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Commercial Arbitration: Expanding the Judicial Role

I. INTRODUCTION

Arbitration is usually defined as "the voluntary agreement of . . . persons to submit their differences to judges of their own choice and to bind themselves in advance, to accept the decision of judges, so chosen, as final and binding."

A specialized category of arbitration—commercial arbitration—is widely used by businessmen and their attorneys as a speedy and relatively inexpensive method of trying and resolving contract disputes before commercial specialists. Modern American legislatures and courts have increasingly restricted judicial control over commercial arbitration on the theory that arbitration can be used successfully only where the role of the courts is strictly limited. Moreover, recent decisions allowing arbitrators to determine threshold questions concerning the legality of commercial contracts have increased the separation of arbitration from the normal controls of a democratic society. These trends have helped create a body of institutional law which is often responsive to narrow institutional interests. As a result, commercial conduct repugnant to many general societal norms has been encouraged.

This Note will examine the underlying policies of American commercial arbitration, the scope of judicial review of such arbitration, the problems engendered thereunder, and propose a method of judicial control which will encourage maximum use of arbitration by businessmen while eliminating many of the current problems.


2. Commercial arbitration may be defined as the settlement of disputes involving sales contracts, trade association contracts, building contracts, etc., by arbitration. See note 1 supra.


II. BUSINESS DESIRES AND PRESENT ARBITRATION LAW

The businessman faced with commercial disputes or the possibility of such disputes has four methods available for resolving them. He may negotiate, capitulate, arbitrate, or litigate. Each method has advantages depending upon the circumstances surrounding the dispute, although the last three are probably never resorted to without some attempt to negotiate. The businessman may capitulate when he is sure to lose if he presses further, or when the amounts or principles involved are insignificant in relation to other factors such as maintenance of goodwill or the cost of pursuing the matter further. However, those disputes that are not negotiated to a settlement generally will be either arbitrated or litigated. Arbitration will be used to settle disputes when the factors favoring its use outweigh those favoring litigation. The question then becomes what factors are considered by the businessman when he makes the choice between these alternatives.

A. FACTORS FAVORING ARBITRATION

The factors influencing a businessman to use arbitration to resolve disputes include speed, economy, privacy, maintenance of goodwill, and the use of experts as arbitrators. Arbitration is speedier than litigation because currently most court calendars are extremely crowded. Also, arbitration is more expedient because of simplified procedures and informality in presentation of evidence. Since the arbitration tribunal is set up to handle only the specific dispute referred to it, there is no wait-

5. RESOLVING BUSINESS DISPUTES 40.
8. See Note, Judicial Control 542; Note, Predictability of Result 1022 n.2.
9. The average time between filing of a case and the final award is approximately two to three months in arbitration as opposed to fourteen months in litigation. M. Domke, COMMERCIAL ARBITRATION 8 (1965) [hereinafter cited as Domke]; RESOLVING BUSINESS DISPUTES 48–49, 127–33. Arbitration is also fast since there is no appeal as a matter of course and, therefore, the delay inherent in appeal is absent. Schiffer, supra note 7, at 51. See also Dworkin, Arbitration: An Obvious Solution to a Crowded Docket, 29 Cleve. Bar Ass'n J. 187 (1958); Sarpy, supra note 1, at 182–84.
The use of experts as arbitrators further accelerates the process, because it eliminates the need for expert witnesses to explain trade practices to the court. Acceleration of the decision process is beneficial since evidence will be received before it becomes stale. In addition, business capital will not be tied down for long periods of time since it is not necessary to set aside capital to satisfy possible future judgments. A greater chance also exists for recovering a judgment since there is less risk of the loser's going bankrupt or losing his assets.

Arbitration may also be less expensive than litigation. The additional time that the businessman and his attorney must spend in trial proceedings generates greater costs than the time spent in arbitration. Also, arbitration proceedings require the print-

11. See Jalet, supra note 1, at 522–23.
14. DOMKE 9. A speedy decision also allows the businessman to more intelligently plan for the future since he knows what income to expect or what amount he will have to pay. Sarpy, supra note 1, at 189.
15. DOMKE 9; Popkin, supra note 13, at 652.
ing and writing of only a few records\textsuperscript{17} whereas a trial may require substantial documentation. The public also benefits financially since the costs of arbitration are paid entirely by the parties.\textsuperscript{18} These costs are not too burdensome to the businessman because most arbitrators serve without pay.\textsuperscript{19}

