis of the cases reveals, it is said, that the basis of decision is rational and predictable. But see also Marks, "Shaky Foundation of Arbitration," 13 Bar. Bull. N.Y. County Law. Ass'n 206, 208 (1956),
lacking in this branch of the law. There still remain, however, many jurisdictions in which the common law rule prevails that agreements to arbitrate, though perfectly legal, are revocable at the option of either party up to the time of the granting of the award, and therefore will not be enforced in the courts of those states. This doctrine has been particularly harsh on agreements to arbitrate future disputes.

Certainly it cannot be denied that the refusal of courts to enforce an agreement they characterize as valid has caused confusion and disappointment to those who consent to arbitrate their differences. For two persons to solemnly agree to pursue a course of action which is deemed completely legal, and then to find that there is no sanction behind their agreement other than the good faith of either party, raises strong doubts as to the wisdom of judicial adherence to the common law rule. But it has a respectable lineage and a long history commencing in 1609 with an early ruling on the revocability of the authority given an arbitrator in Vynior's Case. This was a mere dictum by Lord Coke, although in some inexplicable fashion it led, in Kill v. Hollister, to the pronouncement of the theory, since oft repeated, that the courts cannot approve irrevocability because it "ousts the jurisdiction of the courts." Thus were sown the seeds of a growing judicial antipathy to arbitration which reached full flower decrying the "lack of predictability" in arbitration, the outcome being a "matter of pure speculation."

26 For just as with the mushrooming of administrative agencies administrative law became a separately recognized field of study in our leading law schools, so also courses in the law of arbitration are now offered, though not as widely as in the case of administrative law. Here, too, there is a burgeoning, for it has been estimated that "the matters going to arbitration rather than to the courts represent 70 percent or more of our total civil litigation." Mentschikoff, supra note 16 at 698. See "An Outline of a Course in Arbitration Law," planned by J. Noble Braden and Martin Domke, and presented in 11 Arb. J. (n.s.) 115 (1956).

27 The common law rule applies except in those states which have adopted statutes which change it. A fairly uniform modern arbitration law has been adopted in some 18 states, three of this number—Florida, Minnesota and Wyoming—adopted the Uniform Arbitration Act approved by the National Conference of the Commissioners on Uniform State Law, August 20, 1955, as amended August 24, 1956. Florida and Minnesota enacted it in 1957 (Florida with slight modifications); Wyoming in 1959. The dates for the 15 other state enactments are: New York (1920), New Jersey (1923), Massachusetts (1925), Oregon (1925), California (1927), Louisiana (1928), Pennsylvania (1928), Arizona (1929), Connecticut (1929), New Hampshire (1929), Rhode Island (1929), Ohio (1931), Wisconsin (1931), Michigan (1941), Washington (1943). Most statutes plainly preserve the common law right of arbitration which the parties are sometimes anxious to resort to when there may not have been strict compliance with the statute. See Zelle v. Chicago & N.W. Ry. Co., 242 Minn. 439, 65 N.W.2d 583 (1954).


and has continued on down to the present day, although it has substantially lessened.

**The Scope of Judicial Review**

Despite all the advantages of arbitration and the stronger position it holds today, it faces hazards that may, as one author has recently put it, "reverse the trend towards arbitration as a means of settlement," at least in labor disputes. Chief among these is the scope of judicial review, which is one of the bases for the above-quoted assertion.

There have been few charges against the judiciary in arbitration cases, as there have been in the past with respect to its review of decisions of administrative agencies, that the courts were abdicating their function and deferring to arbitrators. Instead, criticism is sharply the other way. Reference is to "judicial intervention," to "the hostility of the courts," to "unwarranted interference," and

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33 See dissenting opinion of Judge Brown in Refinery Employees Union v. Continental Oil Co., 268 F.2d 447, 460 (5th Cir. 1959), discussed infra at text accompanying note 135, where he relentlessly criticizes the majority opinion for its refusal to find that the arbitrator had power to award damages as a remedy.


36 The provisions for "Appeals" contained in the New York Arbitration Law (N.Y. Civ. Prac. Act § 1467) and Uniform Arbitration Act § 19 are not directly encompassed in this study of judicial review, for they offer the usual court protection and proceed as appeals normally do in a civil action. The United States Arbitration Act (9 U.S.C. §§ 1-14 (1958)) has no provision for appeals as such, §§ 3 and 4 referring only to motions to stay or compel arbitration. These provisions are found also in the New York Arbitration Law § 1450 (Supp. 1959) (to compel) and § 1451 (Supp. 1959) (to stay) and the Uniform Act § 2. The Federal Rules of Civil Procedure appear to make a special appeals provision unnecessary. See 28 U.S.C. where "Rules of Courts" are set forth following § 2042, especially Rule 81a(3) ("Application of Rules to Arbitration Proceedings").

37 Justice Frankfurter writing the opinion in Universal Camera Corp. v. NLRB, 340 U.S. 474, 489-90 (1951). And note Professor Cox's comment:

The parallel problem which arose in defining the scope of judicial review of administrative action was resolved against judicial abdication and in favor of permitting the judge to ask whether, on the record of administrative action, he could conscientiously enforce the dictate of the administrative agency. Although we may hope that the scope of judicial review of arbitration awards will never be as broad as review of administrative action, it is important to realize the degree to which judges feel that they are required to stultify themselves if their sole function is to rubber-stamp arbitrary decisions by another, unofficial tribunal.


39 Kulukundis Shipping Co. v. Antorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942) (opinion by Frank, J.); and, more recently, Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 407, 412 (2d Cir. 1959) (opinion by Medina, J.).

to “the growing mistrust and apprehension with which judges have viewed arbitration proceedings.”

Is this castigation of the measure of control exercised by the judiciary justified? Do not the origins of arbitration in contract law mean that this mode of settlement falls naturally under the province of judges skilled in determining the existence of all manner of agreements and in interpreting their terms? And can it not be argued that our courts are doing no more than is required of them—fulfilling their proper function as guardians of the legal rights and duties of those who appear before them—serving ultimately as the final arbiters of any dispute? An answer to these queries may lie in an examination of the actual scope of judicial review.

The Charge of Judicial Hostility—Case Illustrations

The doctrine of judicial jealousy, if in fact it ever had existence except in the constant repetition of a vacuous phrase, met with a strong rebuff in the 1950's when lawyers and scholars alike rose in protest and a plethora of articles appeared in law reviews and other legal publications. Both commercial and labor arbitrations were defended. The general tenor of these writings was that the courts were encroaching upon the prerogatives of the arbitrator. The accusations ran thus:


42 Williston discusses the “primary contractual phases” of arbitration, in his treatise, 6 Williston, Contracts § 1918 (rev. ed. 1938).

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43 Sayre questions the propriety of attributing “such unworthy motives to the courts in their development of arbitration law from the earliest times to the present,” Sayre, “Development of Commercial Arbitration Law,” 37 Yale L.J. 595, 610 (1928).

44 The offending phrase is “oust the jurisdiction of the courts.”


1. The courts have substituted their judgment for that of the arbitrator.

In *Black v. Cutter Laboratories*, a proceeding by a union against the employer to enforce an arbitral award, the arbitrator's decision rested upon a finding that the employee, Mrs. Doris Walker, had been discharged because of union activities rather than upon the ground proffered by the company that she was an alleged Communist. Her reinstatement with back pay was ordered. The affirmance of this award by the lower court in San Francisco was reversed (three judges dissenting), the Supreme Court of California taking the position that it was against the public policy of the state to grant enforcement where, as here, the party to be reinstated was an avowed Communist advocating the overthrow of our government. Yet the arbitrator was aware of Mrs. Walker's membership and considered it in making his award, as well as the added circumstance that the employer had known of the affiliation for some two years prior to the discharge, which fact, the arbitrator concluded, made the basis for the discharge "stale." The California court denied rehearing, but the case went to the Supreme Court of the United States on certiorari upon constitutional issues not directly relevant here.

It is worthy of note, however, that the Supreme Court's dismissal of the writ because "there was no substantial federal question presented" was disapproved by Chief Justice Warren and Justices Douglas and Black. The majority had found that there was no more involved than "California's construction of a local contract under local law"—that the state court's construction of the term "just cause" to embrace membership in the Communist Party was a determination it was free to make and afforded a justifiable ground for Mrs. Walker's discharge. Justice Douglas in a strong dissent noted that not only did the decision of the California Supreme Court substitute that court's finding as to the ground of discharge for the one given by the arbitration board (membership in the Communist Party rather than union

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48 On certiorari to the Supreme Court of the United States, 351 U.S. 292, 299 (1956), the writ was dismissed. The opinion of the California court was carefully studied, and although Justice Clark recognized that there was some support for the charge made by counsel for Mrs. Walker that the state court spoke in terms of a California public policy against specific performance of arbitration awards that in effect protected activities "by a Communist on behalf of her party whether in the guise of unionism or otherwise" and that a decision resting upon such grounds might violate the equal protection clause of the fourteenth amendment, nevertheless a determination of the constitutional question could be bypassed for there was sufficient other ground upon which the Supreme Court of California could have rested its opinion. Justice Clark noted that the Supreme Court of California "did not limit itself to a discussion of the application of California public policy," but "subjected the findings of the Arbitration Board to scrutinizing review."
activity), but that a state decision resting on such grounds raised "an important question under the First and Fourteenth Amendments." The Justice found that Mrs. Walker was penalized for her beliefs in violation of the Bill of Rights.49

It becomes clear that the decision in this case is taken out of the normal arbitration setting by the taint of "communist activity" which attaches to the facts. One can detect a natural judicial unwillingness to force a company—especially one engaged in a business affecting public health and safety, the production of antibiotics for the civilian and military population—to reinstate an employee of questionable loyalty.

2. Under the guise of a need to construe the contract, the courts interpret its terms when it is the function of the arbitrator to do so.