Great freedom is afforded by the arbitration agreement, because the parties can determine the place of arbitration as well as the court of competent jurisdiction, should resort to a court be necessary, even though there is no contact with the jurisdiction.\textsuperscript{20} The parties may also choose which law will be applied to the agreement.\textsuperscript{21} In addition, the agreement can specify procedures to be followed during the proceedings.\textsuperscript{22} Moreover, by selecting the place of arbitration, the parties may obtain privacy in the proceedings,\textsuperscript{23} which is often important to a businessman to protect the reputation of his company or product,\textsuperscript{24} trade secrets,\textsuperscript{25} and continuing useful business relationships.\textsuperscript{26}

\begin{footnotesize}


23. See also RESOLVING BUSINESS DISPUTES 53-54.

24. The business reputation of a company or product may be damaged by the very fact that a suit has been filed against them regardless of the outcome or merits of the suit. Arbitration prevents this type of disclosure. See Sarpy, supra note 1, at 189. Disclosure of a pending legal action may also imperil a party’s credit rating. DOMKE 10. See RESOLVING BUSINESS DISPUTES 53-54.

25. Court proceedings may require public disclosure of trade secrets and other production and management data which the businessman may feel should be kept secret. See DOMKE 10-11; RESOLVING BUSINESS DISPUTES 53.

26. Private proceedings combined with informal procedures help
In addition to the aforesaid factors favoring arbitration, Congress and a large number of states have enacted statutes attempting to further the use of commercial arbitration. These statutes uniformly provide for the enforcement of arbitration agreements and awards by the courts.

Consequently, specific statutory provisions declare written arbitration agreements irrevocable and compel an unwilling party to arbitrate. Arbitration is further encouraged by sections expediting review of a party's claim that the arbitration is invalid and provisions authorizing the court to stay any action or proceeding in law or at equity, subject to arbitration. A party may proceed ex parte and obtain a valid award after this proceeding if the other party does not respond or appear after the notice of intention to arbitrate.

businessmen to remain on good terms and to continue doing business rather than creating antagonisms which might break these relationships. See Isaacs, Two Views of Commercial Arbitration, 40 Harv. L. Rev. 929, 931 (1927); Schiffer, supra note 7, at 51; Note, Judicial Control 542; Note, Judicial Review 681.

29. See, e.g., Minn. Stat. § 572.08 (1965); Domke 18-19 (1965); Pirsig, The Minnesota Act.
31. See, e.g., 9 U.S.C. § 2 (1964); Minn. Stat. § 572.08 (1965). The signing of a contract containing an arbitration clause binds both parties to arbitration, unless one party is able to raise one of the traditional contract defenses that exists in law or equity for the revocation of any contract. See also Pirsig, The Minnesota Act 337; Note, Judicial Control 521-22. However, breach of contract is not a ground that may be asserted to avoid the arbitration clause. See Almacenes Fernandez, S.A. v. Golodetz, 149 F.2d 628 (2d Cir. 1945); In re Pahlberg Petition, 131 F.2d 978 (2d Cir. 1942); Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942). Once a court has determined that an agreement to arbitrate exists the merits of any dispute arising under the agreement are within the exclusive jurisdiction of the arbitrator. Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 174 N.E.2d 463, 214 N.Y.S.2d 350 (1961); In re National Cash Register Co., 8 N.Y.2d 377, 171 N.E.2d 302, 208 N.Y.S.2d 95 (1960); Greene Steel & Wire Co. v. F.W. Hartmann & Co., 235 N.Y.2d 203 (Sup. Ct. 1962), aff'd mem., 20 App. Div. 2d 683, 247 N.Y.S.2d 1008, appeal dismissed, 14 N.Y.2d 688, 198 N.E. 2d 914, 249 N.Y.S.2d 886 (1964).
32. See, e.g., Minn. Stat. § 572.09(a) (1965); Pirsig, The Minnesota Act 346.
33. See, e.g., Minn. Stat. § 572.09(a) (1965); Pirsig, The Minnesota Act 344-45.
34. See, e.g., Minn. Stat. § 572.09(d) (1965).
To avoid resort to the courts, statutory sections provide for confirmation of an award by the court upon the application of a party. Once the award is confirmed, a judgment or decree will be entered in conformity therewith. This judgment or decree will be enforced as any other judgment or decree.

B. FACTORS WEIGHING AGAINST ARBITRATION

In deciding whether or not to use arbitration, the businessman must also consider those factors unfavorable to its use as a dispute settling mechanism. These factors include the unenforceability of agreements to arbitrate in many jurisdictions, inability to predict results, unfamiliarity with its procedures, and some risks inherent in the nature of the arbitrator's decisional processes. Under the common law an agreement to arbitrate is unilaterally revocable until the award is granted. Therefore, although the decision of the arbitrator is final, enforcement of an agreement to arbitrate, except by a suit for breach of contract, is impossible under the common law rule which is still in effect in most states. This defect has been partially remedied by the enactment in many states of arbitration statutes which contain specific provisions providing for enforcement of agreements to arbitrate.

An arbitrator is not required to follow substantive law,


38. Id.


40. Id.


43. See Sturges & Reckson, supra note 1, at 826-31. Nearly all American jurisdictions have common law and statutory arbitration. Id. at 826-31.

44. Prior to the enactment of the New York Act, statutes covering arbitration provided only that agreements to arbitrate existing disputes were enforceable. Sturges & Reckson, supra note 1, at 822.
either legislative or judicial, but is free to decide the controversy according to his own interpretation of equity and justice. Furthermore, the arbitrator is not limited to legal or equitable remedies or to the rules governing their use by a court of law. The arbitrator's decision is final as to questions of law and fact. Therefore, case-to-case inconsistencies, errors of judgment, and misconstruction of contracts on the part of the arbitrator are risks of arbitration and not subject to judicial review.

Combined with the above factors is the businessman's knowledge that one party may have an advantage over the other due to his familiarity with arbitration and the availability to him of previous arbitration awards which may have some precedential value. While this disadvantage is not limited to arbitration, it is enhanced by the fact that arbitration records are not generally available to parties who are not members of the particular association. This is particularly true in cases involving insurance, where the company probably has on file many previous cases involving the policy or question in dispute while the policyholder's lawyer will not have access to such material. The same problem exists in arbitration before trade associations to which the businessman does not belong. Furthermore, the outsider suffers the additional handicap of being unable to participate in the selection of the arbitrators, who are usually picked from a panel selected by the trade association.

50. See Mutual Benefit Health & Acc. Ass'n v. United Cas. Co., 142 F.2d 390 (1st Cir. 1944); The Hartbridge, 62 F.2d 72 (2d Cir. 1932).
52. Isaacs, supra note 26, at 931.
54. See Kronstein, supra note 53, at 614 n.11.
III. JUDICIAL REVIEW OF ARBITRATION

A. Pre-Arbitration Review

In reviewing motions to compel arbitration or to stay arbitration pending litigation, the courts have been confined by statute to reviewing only whether there is an agreement to arbitrate, and, if so, whether the dispute is within that agreement. Court decisions on these issues are deemed necessary under the theory that arbitration is a creature of the contract and cannot exist outside of that agreement. Traditionally, the courts have decided these questions by using the criteria normally employed to determine the existence and validity of a contract. Thus, the court will look to the contract in order to determine if mutual assent is lacking. If the contract is void for lack of mutuality, the arbitration tribunal is a nullity.

The court also determines whether the subject of the contract is prohibited by law, but if the objection is based on public policy the arbitrator may be allowed to decide the issue. However, the courts still retain the power to set aside awards which violate public policy. In many jurisdictions

57. Jalet, Judicial Review of Arbitration: The Judicial Attitude, 45 Cornell L.Q. 519, 531-32 (1960); Note, Judicial Control 532. Pirsig feels that the court should not be allowed to decide the question of whether the dispute is within the container contract since this in effect allows the court to decide the entire dispute. Pirsig, The Minnesota Act 346-47.
58. See Finsilver, Still & Moss v. Goldberg, Maas & Co., 253 N.Y. 382, 390-91, 171 N.E. 578, 582 (1930); Jalet, supra note 57, at 526 n.42.
63. See, e.g., Loving & Evans v. Blick, 33 Cal. 2d 603, 204 P.2d 23 (1949); Franklin v. Nat. C. Goldston Agency, 33 Cal. 2d 626, 204 P.2d 37 (1949). Both these cases involved disputes where one of parties failed to obtain a license as required by law. The arbitrators decided in favor
both the issue of fraud in the inducement of the arbitration contract and the performance of a condition precedent are still reserved for court decision. Recently, however, some courts have shown a tendency to surrender the decision of some of these pre-arbitration and award matters to the arbitrator of the dispute. This has been accomplished by the development of the separability theory whereby the arbitration clause is separated from the container contract. If the arbitration clause has not been obtained by a fraud particular only to it, it is valid and the arbitrator may decide the issue of whether the container contract was obtained by fraud.