In International Ass'n of Machinists v. Cutler-Hammer, Inc.,50 a collective bargaining agreement provided that the union and the company would meet at a designated time "to discuss payment" of a bonus in the ensuing year. Union and management took opposing views of the meaning of the provision "to discuss payment," the union interpreting it to mean that a bonus would definitely be paid and only the amount thereof remained to be determined, the company claiming that its obligation was fulfilled when it met "to discuss" the matter. The New York Court of Appeals affirmed (two judges dissenting) the per curiam opinion of the appellate division which denied the union's motion to compel arbitration. The court affirmed the lower court's opinion that "the clause of the agreement . . . can only mean what it says, that the parties will discuss the subject."51 The First Department upheld the power of the courts to determine in the first instance whether there exists an arbitrable issue—whether there was an agreement to arbitrate the particular type of dispute in question—but found there was no issue here:

[T]he mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue. It is for the Court to determine whether the contract contains a provision for arbitration of the dispute tendered. . . . If

49 "Communists, except and unless they violate laws, are entitled to the same civil rights as other citizens." 351 U.S. 292, 303 (1956) (Douglas, J., dissenting).

"I do not think we can hold consistently with our Bill of Rights that Communists can be proscribed from making a living on the assumption that wherever they work the incidence of sabotage rises or that the danger from Communist employees is too great for critical industry to bear." Id. at 304.


the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration. (Emphasis added.)

The New York Court of Appeals adopted this reasoning as its own in *Matter of General Elec. Co.* saying, "If there is no real ground of claim, the court may refuse to allow arbitration, although the alleged dispute may fall within the literal language of the arbitration agreement."

The case of *Alpert v. Admiration Knitwear Co.* cites with approval the *Cutler-Hammer* and *General Electric* decisions. In this case the purchaser sought specific enforcement of the provision for arbitration contained in a contract for the sale of woolen materials. That contract gave the seller the right to demand cash payments in advance where the purchaser's financial responsibility became unsatisfactory. The seller invoked this provision and notified the purchaser that henceforth no goods would be shipped except upon payment in advance. The purchaser refused to comply with this demand and called for arbitration of this dispute. The court found that the seller was not guilty of any breach of contract for failure to deliver and therefore it could not be compelled to proceed to arbitration. Furthermore, the controversy over payments could raise no arbitrable issue because the failure to tender payment upon demand terminated the contract; thus, there was no longer an issue thereunder to submit to arbitration.

3. The courts have narrowed the jurisdiction of the arbitrator by requiring the clearest and broadest language in order to find that he has any.

*Matter of Western Union Tel. Co.* was a case that seemed to call rather strongly for a decision in favor of arbitration and which arose upon an application by the union for confirmation of the arbitrator's award. The collective bargaining agreement between the union and the

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52 Ibid.
53 300 N.Y. 262, 264, 90 N.E.2d 181, 182 (1949) (per curiam). The union sought to compel arbitration of a dispute over pension credits.
54 Id. at 264. In *Towns & James, Inc. v. Barasch*, 197 Misc. 1022, 96 N.Y.S.2d 32 (Sup. Ct. N.Y. County 1950) a lower court reached the same result by finding the language of the agreement "not explicit enough" to cover a wage revision controversy between union and employer. It is noteworthy that in both the General Electric and *Towns & James* case there was before the court a situation where the arbitrator would be making a new agreement for the parties. The arbitration of contract negotiation disputes concerned with the terms of new or renewal contracts is viewed with much less enthusiasm by the disputants themselves as well as by the courts, for they are not deemed suitable for arbitration. See Elkouri, *How Arbitration Works* 16 (1952).
55 304 N.Y. 1, 105 N.E.2d 561 (1952).
56 299 N.Y. 177, 86 N.E.2d 162 (1949), discussed in Note, 63 Harv. L. Rev. 347 (1949) and criticized as "seriously impairing the usefulness of arbitration proceedings."
company contained a "no strike or other stoppages of work" clause. Sympathy for a strike called by affiliated unions against certain cable companies caused the union members to refuse to handle messages for any of the strike-bound companies. The issue as to whether this constituted a breach of contract was submitted to an arbitrator authorized to interpret, but not to alter the contract. The arbitrator took cognizance of a custom in the industry "not to handle struck traffic" and, finding that there was no breach, decided the controversy in favor of the union. On appeal, the appellate division's reversal of the supreme court's order confirming the award was affirmed, on the ground that the arbitrator exceeded his authority when he took into account extrinsic circumstances in order to interpret the contract, the court viewing what he did as amounting to an alteration of it. The decision would seem to impose the court's interpretation of the "clear language" of the contract upon the parties thereto, rather than the meaning accorded it by their chosen umpire.

This review presents only some of the usurpations charged against the judiciary. The accusations appear too sweeping, but their ultimate effect has been to impugn the motives of the courts and to weaken the cause of arbitration.

One is led to question why judicial hostility to arbitration has continued to linger in our courts. The force of precedent alone cannot account for it. One answer may be found in the similarity between the functions of the arbitrator and the judge. Arbitration has been characterized as essentially a "judicial process"—both judges and

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57. The decisions in the cases discussed in the immediately preceding pages, which have been cited as most flagrantly displaying hostility, can be justified if it is considered that other factors entered into the decisions of the courts. In Black v. Cutter Laboratories, supra note 47, a taint of Communist activity pervaded the facts surrounding the employee's discharge. In Matter of General Elec. Co., supra note 53, it is questionable whether the particular facts of the case could have warranted any other result. The union sought to invoke an anti-discrimination clause, which was a part of one collective bargaining agreement, in a second, separate and distinct agreement having no relation to the first. This the court would not permit. Lastly, in the most challenged case of all, Matter of Western Union Tel. Co., supra note 56, the action of the company's employees in refusing to transmit messages violated the Penal Law and was considered unlawful conduct. The fact that the company was "the only landline telegraph carrier operating in the United States" was also a factor, for it was then affected with a public interest.

58. Judge Frank carefully traces the history of the judicial attitude toward arbitration in Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942). At one point he says: "The hostility of the English Courts to executory arbitrations . . . was largely taken over in the 19th Century by most courts in this country." He finds that the lower federal courts became critical of this judicial unfriendliness and the Supreme Court began to waver. The passage of the United States Arbitration Act of 1925 served "to alter the judicial atmosphere previously existing."

59. See reference to early English cases, supra, p. 524.

60. Carlston, "Theory of the Arbitration Process," 17 Law & Contemp. Prob. 631 (1952). Note that in international law, arbitrations between nations are regarded "as essentially a judicial process." 1 Moore, International Adjudications xl-lxii (1929), where the learned author reviews authorities throughout the world.
arbitrators are arbiters of disputes. Each operates in a separate and distinct area. There is no merging. Nevertheless, because the final control lies in the courts they have naturally tended to overstep their bounds, especially where they regard themselves as equally, or perhaps even better, qualified to settle the controversy. Certainly with respect to language limiting matters that are arbitrable, courts are justified in carrying out their customary function as they give effect to the intention of the parties. The application of this doctrine of intent is two-sided. It may lead to the enforcement of agreements to arbitrate as well as to their invalidation, depending upon the facts. Where the contest has proceeded to arbitration and a question is raised only after the rendering of the award, not only will the party objecting be deemed to have waived his right to do so, but the courts view his protest with a skeptical eye. Mere dissatisfaction with the outcome of an award is not a ground for objection—an adverse decision is one of the risks of arbitration.

In trying to understand the attitude of the judiciary, it must be remembered that arbitrators function under the power bestowed upon them by the parties—that its source is the arbitration agreement, which is a “charter” of their authority to act thereunder. It is, therefore, incumbent upon the courts to determine the extent of that authority, especially when it has been challenged by one of the

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61 Matter of Belding Heminway Co., 295 N.Y. 541, 68 N.E.2d 681 (1946). It was a debatable question whether the closed shop provisions were intended to be applied to employees in the New Jersey plant. Arbitration stayed. Cf. Matter of Bohliger 305 N.Y. 539, 114 N.E.2d 31 (1953) where the question was whether the right to discharge was an arbitrable issue under the broad language of the collective agreement. It was held that it was and that the employer’s motion to stay arbitration must be denied. And see the Cutler-Hammer case discussed in the text accompanying note 50.


63 Dressler v. Peter Kiewit Sons’ Co., 102 Ohio App. 503, 144 N.E.2d 269 (1957). A government contract relating to an air conditioning system was to be construed. The party was held estopped to raise the question of legality and enforceability of the contract clause providing for arbitration where he had proceeded to arbitrate and made no complaint until the award went against him.

64 Canadian Gulf Lines, Ltd. v. Continental Grain Co., 98 F.2d 711 (2d Cir. 1938) (petition by charterer to compel arbitration in accordance with terms of charter party granted). Judge Augustus Hand quite appropriately said: “Arbitration sometimes involves perils that even surpass the ‘perils of the seas.’” Id. at 714. And see Matter of Wilkins, supra note 62.

65 Sturges, Commercial Arbitrations and Awards 144 (1930). The issue of the arbitrator’s authority is often inextricably interwoven with the determination of the arbitrable issue—whether it was agreed to arbitrate the particular type of dispute. If it was not, the arbitrator has no authority to render a decision concerning it. See Engineers Ass’n v. Sperry Gyroscope Co., discussed infra, text accompanying note 132.

66 The situation is analogous with respect to the acts of administrative agencies: “Even where judicial review is authorized by statute, the courts have the power and the duty to make certain that the administrative official has not acted in excess of the grant of authority given him by statute or in disregard of the standard prescribed by
parties, the very giver of the power. And, of course, in the absence of any express direction to that effect, it is not for the arbitrator to determine the limits of his own jurisdiction.\(^6\) There can be no quarrel, therefore, with this aspect of judicial review. There may be instances where uncertainties of language have led to doubts that have been resolved against the arbitrator,\(^6\) but that is a part of the decisional process.

Interpretation is likewise an inherent court function. Judges know, from long experience in construing contracts and enforcing contractual obligations, that the parties do not always mean what they say—that a term may creep into an agreement without one side or the other ever having been aware of it.\(^8\) Arbitration clauses should, therefore, be drafted with care. They are subject to close judicial scrutiny. Where the parties foresee the possibility of future disputes and wish to choose arbitration as the means by which their differences are to be settled, preferring it to the more contentious nature of litigation, the choice is theirs, but it must be clearly made. All too often it is not.\(^7\)

**Status of Arbitration Award**

There is one aspect of arbitration—the status of arbitral awards—to which the courts practically “pledge allegiance,” yet which they have had great difficulty in following. An arbitration award stands on a different footing from either a lower court decision or an adjudication of an administrative agency.\(^7\) Awards are not reviewable on the legislature." Matter of Guardian Life Ins. Co. v. Bohlinger, 308 N.Y. 174, 183, 124 N.E.2d 110, 114 (1954).