The classic case illustrating this trend is Robert Lawrence Company v. Devonshire Fabrics, Inc., where the court held that the parties under a general arbitration clause can agree that the issue of fraud in the inducement as well as issues of performance under the contract be decided by the arbitrator, although the parties may not allow the arbitrator to decide the of the unlicensed party and the court vacated the awards on the grounds that they violated public policy. However, it has been argued that "public policy," since it is constantly changing, is too vague a reason to allow a court to overrule an award. Metiner's Arbitration Awards and "Public Policy," 17 Am. J. (N.S. 145 (1962). Courts also ought to interfere when an award directs or allows the parties to depart from a law which operates notwithstanding a contrary consensual arrangement. Cf. Western Union Tel. Co. v. American Communications Ass'n, 239 N.Y. 177, 86 N.E.2d 162 (1949) (award vacated which allowed a party to violate a penal law). However, courts do not always vacate awards which arguably violate public policy. See, e.g., Grayson-Robinson Stores v. Iris Constr. Corp., 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960) (specific performance of a building contract); Staklinsky v. Pyramid Elec. Co., 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959) (specific performance of a personal service contract). See also Pirsig, The Minnesota Act 335.

67. The reasoning behind this theory is that the arbitration statutes are concerned only with arbitration provisions. Therefore, from the scope of the statutes it is apparent that the legislature wanted the arbitration provision treated separately. Note, Judicial Control 524-32.
68. 271 F.2d 402 (2d Cir. 1959).
69. Id. at 410-11.
issue of fraud in the inducement of the separate arbitration clause.70 The Devonshire court reasoned that all doubts should be resolved in favor of arbitration in order to fulfill the parties’ original intentions and to help ease the current congestion of court calendars.71 In 1967 the United States Supreme Court, in *Prima Paint Corporation v. Flood & Conklin Manufacturing Company*72 affirmed Devonshire’s view of the judiciary’s restricted role prior to the arbitration proceedings.73

B. Post-Arbitration Review

With judicial control and review prior to arbitration thus limited, the post-award review procedures become more important.74 After the arbitrator has reached a decision he is required to draw up an award, sign it, and deliver a copy thereof to each party.75 Upon receipt of the award, a party may move in court for confirmation of the award which will be granted unless the other party seasonably moves to modify, correct, or vacate the award.76 The award will be modified or corrected where miscalculation or mistaken description is obvious on the face of the award,77 or where the arbitrator has decided a matter not submitted to him and the correction may be

70. Id. at 411. The court reasoned that allowing the mere cry of fraud in the inducement to avoid arbitration would frustrate “the very purposes sought to be achieved by the agreement to arbitrate, i.e., a speedy and relatively inexpensive trial before commercial specialists.” Id. at 410.

71. 271 F.2d at 410.


73. 388 U.S. at 399-400, 402-04. The Court stated that the congressional purpose underlying the Act was to afford businessmen a speedy method of dispute settlement which would avoid the delay and obstruction typical of court actions. 388 U.S. at 404. See also Dworkin, Arbitrations: An Obvious Solution to a Crowded Docket, 29 Cleve. B. Ass’n J. 167 (1958).

74. See Note, Judicial Supervision 1079. See also Note, Judicial Review 683-90.


76. See, e.g., Minn. Stat. § 572.18 (1965); Pirsig, The Minnesota Act 351.

made without affecting the merits of the decision on the issues submitted.\textsuperscript{78}

An award may be vacated when fraud, corruption, or other undue means were used to procure it,\textsuperscript{79} when the arbitrator was biased or engaged in misconduct prejudicing the rights of any party,\textsuperscript{80} or if the arbitrator exceeded his powers.\textsuperscript{81} However, the practical problems of obtaining review are great. Usually the only writing required by statute is the award itself,\textsuperscript{82} which is difficult to review since it is usually only a statement of the amount awarded to the winning party. Bias is the ground usually chosen for attack of the proceedings and the award, but even here great leeway is allowed and few awards are overturned.\textsuperscript{83} This result is desirable, however, because most of the benefits of arbitration are lost when a party resorts to the courts after arbitration.\textsuperscript{84}

IV. PROBLEMS ENGENDERED BY PRESENT LIMITS ON JUDICIAL CONTROL OF ARBITRATION

A. Societal Control vs. Institutional Control

Commercial practices usually develop and change more rapidly than the laws which society has enacted to control and guide business relationships.\textsuperscript{85} As a result the business community has turned to the institution of arbitration to maintain the

\textsuperscript{78} See, e.g., MINN. STAT. § 572.20 (1) (2) (1965).
\textsuperscript{79} See, e.g., MINN. STAT. § 572.19(1) (1) (1965). See also Comment, supra note 77, at 240-42; see generally Rothstein, Vacation of Awards for Fraud, Bias, Misconduct and Partiality, 10 VAND. L. REv. 813 (1957).
\textsuperscript{80} See, e.g., MINN. STAT. § 572.19(1) (2) (1965).
\textsuperscript{81} See, e.g., MINN. STAT. § 572.19(1) (3) (1965).
\textsuperscript{82} See, e.g., MINN. STAT. § 572.15 (1965).
\textsuperscript{83} E.g., Nelly v. Mayor & City Council, 224 Md. 1, 166 A.2d 234 (1960) (arbitrator was an employee of one of the parties); Kronstein, supra note 53, at 680.

Impartiality in arbitration can best be safeguarded by holding over the proceedings the possibility of judicial review. Schmitthoff, Arbitration: The Supervisory Jurisdiction of the Courts, 1967 J. Bus. L. 318, 325.

\textsuperscript{84} See Jalet, supra note 57, at 556; Note, Predictability of Result 1023 n.10.
\textsuperscript{85} See Ellenbogen, English Arbitration Practice, 17 LAW & CONTEMP. PROs. 655, 657 (1952) [hereinafter cited as Ellenbogen, English Practice]. The remedy should be to update the law, not bypass it, unless it is to be completely bypassed. The reconciliation of the law with present commercial practice is the basic problem in arbitration. Carlston, Theory of the Arbitration Process, 17 LAW & CONTEMP. PROs. 651, 651 (1952).
flexibility which it feels is necessary for its continued growth. Consequently, arbitration is used by some trade associations and businesses to avoid judicial and legislative prohibitions, thereby developing and implementing institutional interests instead of those of the body politic. It is currently recognized that businessmen use arbitration to avoid possible legal difficulties with the nature of the transaction involved; to avoid governmental control of business; to control the business ethics of the participants; to coerce, control, and discipline economically weaker businessmen by using it to enforce unconscionable contracts; and to oppose the impact of laws, such as the anti-trust statutes, designed to regulate or restrain business activities.

Recent decisions allowing arbitrators to determine threshold questions of legality have further increased this separation of arbitration from societal control. It is evident from a review of these cases that arbitration has created a body of law separate from that applied by the courts to govern commercial conduct. The arbitration law is formulated only in relation to a particular dispute or to the institutional interests of a particular trade association with expediency and self-interest the only guides.

87. See Mentschikoff, Commercial Arbitration 868.
88. See Carlston, supra note 85, at 651. This, of course, is a result of institutional as opposed to individual arbitration. Herzog, Judicial Review of Arbitration Proceeding:—A Present Need, 5 DEPAUL L. REV. 14, 31 (1955).
89. Mentschikoff, Commercial Arbitration, lists this as one of the four moving factors in choosing arbitration. The others are (1) a desire of privacy, (2) the availability of expert deciders, (3) the random acceptance by many businessmen of the idea that arbitration is faster and cheaper than litigation. Id. at 849.
90. See DOMKE 2; cf. Gotshal, Foreword, 10 VAND. L. REV. 649 (1957). See also Mentschikoff, Commercial Arbitration 853-54.
91. DOMKE 2.
92. See Note, Judicial Supervision 1098-1101, and cases cited therein. See also RESOLVING BUSINESS DISPUTES 62-65.
95. See Kronstein, supra note 53, at 662; Herzog, supra note 88, at 26-27.
No attempt is made to weigh public policy or the other factors considered by the courts or the legislatures when these institutions establish legal norms. However, this new body of "law" has the same binding force as that enacted by legislatures and formulated by the courts. Consequently, large and important areas of conduct are removed from judicial and legislative control. The existence of this phenomenon raises the question of the wisdom of having law created by persons who are unresponsive and and unresponsible to society in general. The arbitrator, as lawmaker, is responsible primarily to the parties and secondarily in some cases to the institution which has appointed him to his office. From this position of power the arbitrator is able to decide the particular dispute with total unconcern for public policy, established precedent, or even, ironically, trade practice.

B. UNPREDICTABILITY

The primary concern of most members of the business community is to avoid commercial disputes. This can be done only by structuring commercial practices so that they will infringe neither the accepted legal nor commercial norms. Trade and business practices can be made to conform with these norms only if the businessmen whose conduct is to be governed know what the norms are. The problem with using arbitration

97. See Herzog, supra note 88, at 27-28; Note, Judicial Review 681. It is clear that arbitration may affect society as a whole in a manner that requires some attention by a decision maker who is responsible to society in general. Jones, The Nature of the Courts "Jurisdiction" in Statutory Arbitration Post-Award Motions, 46 Calif. L. Rev. 411, 413 (1958).