\(^6\) Sturges, op. cit. supra note 65 at 145, adding that the courts do not readily infer that the agreement accords such power.

\(^8\) Chandley Bros. & Co. v. Cambridge Springs, 200 Pa. 230, 233, 49 Atl. 772, 773 (1901), where the court says: "Whatever powers the engineer had to settle disputes between the contracting parties are found in paragraph twenty-four of the general specifications and conditions of agreement, and nowhere else." The engineer who was designated by the parties to make decisions as to the true meaning of drawings or specifications or the character of work was held not to be empowered to pass upon an issue of liquidated damages in cases of delay.


\(^7\) Review of decisions of lower courts, made on appeal, may present questions of law or fact. Administrative agency adjudications are conclusive as to findings of fact.
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questions of law nor on questions of fact—nor of mixed law and fact. This plenary power of the arbitrator is asserted again and again by the courts: "Where the merits of the controversy are referred to an arbitrator selected by the parties, his determination, either as to the law or the facts, is final and conclusive."\(^2\) This is true both at common law and according to statute.\(^3\) The statement of the Court of Appeals of New York, made through Andrews, J., has become a classic on this subject:

It is the general doctrine pervading our jurisprudence on the subject, that the decision of an arbitrator in a matter within his jurisdiction is final and conclusive between the parties. The jealousy with which, at one time, courts regarded agreement of parties, has yielded to a more sensible view, and arbitrations are now encouraged as an easy, expeditious and inexpensive method of settling disputes, and as tending to prevent litigation. The arbitrator is a judge appointed by the parties; he is by their consent invested with judicial functions in the particular case; he is to determine the right as between the parties in respect to the matter submitted, and all questions of fact or law upon which the right depends are, under a general submission, deemed to be referred to him for decision. The court possesses no general supervisory power over awards, and if arbitrators keep within their jurisdiction their award will not be set aside because they have erred in judgment either upon the facts or the law. If courts should assume to judge the decision of arbitrators upon the merits, the value of this method of settling controversies would be destroyed, and an award instead of being a final determination of a controversy would become but one of the steps in its progress.\(^4\)

But though the courts have done yeoman duty in giving lip service to this doctrine, in actual practice they have questioned arbitrators' findings of fact,\(^5\) have challenged their interpretation of legal principles,\(^6\) and have required compliance with traditional rules of law\(^7\)

\(^2\) If based on substantial evidence," Universal Camera Corp. v. NLRB, supra note 37.

\(^3\) Matter of Wilkins, supra note 62.

\(^4\) Hyman v. Pottberg's Exrs', 101 F.2d 262 (2d Cir. 1939). An award was confirmed when the court found that a settlement following a limitation proceeding in the SS Morro Castle disaster was equivalent to an agreement to arbitrate and therefore controlled by Title 9 of the U.S. Code—the U.S. Arbitration Act—which limited court review to the grounds specified in § 10 thereof.


\(^6\) Matter of Western Union Tel. Co., discussed supra, text accompanying note 56. The arbitrator took cognizance of a custom in the trade, and the court deemed this beyond his authority. Cf. Stefano Berizzi Co. v. Krausz, 239 N.Y. 315, 146 N.E. 436 (1925), where, in a dispute over the quality of bamboo skewers, the arbitrator made an investigation on his own (without the knowledge of the parties) which Chief Judge Cardozo found amounted to misbehavior and necessitated vacating the award.

\(^7\) In Barnes v. Avery, 192 Ga. 874, 16 S.E.2d 861 (1941), an order making an arbitral award the judgment of the court was reversed because the arbitrators' decision went against the uncontradicted evidence. Here, however, the circumstance was unusual in that "the entire evidence taken before the arbitrators" was before the court.

\(^7\) Industrial Elec. Co. v. Meyer, 85 N.E.2d 415 (Ohio App. 1949), where the court set aside the award for the arbitrator's error of law in refusing to consider competent evidence.
so that the statement that "the determinations of the arbitrator are final as to the law and the fact" became but a repetitious, hollow phrase. The temptation to wield judicial power proved too strong; the warning to arbitrators that their awards "are not sacrosanct" was superfluous. 78

But despite this rather dark and confused picture, there are, if one may borrow a poetic metaphor from Justice Douglas, "a few shafts of light that illuminate" 79 the scene. They make visible a discernible path that leads in the direction of greater respect for arbitration as a method of settling disputes, and reveal a growing trend toward a judicial self-limitation which recognizes that there are bounds to the scope of judicial review of arbitration. An analysis of recent cases will point the way.

**An Analysis of Recent Cases**

Decisions of both the federal and state courts 80 reveal the changed and somewhat chastened attitude of the judiciary. Final awards have been confirmed with surprising regularity and there is among these cases not one instance where the parties' privilege to proceed to arbitration has been denied. A motion to stay suit pending arbitration was granted by the appellate division in a labor dispute where the proposer of arbitration, the union, had already gone on strike. 81 An arbitrator was not permitted to grant specific performance of an agreement to purchase a business, 82 but specific performance was decreed of a contract to arbitrate a labor dispute not only in the highest court of New York, 83 but in the Supreme Court of the United States,

78 Herzog, in seeking the basis for the distrust and apprehension with which the courts have viewed the arbitration process, dismisses "professional jealousy" as too "petty" a reason and finds in the behavior of some arbitrators warrant for a justifiable concern that judicial safeguards be preserved. He decry "the folksy jurisprudence of arbitration law." Herzog, supra note 5 at 25.

79 Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 452 (1957), discussed infra, text accompanying note 120.


82 General Fice Co. v. Sightmaster Corp. 7 Misc. 2d 997, 162 N.Y.S.2d 630 (Sup. Ct. Westchester County 1957). The award was held to exceed the scope of the submission; the party had only an option to buy and could not be obliged to purchase.

83 Potoker v. Brooklyn Eagle, supra note 80.
in a significant opinion by Justice Douglas in *Textile Workers Union v. Lincoln Mills.*

Certain of these cases raise familiar issues which were resolved in favor of the arbitrator, though in an earlier day they might well have been decided the other way. In *Arlington Towers Land Corp. v. John McShain, Inc.*, the dispute arose between the owner of a huge building project and the building contractor, and was chiefly concerned with the addition to, or deletion from, the building of items referred to in the basic plans and specifications. After suit was filed the parties chose to arbitrate to determine "the reasonable value of the additions and deletions," thus raising the question whether the award of the arbitrator allowing a net credit to the Land Corporation should be confirmed or vacated. The charges against the arbitrator were that he "determined matters not within the terms of the arbitration agreement," that he failed to afford the petitioner an opportunity to be heard on all relevant issues, that he took *ex parte* evidence, and that his award showed bias and prejudice, for the arbitrator had concealed a prior business relationship between himself and the defendants. The court found none of these charges substantiated, although it was necessary for it to look into the merits of the controversy in order to do so. As to the charge that the arbitrator's computations were in error, the language of the court is noteworthy:

The Arbitrator was expected to utilize his own knowledge and experience in appraising the conflicting claims of both sides. . . . When an arbitrator is himself an expert in the field of the arbitrated controversy, he is empowered to exercise a discretion predicated upon the length and area of his expertness . . . and he may rely on his own findings even though they be in conflict with testimony offered him.

The fact that the arbitrator obtained information from one or more persons employed by him was held not to negate the fact that "he did not accept the findings of those persons as conclusive" but rather "exercised his own independent judgment upon the information furnished by them." And so the court spoke, although the arbitrator's findings varied in some respects from what the court would have found.

*Gramling v. Food Mach. & Chem. Corp.*, arising in the South Carolina District Court, is similarly concerned with a monetary determination by an arbitrator. The question was submitted to a board of six who were to determine the damages suffered when plain-
tiff's peach orchard was sprayed with a product purchased from defendant. Defendant, in making its motion to set aside the award, placed in evidence the affidavits of two arbitrators who had refused to sign the award. The defendant used this refusal as a basis to challenge the award as so excessive as to amount to fraud. The court found defendant's charges unacceptable and that the affidavits of the two arbitrators who did not participate in the award were not admissible, as the testimony of an arbitrator cannot be admitted to impeach his findings. The court concluded that the only way to appeal from the award was by a motion to set aside or modify and that there were no grounds for such a motion on the facts of this case. It is important to observe that here, as in Arlington Towers, the arbitration agreement specifically provided that the award "shall be final and binding and that neither party will appeal therefrom." This fact was not stressed in the Arlington Towers case, although it may have been a factor in the court's decision. In the instant case, however, it was accorded special weight: "The defendant is bound by its contract to accept the award as final, and not to appeal from it. If either party could now attack the award, that contract would be meaningless." A like provision, even more forcefully worded, was held invalid as "contrary to public policy and ineffective to prevent judicial actions" in McCullough v. Clinch-Mitchell Constr. Co. This is representative of the general view that individuals are not to be permitted to contract themselves out of court. But arbitration under a submission agreement expressly entered into after suit has commenced, as in these two cases, can well be deemed an exception to such a rule.

In the case of Rosa v. Transport Operators Co., the New Jersey appellate division upheld an award with regard to the issue submitted to the arbitrator, but concluded that the award was not dispositive of a matter alleged by counterclaim as to which the arbitrator had made no decision. In this action brought for back pay due as a result of wrongful discharge, the employer, who was engaged in the trucking business, counter-claimed that its vehicles had been damaged as a result of the plaintiff's negligence. The issue of negligence was not before the arbitrator; the only question submitted was "whether Rosa was wrongfully discharged." It was argued that the question of negligence was included in the broader one of "wrongful discharge" since, if negligence had

89 "... each and every of said parties hereby waives any and all right of action, suit or suits, or other remedy, in law or otherwise, under this agreement, or arising out of the same."
90 71 F.2d 17, 19 (8th Cir. 1934).
been found, the discharge would not have been wrongful. The court recognized that "an arbitrator does not always decide a case according to strict legal principles" (nor is he required to), but nevertheless it looked into the rule of law applied by the arbitrator. Finding no mention of negligence, but rather that this aspect of the matter had not been dealt with, the court ruled that the plaintiff could not receive the back pay awarded until the issue of negligence had been determined in the court below. The court further found that, in any event, the controversy over negligence was not "an arbitrable matter" under the terms of the labor agreement, which was limited to "the terms or conditions of employment." Thus, the award was upheld, but decision of a question outside the scope of the arbitrator's authority required that it be held in abeyance.