98. Kronstein, supra note 53, at 662. It has been argued that the creation of an individualized body of norms governing behavior is an inevitable result in any situation involving institutionalized behavior. Carlston, supra note 85, at 650. However, creation of these norms does not imply or require that they be immune from regulation if they conflict with those of society at large. See Cohn, Commercial Arbitration and the Rules of Law: A Comparative Study, 4 U. Toronto L.J. 1 (1941).

99. Carlston, supra note 85, at 650; Kronstein, supra note 53, at 662. Commercial arbitration plays its most significant role wherever there is a system of law internal to two or more business institutions. It is this system of law and relationships which is removed from the control of society. See Carlston, supra, at 650 n.58.

100. See Note, The Role of Public Policy 547. See also Mentschikoff, Commercial Arbitration 866.

101. See also Kronstein, supra note 53, at 664.

102. See also Herzog, supra note 88, at 28.

103. See Domke 1-4; Resolving Business Disputes 13-14.
as a method of determining commercial and legal norms is that many times it is impossible for the businessman to predict or determine the norms and sanctions governing his conduct\textsuperscript{104} or to structure his behavior to conform to the rules of conduct which may be invoked against him\textsuperscript{105}.

This unpredictability is partly attributable to the character of arbitration as a fact finding procedure in which experts apply specialized knowledge of trade practices and goods to measure performance under a contract,\textsuperscript{106} rather than a method of determining what is or should be the legally established standard of conduct in a given social-commercial context. Although arbitration may be more predictable than litigation as a fact finding procedure since a trade expert rather than a "lay" judge or jury decides the question, the net unpredictability is increased in arbitration as a result of the lack of a requirement that the arbitrator follow legal rules or any other type of precedent.\textsuperscript{107}

It is possible to write into the arbitration agreement the requirement that arbitrators must decide all questions according to the law of the place of arbitration, or any other law,\textsuperscript{108} but this leads to further complications since an arbitrator's award may be reviewed by the courts and reversed if he attempts to follow the law and fails.\textsuperscript{109} The net result of this method of review is to prolong dispute. Businessmen recognizing this problem attempt to avoid arbitration where significant legal issues are involved.\textsuperscript{110}

\textsuperscript{104} See Kronstein, supra note 53, at 662. See also Horowitz, Guides 71–73.

\textsuperscript{105} See Kronstein, supra note 53, at 662.


\textsuperscript{109} See, e.g., Reid & Yeomans, Inc. v. Drug Store Employees Union, 29 N.Y.S.2d 835 (Sup. Ct. 1941); Comment, When May An Arbitrator's Award Be Vacated, 7 DePaul L. Rev. 236, 240 (1958). It is for this reason that the American Arbitration Association discourages written opinions. Note, Predictability of Result 1024 n.16.

\textsuperscript{110} This desire for more formalized and legally predictable proceedings is manifested in various ways, usually in cases involving large sums. It has been shown that as the amount in controversy approaches
C. ENCOURAGING DELAY AND RELATED PROBLEMS

The unpredictability of arbitration does not outweigh its advantages when the parties decide upon the method of resolving a dispute after the controversy has arisen. In this situation, arbitration will probably be successful since the parties are able to assure themselves that the dispute is one which is suitable for decision by arbitration before they bind themselves to arbitrate. It is important that both parties be satisfied that arbitration is the best means to solve their particular problem since any resort to the courts to compel or stay arbitration or to modify or vacate an award will diminish some of the potential benefits of arbitration. Moreover, the main argument favoring judicial laissez faire with respect to arbitration has been that it is a voluntary form of dispute settlement based upon a contract. Although this argument assumes that a person may waive statutory and constitutional rights by contract, it has greater weight when the parties contract to arbitrate after the dispute has arisen. Where the parties agree to arbitrate after the controversy

$20,000, the number of arbitration proceedings in which lawyers are used to present the case increases to 100%. Mentschikoff, Commercial Arbitration 859 n.26. It may be inferred from this data that when large amounts of money are involved the parties desire the relative predictability that accompanies a quasi-judicial interpretation of legal rights. See Ellenbogen, English Practice 677-78.

Litigation may be preferable to arbitration in the following situations:

1. Cases involving difficult questions of law or fact where pretrial procedures are likely to be of substantial assistance.
2. Cases where a decision according to law is wanted both on the procedural level and on the merits level.
3. Cases where a jury trial is wanted.
4. Cases where the expense of arbitration substantially exceeds the expense of court hearing, without compensating advantages.
5. Cases where appellate review of the applicable legal principle is desired.
6. Cases in which special knowledge of arbitration is not essential to obtaining a correct or equitable result.
7. Cases where proper procedural safeguards cannot be obtained by agreement with respect to (a) the personnel of arbitrators; (b) the right to rely on law and rules of evidence or modification thereof; (c) the right to use pretrial techniques; (d) the right to proper hearing dates with respect to the hearing itself and the constituent parts thereof; (e) the right to a decision in which the arbitrators make findings and give their reasons.