The judicial requirement that the parties express in clear language the matters to be arbitrated was not applied in Cournoyer v. American Television & Radio Co.92 There, in a suit upon an arbitrator's award of damages to aggrieved employees, although the wording of the agreement was found to be "ambiguous and unclear," the interpretation by the arbitrators of a provision as to seniority in a collective bargaining agreement was upheld as not modifying the terms of the agreement. The arbitrators were "free to construe or interpret the contract as their best judgment guided them."

The mere fact that this Court might well arrive at a different conclusion in interpreting the two subsections . . . is not of itself a justifiable ground for setting aside the arbitration award.93

Another case in which the arbitrator's construction of a contract term was accepted, though in a commercial rather than a labor arbitration case, was Capelin v. Klein.94 There, the New York appellate division, in a per curiam opinion, upheld the award as "unassailable" because the arbitrators "acted within the scope of the powers conferred upon them by the parties when they construed the contract so as to determine that the adjustments were repayable by the sellers in cash." The sellers had claimed that the agreement called for pro-rated payments rather than a lump sum.

O'Malley v. Petroleum Maintenance Co.95 presents an anomalous situation, for the arbitrators proceeded to render an award at the direction of the court although it is clear that they felt they were

92 249 Minn. 577, 83 N.W.2d 409 (1957).
93 Id. at 581, 83 N.W.2d at 412.
95 48 Cal. 2d 107, 308 P.2d 9 (1957).
exceeding their powers under the collective bargaining agreement. The action arose on appeal\textsuperscript{96} from a judgment of the California Superior Court confirming an arbitral award in favor of the union in a dispute over the discharge of an employee, one Semmett. The collective agreement made no specific mention of discharge though a grievance procedure was outlined. The superior court ignored the question whether the discharge was arbitrable, but, by ordering the arbitration to proceed "on the merits of the discharge," in effect determined itself that it was arbitrable. A submission agreement was drawn specifying two questions to be answered by a panel of three arbitrators. The first concerned the arbitrability of the discharge; the second inquired whether the discharge of Semmett was proper. In a four to three decision, the Supreme Court of California upheld the judgment of the superior court affirming the award with the statement that "the merits of the controversy between the parties are not subject to judicial review." But the truth of the matter is that the court \textit{was} affirming a decision on the merits; when the lower court decided that the issue as to discharge was arbitrable, that went to the merits of the controversy over the meaning of the collective agreement, just as the determination whether the discharge was proper was a decision on the merits as to that phase of the case. At one and the same time, therefore, the court did and did not decide the case "on the merits."

In \textit{Straus v. North Hollywood Hosp. Inc.},\textsuperscript{97} the court assumed a liberal attitude in affirming the award of the arbitrators, perhaps because their decision was just and because it was in harmony with sound legal principle and the court's own view of the law. There existed an agreement between the doctor and the hospital that the latter would furnish Dr. Straus with certain space, facilities, services and equipment for the conduct on its premises of a clinical pathology laboratory. In return the hospital was to retain a certain percentage of the gross monthly billings for the services the doctor performed. The agreement provided for arbitration and that the "arbitrators could terminate the contract." Upon submission of the subsequent dispute to arbitration, it was decided that the contract be terminated and that the doctor was to receive a sum as compensation. The hospital charged that the arbitrators had exceeded their power in making a monetary award since they had found that the hospital did not "wrongfully breach the contract." The court's view was that since Dr. Straus had

\textsuperscript{96} The California Code Civ. Proc. § 1293, states that an order directing arbitration is not appealable. The original appeal from the order directing arbitration was therefore dismissed, and the case now arises after the award has been made.

\textsuperscript{97} 150 Cal. App. 2d 306, 309 P.2d 541 (1957).
rendered substantial performance, he was entitled to compensatory
damages for the loss of his contractual rights under the contract, and
the hospital was thus precluded from receiving any unjust enrichment.
Since the legal theory preventing unjust enrichment may not have
been within the arbitrator's ken, he was led to a result that the
court deemed just and equitable purely as a consequence of his own
good judgment. Nevertheless, the court was satisfied since the out-
come accorded with its view of the law.

In Matter of Staklinski, an unusual award was confirmed which
granted specific performance of a contract for personal services. Had
the decision lain purely in the realm of substantive law, it might have
been otherwise, for traditionally a court of equity will not enforce
specific performance of contracts to render personal services. Little
wonder then, that the New York Court of Appeals divided four to
two. In this case the services, those of the production manager, were
peculiarly personal, requiring the exercise of a high degree of skill and
business judgment. It was the view of the majority that the arbitrator
was empowered, by the terms of the contract which adopted the rules
of the American Arbitration Association, to grant equitable relief in-
cluding specific performance, and there was nothing against public
policy in enforcing the award in this case. Since the award was valid,
the court could see no reason for vacating it and therefore was
obliged, under section 1461 of the New York Civil Practice Act, to
order its confirmation. Thus, as was said in the opinion of the lower
court, "arbitration may provide relief in circumstances and on con-
ditions which even a court has no power to grant."

In another recent New York case, Saks & Co., Inc. v. Women's Shoe
Salespeople Committee, a divided court (three to two) denied the
employer's motion for a stay of arbitration of a grievance dispute
concerned with whether or not an employee was entitled to both
severance pay and pension plan benefits. The employer contended
there was no arbitrable issue because the pension plan by its terms
was to be administered and interpreted exclusively by a committee
set up for that very purpose. The court conceded that disputes in-
volving the administration and interpretation of the pension plan as
such were not arbitrable, but asserted that here a different question

Dep't 1958). See Notes, 45 Cornell L.Q. 580 (1960); 1 B.C. Indus. & Comm. L. Rev.
101 (1959); 34 N.Y.U.L. Rev. 961 (1959); 73 Harv. L. Rev. 776 (1960).
99 Sanguirico v. Benedetti, 1 Barb. 315 (N.Y. 1847) (opera singer could not be
compelled to sing). And see Walsh, Equity § 66 (1930).
was presented. Judge Breitel went to great pains to spell out the
nature of the arbitrable issue, explaining just how it would be possible
for an arbitrator to reach the "rational and logical" conclusion that
there is a controlling difference between retirement benefits and sever-
ance pay. At the same time the judge disaffirmed any intention of
usurping the arbitrator's function by construing the collective bar-
gaining agreement, for "that is within the province of the arbi-
trators."

The last case to be considered in this series is the remarkable opin-
ion of Judge Medina in Robert Lawrence Co. v. Devonshire Fabrics,
Inc., in which he construed the Federal Arbitration Act in a way
most favorable to the advancement of commercial arbitration. The
learned judge recognized that the act represented a congressional
design "to remove the hostility of the Judiciary and make the benefits
of arbitration generally available to the business world," adding
that "any doubts as to the construction of the Act ought to be re-
solved in line with its liberal policy of promoting arbitration."

In the Robert Lawrence Co. case, action was brought by a Massa-
chusetts buyer against a New York seller claiming damages for fraud
in the inducement of the contract for the sale of goods (woolen
fabric), the terms of which were contained in two documents before
the court—an order and a confirmation order, both having the same
provision for arbitration. The opinion is broad and has several as-
pects, but the one of special interest here is the question reached

102 The dissenting opinion takes a position in accord with the rule of the Cutler-
Hammer case, text accompanying note 50 supra, that where the language plainly
can have but only one meaning, there is nothing to dispute and therefore no arbitrable
issue. But the majority opinion illustrates that the New York courts are moving away
from what has been termed the Cutler-Hammer doctrine.

103 9 App. Div. 2d 325, 329, 192 N.Y.S.2d 1002, 1006 (1st Dep't 1959). In another
arbitration case decided the same day by Judge Breitel, the seller of a vessel was com-
pelled to proceed to arbitration of a dispute with the buyer over the fitness of the ship.
The opinion ably outlines the functioning of arbitration as an independent process and
proclaims a "hands-off" policy for the courts. Transpacific Transport Corp. v. Sirena

104 271 F.2d 402 (2d Cir. 1959), cert. granted, 28 U.S.L. Week 3259 (U.S. March 7,
1960) (No. 659).

105 271 F.2d at 407.

106 Id. at 410.

107 Judge Medina tackled questions left open by the United States Supreme Court
in Bernhardt v. Polygraphic Co. of America, 350 U.S. 198 (1956). Among these questions
were those concerning the applicability of the Federal Arbitration Act in diversity cases,
and whether the body of law created by that act is substantive or procedural in charac-
ter. The Judge stated that the act must apply in diversity cases because to rule otherwise
"would emasculate [it]." He saw no issue under Erie R.R. v. Tompkins, 304 U.S. 64
(1938) (which case obliges federal courts to follow state court holdings on matters of
state law) because the act directed the creation of "a new body of substantive law rela-
tive to arbitration agreements affecting commerce or maritime transactions," a field in
which the congressional power to regulate is exclusive and undisputed. This new body
of substantive law, he said, would be equally applicable in state or federal courts and
after the preliminary determination that the Federal Arbitration Act applies in diversity cases, namely, whether fraud in the mere inducement of the basic contract, of which the agreement to arbitrate is a part, permeated the whole contract so as to invalidate the arbitration clause. The court ruled that, because the two are separable,¹⁰⁸ it did not. Therefore, the issue of fraud may be left to the determination of the arbitrator where the arbitration provision of the contract is broad enough to encompass that issue, as here. Judge Medina looked to the intention of the parties and said, significantly,

What is the proper construction and interpretation of the arbitration clause? Did the parties intend the arbitration proceedings to encompass a charge of fraud in the inducement to make the principal contract for delivery of the merchandise? We think it is clear that the parties did just that. It would be hard to imagine an arbitration clause having greater scope than the one before us. Certainly fraud in the inducement is a “complaint, controversy or question which may arise with respect to this contract that cannot be settled by the parties thereto.” And we fail to perceive any rational basis for thinking that the issue is of such a character that only the courts can resolve it. We think that the charge of fraud in the inducement comes squarely within the phraseology of this particular agreement and that nothing short of a renascence of the old judicial hostility to arbitration could evolve a contrary ruling. (Emphasis added.)¹⁰⁹

The opinion concludes with an examination of the New York law and the observation that, had the court felt compelled to apply the law of that state, the decision reached would have been contrary, due to the holding of the New York Court of Appeals in Matter of Wrap-Vertiser Corp.¹¹⁰ Briefly, the parties had agreed to arbitrate any question concerning the validity, interpretation or performance of the contract, a distributor’s franchise agreement. Wrap-Vertiser Corporation petitioned to stay arbitration of that portion of one Plotnick’s claim for damages which was based upon fraud and misrepresentation inducing him to enter into the contract. The motion to stay arbitration of the issue of fraud was granted (although other aspects of the

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¹⁰⁸ By the same token, if the arbitration clause were induced by fraud that would not invalidate the basic contract, but would simply require that the issue of fraud in the inducement of the arbitration clause be tried by the court, and if fraud should be found to exist, “there can be no arbitration.” 271 F.2d at 411.

¹⁰⁹ 271 F.2d at 411-12.

¹¹⁰ 3 N.Y.2d 17, 143 N.E.2d 366 (1957).
controversy were found arbitrable), the court asserting that even though there was no denial of the existence of the contract, this question was not properly determinable by the arbitrator, but was one for the court to decide. In Robert Lawrence, Judge Medina noted the "strong dissent" by Judge Burke,111 and characterized the approach of the New York Court of Appeals as "too narrow," although tempering his remarks with the statement that perhaps the arbitration clause in Wrap-Vertiser was not as broad as "the arbitration clause before us."112

The varied facts of these cases and the special factors peculiar to each make it unwise to make any strong assertions as to their import. But surely there can be discerned a more lenient attitude toward arbitration in contradistinction to what Judge Frank refers to as "the old and now generally rejected judicial aversion."113 This friendlier atmosphere finds expression also in the labor field where an agreement to arbitrate in compliance with the terms of a collective bargaining agreement is specifically enforced, whether it be by way of granting a motion made by a union that the cause proceed to arbitration,114 or by way of granting a stay of court action to achieve the same purpose.115

111 Judge Burke viewed the language of the arbitration clause as showing that the parties intended "that all questions of interpretation and performance were to be decided by arbitration." 3 N.Y.2d at 21, 143 N.E.2d at 368.
112 271 F.2d at 412. It may be that Judge Medina's decision in the Lawrence case is in conflict with a case decided a few weeks earlier in the Sixth Circuit, American Airlines, Inc. v. Louisville & Jefferson County Air Bd., 269 F.2d 811 (6th Cir. 1959), although they are distinguishable on their facts. American Airlines is likewise a diversity case, but there was no element of fraud. Action was brought for a declaratory judgment, and other incidental relief, in a dispute over rental fees and charges for the use of airport facilities for a renewal period, a matter referable to arbitration under the terms of the lease agreement. A question existed as to whether the Air Board, a municipal corporation, could delegate to arbitrators the authority to make such a determination. Although acknowledging that the agreement was an interstate contract, valid under the Federal Arbitration Act, under the special circumstances here, the court concluded that it was enforceable only if "valid and enforceable in accordance with ordinary contract principles under applicable State and Federal law." 269 F.2d at 817. A major part of the opinion was devoted to an attempt to find the Kentucky law, but the courts of that state appear not to have spoken in the matter. The court was hesitant to use its discretion to render a declaratory judgment because questions of state policy were involved. The case was remanded to the District Court with the direction to stay proceedings, although retaining jurisdiction "pending determination by the Kentucky courts of the questions of Kentucky law." Id. at 826. The parties were urged to move diligently for declaratory relief in the Kentucky courts.
113 Signal-Stat Corp. v. Local 475, United Elec. Workers, 235 F.2d 298, 301 (2d Cir. 1956).
114 Potoker v. Brooklyn Eagle, 2 N.Y.2d 553, 141 N.E.2d 841 (1957) (a dispute over claims for severance, accrued vacation, holiday and sick leave pay which was found to be an arbitrable issue under the arbitration clause of a collective bargaining agreement). See Koretz, "Labor Relations Law," 31 N.Y.U.L. Rev. 1391, 1397 (1956).
115 Signal-Stat Corp. case, supra note 113 at 301. The employer sued the labor union for damages occasioned by a strike which violated a "no-strike clause." A stay was granted to the union pending arbitration in accordance with the United States Arbitration Act. The language of the arbitration clause was a decisive factor in the
Specific Performance\textsuperscript{116} of Agreements to Arbitrate Grievance Disputes Under Section 301 of the Labor Management Relations Act of 1947

Collective bargaining agreements, after a careful delineation of grievance procedures, customarily conclude with an arbitration clause designed as the final means of reaching an agreement when the procedures outlined have failed. Its usual form is as follows:

\textit{Arbitration.} Unless otherwise provided elsewhere in this agreement, all disputes, differences or grievances arising out of the interpretation or application of the provisions of this Agreement that shall not have been satisfactorily settled within two weeks following the procedure hereinabove set forth shall, at the request of either party, be promptly submitted to arbitration. (Emphasis added.)\textsuperscript{117}

As might be expected with respect to any matter involving the "interpretation or application" of an agreement, questions as to meaning are raised by labor and management, with almost unbecoming regularity it seems, so that problems are posed both for the arbitrators and the courts.

Whether or not an order should issue compelling the parties to arbitrate grievance disputes is a question that frequently has puzzled the federal courts.\textsuperscript{118} A decision of far-reaching significance in this area is the much discussed\textsuperscript{118} \textit{Textile Workers Union, C.I.O. v. Lincoln

result, for Judge Frank, quoting the clause, "All disputes, grievances or differences are arbitrable," commented: "We can hardly imagine more broadly inclusive language." Ibid.

\textsuperscript{116} Specific performance, which came into existence as a remedy through development of the equity jurisdiction of our courts, simply seeks to enforce the individual's obligation to perform his contract. However, since courts are reluctant to compel parties to act, there must be a showing that the remedy at law is inadequate, as well as the bringing to bear of whatever other equitable considerations would lead a court to require a party to keep his promise. McClintock, Equity 126-30 (1948).

\textsuperscript{117} This clause was before the Court in Engineers Ass'n v. Sperry Gyroscope Co., 251 F.2d 133, 135 (2d Cir. 1957). Compare the provision in controversy in Local 149, American Fed'n of Technical Eng'rs v. General Elec. Co., 250 F.2d 922, 925 (1st Cir. 1957):

\textbf{Article XV Arbitration.} 1. Any grievance which involves the interpretation or application of this Agreement, and which remains unsettled after having been fully processed pursuant to the provisions of Article XIV [Grievance Procedure] shall be submitted to arbitration upon request of either the Union or the Company provided such request is made within 90 days after the decision of the Company has been given to the Union pursuant to Article XIV. In each case, the arbitrator shall be selected and the arbitration proceeding conducted pursuant to procedures mutually satisfactory to the Company and the Union.

This is a somewhat more elaborate clause than in the Sperry Gyroscope case.

\textsuperscript{118} Certiorari was granted in Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 449 (1957), "because of the importance of the problem and the contrariety of views in the courts."

Mills, in which the Supreme Court of the United States gave strong backing to specific enforcement of agreements to arbitrate grievance disputes.

In *Lincoln Mills*, suit was brought by the union to compel the employer to arbitrate grievances concerning work loads and work assignments. It was held that an agreement to arbitrate contained in a collective bargaining contract between labor and management, in an industry affecting interstate commerce, will be specifically enforced through section 301(a) of the Labor Management Relations Act of 1947. Justice Douglas, in an opinion that has been criticized (not wholly justifiably) as failing "to come to grips with the issue," and as placing an onerous burden upon the federal courts with respect to complex problems of labor relations which they are ill-equipped to handle, makes it clear that the part of a collective bargaining agreement to which the Court is directing its attention, and with respect to which "the tenor of the [legislative] history" is clear, is the agreement to arbitrate grievance disputes. It was determined that section 301(a) "authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements and includes within that federal law specific performance of promises to arbitrate grievances under collective bargaining agreements." Justice Douglas equates "agreements to arbitrate grievance disputes" with "agreements not to strike," and finds a federal policy requiring their enforcement when he says,

Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.

Subsequent decisions in the federal courts reflect the confusion into which the directive "to fashion" a remedy that "will effectuate this

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120 353 U.S. 448 (1957).
121 61 Stat. 156 (1947), 29 U.S.C. § 185 (1958). Section 301(a) provides:
Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
122 Bickel and Wellington, supra note 119 at 37, where it is caustically stated that a decision of "far-reaching consequences" was determined without opinion.
123 Feinsinger, supra note 119 at 1295, says "Lincoln Mills imposes a heavy responsibility not only on the federal courts but also on labor and management to preserve the basic values of the institution of free and flexible collective bargaining."
125 Id. at 455.
policy" has thrown the judges. Two cases are of particular interest in this connection because they so plainly show judicial awareness of the criticisms leveled against the handling of labor arbitrations. Both cases are concerned with the determination whether or not there is an arbitrable dispute. In both the federal judges feel constrained by the decision in Lincoln Mills, yet they seem to tackle the problem with gloved hands for fear they will overstep the bounds of judicial review.

In Local 149, American Fed'n of Technical Eng'rs v. General Elec. Co., action was brought by the union to compel arbitration of a grievance concerning job classification which the employer defended by pleading there was no arbitrable issue. Judge Magruder began by saying, "We have been much perplexed by this case," and continued

"We are aware of a viewpoint urged in responsible quarters that the interests of effective labor arbitration would best be served by committing to the arbitrator in the first instance the question of arbitrability, that is, the question whether there is any issue to be arbitrated under the collective bargaining agreement. It is said that a collective bargaining contract is a very special type of document, in respect of interpretation, as to which an arbitrator has certain advantages over a court; that a collective bargaining agreement, though embracing a multitude of terms covering numerous employees working at various tasks, cannot be expected to have pin-pointed each of many problems to be dealt with in relations between the management and the union; . . . Therefore, it may be desirable in the first instance to have an arbitrator pass on the threshold question of arbitrability, instead of running the possible risk that a court, in the guise of ruling on this preliminary question of the jurisdiction of the arbitrator, may in effect make a ruling upon the merits of the asserted grievance. (Emphasis added.)"