RESOLVING BUSINESS DISPUTES 39-40.


113. Carlston, supra note 85, at 631-32.
has arisen, judicial review should be limited to the traditional statutory grounds. The benefits of arbitration, win or lose, would have already been deemed satisfactory by both parties, who arbitrated knowing that the process is unpredictable and that their legal rights might not be correctly enforced.

The judicial refusal to determine the legality of contracts containing arbitration clauses has, however, made unpredictability of outcome more repugnant in those situations where the contract calls for arbitration of all disputes arising under it. The agreement to arbitrate may not be voluntary since unequal bargaining strength or form contracts often result in one party’s involuntarily or unknowingly signing away his right to a court trial. Consequently, the key argument favoring judicial laissez faire with respect to arbitration is not as persuasive in these cases, because it is not really a voluntary form of dispute settlement.

However, because of limited judicial control in this area, a dissatisfied party may resort to the courts only for delay. Thus, a party who voluntarily signs such an agreement may engage in delaying tactics if he feels that the dispute which arose under the contract was not foreseeable and should be decided in court on legal grounds rather than in arbitration on trade practice grounds. Such a dissatisfied party may appeal to the courts before arbitration claiming lack of arbitrability and then invoke all possible delaying actions, appeal after the award, and utilize other disruptive tactics. The result is loss of the advantages of arbitration along with the deprivation of legal rights. A procedure is needed which will reverse this result and still retain the advantages of arbitration while allowing a court determination of the parties’ legal rights.

114. See notes 75-84 supra and accompanying text.
116. RESOLVING BUSINESS DISPUTES 118-20.
Finally, arbitration is not being used as much as it could and should be in many cases where it would be beneficial. This is often blamed upon lack of knowledge in the business community of the availability and advantages of arbitration and upon the hostility with which it is viewed by many lawyers. Although increased awareness in the business community might help to spread the use of arbitration, its full potential will not be reached until some method of obtaining greater predictability is injected into its procedures. Businessmen and lawyers will not invest heavily in contracts when they are unable to determine what standards of conduct they must meet in order to avoid monetary loss.

IV. PROPOSAL: THE SPECIAL CASE

Many of the objections to arbitration previously discussed would be reduced by revising current arbitration statutes to allow courts to resolve the legal questions involved. This could be implemented by following the model of the English Arbitration Act which provides that a “special case” can be stated by either the arbitrator or the parties. The “special

118. Sarpy, Arbitration as a Means of Reducing Court Congestion, 41 NOTRE DAME L. 182, 184 (1965), suggests the use of arbitration to handle auto cases in an attempt to clear court congestion. Id. at 182-84. The approach is worth exploring, but it points out the need for more judicial-societal control of the resolution of disputes by arbitrators as more of society's conflicts are settled in this manner.

119. See RESOLVING BUSINESS DISPUTES 42, 120-22.

120. Several other methods have been proposed to improve the arbitration process. One proposal would allow or require the arbitrator to use the services of a lawyer for counsel on legal questions. Marks, Shaky Foundation of Arbitration, 13 B. Bull. N.Y. COUNTRY LAW. ASS'N 206, 209 (1956). However, this overlooks the fact that many arbitrators are lawyers. In addition, this procedure would not provide for a decision on issues involving society in general by a decision maker responsible to that society. It has also been proposed that arbitration would be promoted by allowing the arbitrators to write opinions explaining and clarifying for lawyers the considerations the arbitrators feel are relevant in making their award. Note, Predictability of Result 1033. It is probable that written awards would clarify those grounds which are relevant in making awards and thereby aid predictability. However, unless these awards are both reviewable and reversible the growth of a separate body of law would be encouraged.