It is significant that, at the same time that he felt obliged to deny arbitration, Judge Magruder cited articles highly critical of the judicial attitude toward labor arbitration. He rested the court's decision upon

126 In A. H. Bull S.S. Co. v. Seafarers' Int'l Union, 155 F. Supp. 739 (E.D.N.Y.), rev'd, 250 F.2d 326 (2d Cir. 1957), cert. denied, 355 U.S. 932 (1958), Judge Bruchhausen of the District Court for the Eastern District of New York, flying in the face of the prohibitions of § 4 of the Norris-LaGuardia Act, granted specific performance of a "no-strike clause" of a collective bargaining agreement, interpreting the broad language of the opinion in Lincoln Mills—"collective bargaining contracts were made 'equally binding and enforceable on both parties'"—as meaning that all provisions of collective bargaining agreements were to be enforced. It is submitted that Justice Douglas' opinion, carefully studied, does not lead to the conclusion reached by Judge Bruchhausen, for the holding of Lincoln Mills is limited to specific enforcement of agreements to arbitrate only.


129 250 F.2d at 926.
the definition in the collective bargaining agreement of those matters that were to be submitted to arbitration; he did not find job descriptions among them. Since the absence of any such language left nothing for an arbitrator to interpret or apply, the court could reach no conclusion but that the employer had not agreed to arbitrate the question of the arbitrability of the particular grievance set forth.\textsuperscript{130} The language with which Judge Magruder affirmed not only the power, but the duty, of the court to determine whether the parties had agreed to arbitrate the contested issue, is impressive:

But when one of the parties needs the aid of a court, and asks the court for a decree ordering specific performance of a contract to arbitrate, we think that the court, before rendering such a decree, has the inescapable obligation to determine as a preliminary matter that the defendant has contracted to refer such issue to arbitration, and has broken this promise. (Emphasis added.)\textsuperscript{131}

In the second case, \textit{Engineers' Ass'n v. Sperry Gyroscope Co.},\textsuperscript{132} the question before the Second Circuit was whether merit increases were included among the issues to be arbitrated under a comprehensive clause in the collective bargaining agreement. The labor union sought arbitration on the ground that the raises given to certain employees, who were transferred to a new plant in Salt Lake City, were intended to afford to such employees incentive to accept the transfer rather than resting on a “merit basis only” as was required by the terms of the agreement between the union and the company. The company countered with the recital in the contract that “merit increases are at the

\textsuperscript{130} Id. at 930.
\textsuperscript{131} Id. at 927. In Boston Mut. Life Ins. Co. v. Insurance Agents' Union, 258 F.2d 516 (1st Cir. 1958), Chief Judge Magruder reaffirmed his holding in Local 149. Plaintiff employer sought a declaratory judgment under § 301 of the Labor Management Relations Act of 1947 to the effect that the arbitrator did not have jurisdiction to arbitrate a grievance arising out of the discharge of an employee, and further sought injunctive relief precluding the union from proceeding with the arbitration. The union counterclaimed seeking enforcement of the collective bargaining agreement which named the American Arbitration Association as director of the arbitration procedure. Chief Judge Magruder said: “We have no disposition to whittle away our holding in Local No. 149, etc. v. General Electric Co. . . . It seems to us that in the case at bar the district court did not sufficiently adhere to the teaching of Local No. 149, etc. . . .” 258 F.2d at 517. After voicing this admonition the court of appeals proceeded to vacate the order below that the parties proceed to arbitration and remanded the case to the district court for a decision on the question whether the union had proceeded with sufficient diligence to press for arbitration. Compliance with this requirement in the collective bargaining agreement was a condition precedent to arbitration, the court found, and posed an issue of arbitrability which must be resolved by the court as a preliminary matter. 258 F.2d at 522. Upon remand, in determining the issue of timeliness, Judge Wyzanski held that the union's demand for arbitration was submitted with reasonable diligence (although there was a delay amounting to almost a year) because no specific time limit was set in the collective bargaining agreement and the employer, had it been suffering any hurt, could have ended the delay “at any moment.” Boston Mut. Life Ins. Co. v. Insurance Agents' Union, 171 F. Supp. 125 (D. Mass.), aff'd per curiam, 268 F.2d 556 (1st Cir. 1959).

\textsuperscript{132} 251 F.2d 133 (2d Cir. 1957), cert. denied, 356 U.S. 932 (1958).
sole discretion of the employer," so there could be no arbitrable issue. The court found that this contention begged the question, and held that a determination of the true nature of the basis for the increases was properly arbitrable.

What puzzled Judge Waterman, however, was the method by which the court could resolve the threshold inquiry concerning the arbitrability of the dispute without, at the same time, making a decision on the merits which, it was acknowledged, was properly the arbitrator's function.

_The difficulty in the present case, as the court below recognized, is that a determination of the arbitrability of the grievance depends upon the same facts relevant to a decision by an arbitrator upon the merits of the grievance. . . . But, merely because there is an identity of issues in the two proceedings, the court is not relieved of its duty to determine whether an arbitrable dispute exists._ (Emphasis added.)

By drawing a fine distinction between the quantum of proof necessary to determine arbitrability and that required to render a decision on the merits, Judge Waterman endeavored not to detract from the arbitrator's powers:

'It should be observed, however, that even in a case such as the present one, where the same facts are determinative of both arbitrability and the merits of the controversy, an order compelling the parties to submit to arbitration does not impinge upon the power of the arbitrator to decide the merits of the dispute. _The difference between the two proceedings is in the quantum of proof necessary for the moving party to obtain relief._ In the arbitration hearing, the party seeking relief must fully establish his claim that the opposing party has violated the contract. Determination of arbitrability only requires that the moving party produce evidence which tends to establish his claim. Once the tendency of the evidence to support the claim is established, it is then the function of the arbitrator to weigh all the evidence and to then determine whether the contract was broken. (Emphasis added.)'

This long established power of the courts to ensure there is an arbitrable issue was once again affirmed in _Refinery Employees Union v. Continental Oil Co._ wherein Judge Wisdom placed strong reliance upon the opinion of Chief Justice Magruder in _Local 149, American Fed'n of Technical Eng'rs v. General Elec. Co._ In

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193 251 F.2d at 137.
134 Ibid.
136 Discussed supra, text accompanying note 128. This case is remarked upon as Judge Magruder's "most celebrated post-Lincoln Mills case" in Harry H. Wellington's tribute to the Chief Judge. "Judge Magruder and the Labor Contract," 72 Harv. L. Rev. 1268, 1292 (1959). In analyzing Judge Magruder's labor arbitration opinions the author finds that in pre-arbitration cases (like the Local 149 case) the eminent jurist "does not view his role as limited, because of an institutional incompetence, by any notion
the Refinery Employees Union case, the controversy arose when the company foreman, to the detriment of another employee, wrongly assigned overtime work to an employee whose job classification did not warrant it. The company acknowledged the foreman's error but refused to comply with the union's demand that the wronged employee be paid for the task that should have been his. The company refused to make an exception to its "no work-no pay" policy, although offering other concessions. The union invoked arbitration, but again the company balked, refusing to submit to arbitration anything more than the question whether there had been a violation of the collective bargaining agreement, and insisting that the matter of remedy for the breach, if any be found, should be the subject of negotiation between the company and the union. The union rejected these limitations upon arbitration and maintained that the right to make an award was a matter of interpretation of the contract for the arbitrator to determine. As agreement could not be reached upon the arbitrable issue, the union brought this action for specific performance of the agreement to arbitrate. In its opinion the court acknowledged that the question before it was the difficult one of determining the propriety of the district court in limiting the arbitrable issue by holding that the parties did not intend that the arbitrator determine the remedy, but that he had authority only to decide whether there had been a breach of the collective bargaining agreement. The judgment below was affirmed, the court finding, upon examining the arbitration clause, that it was not a broad grant of authority, but a limited clause that did not purport to cover any and all disputes and that was silent as to the power of arbitrators to provide a remedy. The narrowness of the arbitration clause, therefore, led to the conclusion that an award of damages was not within the scope of the arbitration agreement since of restraint. To the contrary, his approach in these cases is the same as it would be in any case which calls upon a judge to interpret a contract." His assessment of the judicial role in labor arbitration is not one of abnegation, but of a duty to assume the congressional grant of jurisdiction that § 301 directs and to maintain by decisional excellence the confidence thus reposed in the judiciary. Judge Magruder, like many another judge, views with skepticism "the view in responsible quarters" that would limit the functions of the courts in labor arbitration.

Lincoln Mills makes it clear that the court has jurisdiction. But a most difficult question remains, namely what is the proper role of the district court in a pre-arbitration contest? ... In Lincoln Mills ... the Supreme Court did not devote itself to any of the problems the lower federal courts were bound to face in subsequent arbitration cases under section 301. Wellington, note 136 supra at 1283-84. Whether or not the contract speaks about a remedy is immaterial, according to Archibald Cox, who says that the arbitrator's power to fashion remedies is so generally accepted today that "the power to determine whether a collective-bargaining agreement has been violated carries the implied power to grant a remedy for the violation. ... Not a word in the average labor contract expresses the intention." Cox, "Reflections Upon Labor Arbitration," 72 Harv. L. Rev. 1482, 1494 (1959).
it was not a "difference relating to the interpretation or performance" of the collective bargaining agreement. The ruling was that arbitration should proceed and that the arbitrator was to determine the issue of work assignment, but that his authority did not extend to the fixing of damages. This was a matter, said the court, to be decided at the bargaining table.\textsuperscript{139}

Justice Brown\textsuperscript{140} vehemently disagreed with the holding of the majority, accusing them of tenaciously holding on to their judicial prerogative to decide disputes in a cause properly referable to arbitration, and of displaying a jealous watchfulness "that has long since earned a decent internment."\textsuperscript{141} He went even further and saw in the opinion the same old effort to sugar-coat what, to the judiciary, has long been a bitter pill—the idea that someone other than a court can properly adjudicate disputes; that in the field of human disputes lawyers and ex-lawyers as judges alone have the Keys to the Kingdom.\textsuperscript{142}

It was Judge Brown's view that the unfortunate effect of the court's decision was that it could "become the subject of a new and further one"—that if agreement could not be reached at the bargaining table to which the parties had been sent, then the issue would once more be before the courts. In brief, Judge Brown urged that the failure to give the arbitrator plenary powers simply sowed the seeds of future industrial conflict. However, this position overlooks the fact that it was, and by virtue of the court's ruling still is, within the power of the parties themselves to resolve this conflict by extending the authority of the arbitrator.

In the view of some, the decision may mark a backward step in arbitration annals;\textsuperscript{143} but in the minds of others,\textsuperscript{144} including this writer, it stands on sound legal ground and is in conformity with a

\textsuperscript{139} 268 F.2d 447, 459 (5th Cir. 1959).
\textsuperscript{140} Judge Brown was the lone dissenting judge in Lincoln Mills when it was heard in the court of appeals, 230 F.2d 81, 89 (5th Cir. 1956). He called upon the Supreme Court to fashion a body of substantive law in the field of labor arbitration under § 301. This plea Justice Douglas answered in his opinion in Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).
\textsuperscript{141} 268 F.2d 447, 460 (5th Cir. 1959).
\textsuperscript{142} For this diatribe, Judge Brown was sternly taken to task by Chief Judge Hutcheson, who concurred specially for the avowed purpose of depreciating the dissenting opinion.
\textsuperscript{143} The decision has been condemned as injurious to the efficient settlement of labor-management differences for both labor and management will now hesitate to turn to arbitration when there is little hope of a compensatory remedy. Note, 6 Utah L. Rev. 586, 588 (1959).
\textsuperscript{144} The decision has been lauded as upholding the intent of the parties and as alerting them to "the practical necessity of contract provisions clearly spelling out their intent with respect to arbitration"; it also has impressed upon labor and management "the need to face the problem at the bargaining sessions and resolve it in the collective bargaining agreement." Note 43 Marq. L. Rev. 260, 263 (1959).
literal interpretation of the collective bargaining agreement. If, however, as Professor Cox suggests,146 the settlement of labor disputes by arbitration is of a peculiar genre—not fitting wholly into the law of contract or of arbitration, but resting on a sort of amorphous "industrial jurisprudence"—the court has not decided the issue in relation to the context in which it arose. But it is submitted that Professor Cox goes too far in placing upon the courts the onus of resolving issues that had better be determined through collective bargaining. If, as he asserts often happens, the parties deliberately choose vague language because they cannot reach agreement yet "must strike some kind of a bargain"—if they thus choose to shift the decisional burden to the court, each side hoping the question will be decided in its favor—then they may not be heard to complain when the problem is placed right back in their laps where it belongs.

Another recent labor arbitration case, concerned not with arbitrability but with specific performance of an arbitration award under section 301 of the Labor Management Relations Act of 1947, is Enterprise Wheel & Car Corp. v. United Steelworkers,146 where the Fourth Circuit Court of Appeals assumed a very broadminded attitude toward arbitration. In a controversy over the amount of back pay due employees who were discharged, the court deemed the arbitration award so indefinite as not to provide any basis upon which to calculate the sums due. Despite this incompleteness, however, the award was upheld. Judge Soper recognized that a final award not definite and certain in its terms may be vacated for the reason that "the powers of the arbitrator are exhausted and the award cannot be resubmitted to him for correction or amendment."147 He noted, however, that this rule forbidding resubmission was developed when the courts looked with disfavor upon arbitration proceedings, and that, in line with the congressional policy favoring arbitration of grievance disputes which was affirmed in Lincoln Mills, it should not be applied today in the settlement of employer-employee disputes.

146 Professor Cox ably presents his thesis in Cox, "Reflections Upon Labor Arbitration," 72 Harv. L. Rev. 1482 (1959). See especially pp. 1490-93, where he concludes:

The generalities, the deliberate ambiguities, the gaps, the unforeseen contingencies, and the need for a rule even though the agreement is silent all require a creativeness in contract administration which is quite unlike the attitude of one construing a deed, a promissory note, or a 300-page corporate trust indenture. The process of interpretation cannot be the same because the conditions which determine the character of the instruments are different.


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The most difficult decisions faced by the courts, not only in grievance disputes, but in arbitration generally, concern the arbitrability of disputes—the question whether a controversy of the exact nature as the one before them was intended by the parties to be included within the terms of the arbitration provision. Since the participants are at odds, the court must look for guidance to the wording of the arbitration clause. Where the language is clear, either encompassing many matters because of its breadth, or including but a few due to its narrowness, decision is reached with relative ease. But ambiguous, poorly drawn arbitration clauses cause nothing but trouble for the parties and the courts and hinder the arbitration process. It would seem to be that it is this weakness, almost more than any other, that has made it appear that the courts are usurping the arbitrator's function. This is true not only because the parties, plagued by uncertainty, have recourse to the courts, but because often the same facts which are determinative of the question whether there is an arbitrable issue are as well decisive of the merits of the controversy.

Judicial review, as presented herein, has not been confined to decisions on the final arbitration award (whether to confirm, modify or vacate it). Instead, it has encompassed a very broad definition of the term, including within its range the primary determination of whether there is in fact an agreement to arbitrate as well as such

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148 See analysis of recent cases p. 534 supra.
149 Matter of Lipman, 269 N.Y. 76, 43 N.E.2d 817 (1942). In a proceeding to compel arbitration of a dispute arising from a contract for the sale of shellac, where the language of the contract was very broad—"any and all controversies arising out of and in connection with"—it was decreed that the parties should proceed to arbitration. In Signal-Stat Corp. v. United Elec. Workers, 235 F.2d 298 (2d Cir. 1956), suit was stayed pending arbitration, the language reading, "all disputes, grievances or differences."
150 In Matter of Berger, 191 Misc. 870, 79 N.Y.S.2d 490 (Sup. Ct. N.Y. County), aff'd mem., 274 App. Div. 789, 81 N.Y.S.2d 196 (1st Dep't 1948) (a motion by the union to compel arbitration was denied. The arbitration clause did not include negotiation of a new scale of salaries incident to a "re-opening" provision).
151 In Riverdale Fabrics Corp. v. Tillinghast-Stiles Co., supra note 70, a petition to compel arbitration was denied, but arbitration was stayed at the behest of the other party. The court required clear language showing an intention to surrender one's right to resort to the courts.
152 Engineers Ass'n v. Sperry Gyroscope Co., discussed supra, text accompanying note 132. Two labor cases concerned with whether or not there is an arbitrable issue are scheduled to be heard by the Supreme Court: United Steelworkers of America v. American Mfg. Co., 264 F.2d 624 (6th Cir. 1959), cert. granted, 361 U.S. 881 (1959) (reinstatement of an employee the severity of whose injury was questionable constituted a frivolous grievance and was therefore not arbitrable); United Steelworkers of America v. Warrior & Gulf Nav. Co., 269 F.2d 633 (5th Cir. 1959), cert. granted, 361 U.S. 912 (1959) (the employer's right to contract out maintenance work fell within the functions strictly reserved to management and presented no arbitrable issue).
154 Bellmore Dress Co. v. Tanbro Fabric Corp., 115 N.Y.S.2d 11 (Sup. Ct. N.Y. County 1952). In an oral contract for the purchase and sale of goods did an unsigned purchase order which contained an arbitration clause amount to a contract to arbitrate within the requirements of N.Y. Civ. Prac. Act § 1449? It was held that it did.
intermediary proceedings as motions to stay suit until arbitration can proceed\textsuperscript{155} or resume, and actions to compel specific performance of the agreement to arbitrate.\textsuperscript{156} This was deemed necessary in order that there might be full appreciation of the scope of the court's exercise of the reviewing power,\textsuperscript{157} which touches more than the final award.

No sharp distinction has been made herein between commercial and labor arbitration. Some writers, however,\textsuperscript{158} have advocated a separate law of arbitration suited to the complexities that abound in the labor relations field. It is an area in which arbitration is viewed as an alternative to the strike, with the result that arbitration is looked upon as a solution to the differences of labor and management—one that will preserve industrial peace. Nevertheless, labor arbitration is still but a part of arbitration law. The settlement of labor disputes

\textsuperscript{156} Matter of Canadian Gulf Line, Ltd., 98 F.2d 711 (2d Cir. 1938).
\textsuperscript{157} United States Asphalt Ref. Co. v. Trinidad Lake Petrol. Co., 222 Fed. 1006, 1009-11 (S.D.N.Y. 1915), wherein Hough, J., criticizes the judicial attitude toward arbitrators as he traces its historical background:
Yet it is surely a singular view of juridical sanctity which reasons that, because the Legislature has made a court, therefore everybody must go to the court. . . . The courts will scarcely permit any other body of men to even partially perform judicial work, and will never permit the absorption of all the business growing out of disputes over a contract by any body of arbitrators, unless compelled to such action by statute.

This decision, rendered before the existence of modern state and federal arbitration statutes, concerned breach of a charter party; the defendant moved for a stay on the ground that any dispute arising thereunder was to be "settled in London by arbitration." It was held that an agreement to arbitrate differences arising under a contract went to the remedy; therefore, the law of the forum controlled (federal law). The Judge found that the Supreme Court had ruled "such a complete ouster of jurisdiction" void; therefore the agreement to arbitrate could not be enforced, although valid in London where the contract was made.

\textsuperscript{158} Freidin, "Labor Arbitration and the Courts," Labor Relations Series 47 (1952): There should be separate statutes dealing with labor arbitration. They ought to take full account of its special nature and unique function. They should curtail with sensible severity the power of courts to enjoin arbitrations or vacate or modify awards. Certainly they should withdraw from the courts and vest in the arbitrator jurisdiction to determine the arbitrability of a dispute. And they should recognize and sanction the extraordinary services that a jointly chosen arbitrator can render to peaceful labor relations, even though his views and methods do not conform to orthodox judicial standards.

The same view is differently expressed by Syme, "Arbitrability of Labor Disputes," 5 Rutgers L. Rev. 455, 472 (1951):
Labor arbitration has traveled a tortuous road. . . . There have been chaos and confusion. . . . The basic cause for the dilemma has been the assumption of a fallacious premise. A parallel has been drawn between commercial and labor arbitration. The two are entirely dissimilar. Their origin is different, their purposes are disparate and their functioning is antithetic. Commercial arbitration evolved as a substitute for litigation. The parties either litigated or arbitrated. . . . Labor arbitration is not a substitute for litigation. Labor arbitration is a substitute for the strike.

One eminent scholar has gone so far as to suggest that "the law stay out" of labor arbitration. Shulman, "Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999, 1024 (1955).
by arbitration may follow a somewhat different course\(^{159}\) from commercial arbitrations, but the applicable basic principles remain the same.

**International Arbitration**

The international aspects of arbitration, involving, as they often do, questions of international law,\(^{160}\) are not the subject of this study, but they are of tremendous importance and may not pass unmentioned.

International commercial arbitration functions principally under the control of private interests,\(^{161}\) e.g., individual business corporations, affiliated trade associations (the English Cotton Trade Association; the Corn Trade Association), or the International Chamber of Commerce. This latter organization promotes no particular product or trade but seeks rather to join varied commercial interests. These different groups promulgate rules and regulations of their own which must be adhered to as a condition of membership. Professor Heinrich Kronstein is highly critical of their functioning and sees them as a form of "private government" which fosters an "extraterritorial arbitration" operating outside the law and reaching its objectives regardless of the municipal law of the forum.\(^{162}\) Yet this cannot be wholly true, for every arbitration, of necessity, has its roots in the legal system of the particular country from which it emanates and is subject to its national law and rules.\(^{163}\)

Professor Kronstein's charge bears some relation to the fact that with respect to the enforcement of foreign arbitration awards there seldom exists a judicial review as broad in scope as that prevailing in the United States in the handling of municipal cases. The courts of most countries, including our own,\(^{164}\) accord full recognition to arbit-

\(^{159}\) Mention is made earlier of the fact that only in labor arbitrations are opinions regularly rendered. Supra note 19. And it has been said of the process of labor arbitration that it "comes under frequent fire for its alleged tendency toward 'excessive legalism.'" Gorske, "Burden of Proof in Grievance Arbitration," 43 Marq. L. Rev. 135 (1959).


\(^{161}\) National governments have entered the world trade field and agreements are not uncommon between them and private individuals or corporations. When disputes arise between the state, or state-controlled agency, and a private person or group, arbitration may be resorted to. It is not possible to coerce the state, but nations who enter into private trading relations often do so under commercial treaties "which expressly disavow immunity in state-trading relations with respect not only to 'suits' in ordinary courts, but also to arbitration." Domke, "Arbitration of State-Trading Relations," 24 Law & Contemp. Prob. 317 (1959).


\(^{164}\) Domke has observed that "a most liberal practice has been followed in the
tral awards made in another state. There is sometimes the requirement that the award first be reduced to a judgment in the country where it has been obtained, after which suit may be maintained on that judgment. The award is not examined on the merits, the decision being limited to jurisdictional questions only. This is true in both common law and civil law countries.\textsuperscript{165}

Furthermore, just as state and federal statutes have been enacted in the United States to regulate and uphold arbitration,\textsuperscript{166} so also in the international field there has been legislation, in the form of agreements between nations, both bilateral and multilateral, to achieve the same purpose. These are given expression either in the reciprocally binding bilateral treaties of friendship, commerce and navigation which are now in force between many nations,\textsuperscript{167} or in multilateral conventions such as the Geneva Protocols of 1923 and 1927\textsuperscript{168} concluded under the auspices of the League of Nations. The 1923 convention was designed to uphold the validity of agreements to arbitrate, whether present or future, while that of 1927 was intended to assure enforcement of foreign arbitration awards within the signatory countries.\textsuperscript{169}

Arbitration between nations has evolved as the primary means of settling their differences. Recourse to international arbitration tribunals is a natural phenomenon; national states find in the \textit{ad hoc} nature of arbitration a means of settlement which enables them to delimit in advance the issues to be decided so that each country is able to limit its participation in whatever way it sees fit. Thus is their sovereign status preserved. For this reason, \textit{ad hoc} tribunals continue

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\item United States" and he cites Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931), in support of that statement. Domke, "On the Enforcement Abroad of American Arbitration Awards," 17 Law & Contemp. Prob. 545, 550 (1952). Gilbert v. Burnstine is a leading case holding that arbitration held in London in accordance with the arbitration law of Great Britain was to be enforced in the New York courts even though it was rendered without personal jurisdiction over the defendant, a resident of New York. But cf. Matter of Amtorg Trading Corp., 304 N.Y. 519, 109 N.E.2d 606 (1952), where the New York Court of Appeals, in a per curiam opinion granting a stay until the parties had proceeded to arbitrate their differences in Moscow as agreed, indicated by way of dictum that if after an award was rendered the American party felt it was not a fair and impartial determination it could come back to the court and challenge the award.\textsuperscript{165}

\item Bresch, "The International Enforcement of English Arbitral Awards," 2 Bus. L. Rev. 98 (1955).\textsuperscript{166}

\item See supra, text accompanying notes 23 and 24.\textsuperscript{168}

\item The first such treaty entered into by the United States was with China, November 4, 1946. Art. VI(4), 63 Stat. 1299, T.I.A.S. No. 1871.\textsuperscript{167}

\item International Yearbook on Civil and Commercial Arbitration 239, 240 (Nussbaum ed. 1928).\textsuperscript{168}

\item For a full review of the significance of these Conventions see Nussbaum, supra note 163.\textsuperscript{169}

\end{itemize}
\end{footnotesize}
to be favored, despite the existence since 1922 of a permanent international tribunal, the International Court of Justice. Arbitration between foreign governments differs in some measure from arbitration within the municipal or national law framework, for international arbitration is regarded as essentially judicial in nature, whereas domestic arbitration is regarded as a distinct process chosen by the parties to take them out of court and away from its rigidities.

The question of judicial review does not arise in disputes between foreign governments, partly because the arbitration process used is by its very nature already judicial and, to an even greater extent, because assertion by a state of its rights of sovereignty makes compulsion impossible, as is revealed by the implications of the Interhandel case.

A Limiting Factor

The importance of judicial review of arbitration is not to be minimized, but here, as in the case of administrative adjudications, there is a limitation upon judicial control that exists independent of any judicial attitude that may prevail. Such limitation is present by virtue of the fact that only a small fraction of the awards made by arbitrators are ever contested in the courts. This is particularly to be desired in the case of arbitration, as it means that the parties are

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170 As originally created in 1922, the world court was known as the Permanent Court of International Justice. For a study of its functioning, see Lissitzyn, The International Court of Justice (1951).
171 Bishop, International Law, Cases and Materials 56 (1954). John Basset Moore expresses the same view in his remarkable analysis of the international practice of arbitration between nations in 1 International Adjudications xxiv (1929). Judge Moore, at xlv, quoting the Swiss writer, Dr. Gossweiler, as saying that "what distinguishes arbitration from other amicable methods of deciding [international] disputes is its judicial character."
172 The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 137 (1812). Chief Justice Marshall, in referring to the immunities belonging to the independent sovereign station, said: "One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another. . . ."
174 Gellhorn and Byse, Administrative Law, Case and Comments 641 (1954).
175 A recent article discussing labor arbitration says, "it is impressive how fully these adjudications are observed. A study some few years ago revealed that out of thousands of arbitration awards only 3/10 of one per cent are not voluntarily complied with and require the aid of court enforcement." Mathews, "Critical Issues in Arbitration Practice: Seniority and Discharge Cases," 32 Rocky Mt. L. Rev. 37 (1959).
abiding by their promises and are satisfied with the arbitration process. When it is otherwise, and the participants are before the court, there is cause for concern and judges may well scan what has transpired with a practiced eye. For them to do so is not such a catastrophe as one is led to suppose, for the advantages of arbitration may already be lost.

CONCLUSION

It becomes manifest from a study of court review of arbitration that the charge of judicial intolerance has been carried too far and that it no longer has justification today. It is apparent also, with respect to arbitration, that the judicial role is a limited one, though never so narrow as to negate justice, nor quite so narrow as to require enlargement.

Judges may at times have erred in not making sufficient allowance for differences in the arbitral process; thus, perhaps, some chiding has been necessary as a reminder of its independent nature. In reply, however, it can be said that arbitrators have made inroads on the prerogatives of judges and this could not be accepted lightly. Those who find no element of judicial jealousy in the control exercised by the courts overlook the fact that judges, too, are human. Honorable as is the role of arbitrator, like that of judge, he is not to be allowed to become what Professor Herzog has called him—a "judicial demi-god"—and if completely unrestrained, that title might become appropriate. The very fact that his actions will not go unquestioned leads to greater caution and precision in his making an award. There is no value in protecting a poor award or an erroneous one any more than there is in protecting a wrong decision. Neither has attributes of sanctity. Sharp judicial scrutiny of both makes for better judgments.

Though what is now to be offered cannot serve as justification for

176 It can be noted that there exists a direct relationship between the incidence of court review and the frequency of the use of arbitration. One in a sense mirrors the other. With the increase in resort to arbitrations of all kinds there has been an attendant rise in the number of cases coming before the courts.

177 Professor Herzog minimizes it in his article, supra note 41.

178 "They displayed the attitude of judicial demi-gods, who stood above the law of the community, were not bound by it, and, therefore could create and invoke their own law and determine each case before them according to their own concepts of justice and economic philosophy." Id. at 25.

179 It has been suggested that a greater deterrent to indifferent arbitral awards than fear of court review is the factor of acceptability—the tendency of the parties themselves to dishonor an unacceptable award. Arbitrators wish to be called upon again and are desirous of having their actions approved. Simkin, "Acceptability as a Factor in Arbitration," Labor Relations Series (1952). The writer suggests that both of these checks, judicial review and party acceptability, have a salutary effect.
judicial intervention, at least it can be recognized as one factor in amelioration of the too harsh criticism that has been directed against our judiciary. The courts are faced with a paradox in assessing the role of the arbitrator. Two contradictory attributes of the arbitrator's position and function confuse the judges. At one and the same time he is recognized as an expert and as a mere neophyte. His expertise stems from his special knowledge in his chosen field. The arbitrator may be an authority on international trade, a person informed concerning the vagaries of building construction, or a merchant in the textile business. There the courts accord him his due. But in the area of his ignorance—the law—the judges unrealistically have sought to hold him to a proper application of legal principles, many of which he knows not. Yet it is submitted that a just result can be achieved by the arbitrator without the observance of legal intricacies and, as the orbit of judicial control has become smaller, this has been recognized. Our law rests on basic tenets of right and wrong controlling the actions of all mankind; these principles carry over into the market place and are applied by an arbitrator as they are by a judge, only in a different manner.

180 Note this recent judicial language recognizing the expertise of an arbitrator in a controversy concerning the sale of a vessel claimed by the buyer to be defective: 

'The arbitrators shall be commercial men conversant with shipping matters.' This may not be exactly comforting to the vanity of courts, but it does indicate that the parties decided, rightly or wrongly, that the justice they desired was that of their peers in the shipping business. This they have a right to do under our arbitration statutes. This is a right exercised even in ancient times. . . . This right the court may not deny them.