121. Arbitration Act of 1950, 14 Geo. 6, c. 27.

122. Id. § 21.

(1) An arbitrator or umpire may, and shall if so directed by the High Court, state—
(a) any question of law arising in the course of the reference; or
(b) an award or any part of an award, in the form of a special case for the decision of the High Court.
(2) A special case with respect to an interim award or with
case” allows the arbitrator to present any question of law arising in the course of the reference or award or any part thereof in the form of a special case to a court for decision. The special case must set out all the findings of fact necessary to enable the court not only to decide the point submitted but also to decide whether those points arise and the manner in which they originate. The arbitrator must state all facts affirmatively; no alternative fact findings are permitted. Although questions of fact are not normally left to the court to decide, it may infer secondary facts from the primary findings set out by the arbitrator. Notwithstanding the requirement that the arbitrator must formulate the fact findings to be submitted in a special case, he may insist that the party frame the questions of law to be submitted. The party also has the obligation to ask the arbitrator to make findings on those facts which are necessary for the court to determine the point of law involved. It then becomes the arbitrator’s obligation to respect to a question of law arising in the course of the reference may be stated, or may be directed by the High Court to be stated, notwithstanding that proceedings under the reference are still pending.


The parties cannot validly agree not to apply for a special case. See F. Russell 190; Ellenbogen, English Practice 663. In Czarnikow v. Roth, Schmidt & Co., [1922] 2 K.B. 478, the court ruled that a trade association rule forbidding the parties to apply for the statement of a special case was invalid as contrary to public policy.


124. Windsor Rural Dist. Council v. Otterway & Try Ld., [1954] 1 W.L.R. 1494 (Q.B.). This is necessary to avoid wasted effort on the part of the judiciary.

The court is not at the beck and call of the arbitrator to answer whatever questions the arbitrator may want to put to it, and it is not here to indulge in legal exercises. It is only here to answer questions which it is satisfied do arise in the course of the reference and are material to be determined. . . .

Id. at 1497.


127. Nello Simoni v. A/S M/S Straum, 83 Lloyd’s List L.R. 157 (1949) (K.B.). This allows the arbitrator to state exactly the question the party wants decided and thereby prevents the futility of deciding unimportant questions.

128. F. Russell 195.
formally present the question of law and findings of fact to the court.\textsuperscript{129}

The parties may agree lawfully to have the award itself stated in the form of a special case.\textsuperscript{130} Under this procedure the arbitrator may state the award in the alternative.\textsuperscript{131} An alternative statement of the award allows the court to make its decision and then affirm the proper alternative. This eliminates the need to return the case to the arbitrator for further action. If the parties have agreed prior to arbitration to have only the award itself stated in the form of a special case, the arbitrator may state the award as a special case and alternatively as a final award.\textsuperscript{132} If neither party petitions the court to hear the special case, the award will become final without further action by the arbitrator.

If the fact findings supporting the arbitrator’s award are insufficient, the court has the power to remit the case to the arbitrator.\textsuperscript{133} The court may also set aside an award stated in the form of a special case if the facts found are insufficient to form a judgment on the law.\textsuperscript{134} For example, if the arbitrator states that he is unable to determine facts on the issue of whether or not a person has acted in accordance with prescribed legal standards, the court will remand directing the arbitrator to make

\textsuperscript{129} F. Russell 191.

\textsuperscript{130} Arbitration Act of 1950, 14 Geo. 6, c. 27, § 21(1) (b); see F. Russell 190 n.18.

\textsuperscript{131} See, e.g., Podar Trading Co. v. Tagher, [1949] 2 K.B. 277; The Kyno, 63 Lloyd’s List L.R. 43 (1939) (K.B.); F. Russell 193-94; Schmitthoff, Arbitration: The Supervisory Jurisdiction of the Courts, [1967] J. Bus. L. 318, 324. For example, “the arbitrator will state that if the question of law has to be answered this way, as in his view it should be answered, he awards the applicant £1,000 but, in the alternative, if, contrary to his view, the question of law has to be answered the other way, he dismisses the application.” Schmitthoff, supra at 324.

\textsuperscript{132} See authorities cited note 131 supra.

\textsuperscript{133} Potato Marketing Bd. v. Merricks, [1958] 2 Q.B. 316, 336; Universal Cargo Carriers Corp. v. Citati, [1957] 1 W.L.R. 979, 986 (C.A.); F. Russell 191. The court has the discretionary power to remit all awards for further findings of fact. However, this discretion is seldom exercised in final awards since prima facie the parties have agreed to the arbitrator and therefore must accept his award as final. In an award stated as a special case the award is not strictly final since a question of law has been left for the decision of the court. Therefore, the discretion to remit is more readily exercised in these cases. F. Russell 309.

\textsuperscript{134} This may be done on the grounds that the award contains an error of law on its face or that it is impossible to answer the question from the facts found. See J. Pattison & Co. v. Allied Nat’l Corp., [1953] 1 Lloyd’s List L.R. 520 (Q.B.); Fratelli Schiavo di Gennaro v. Richard J. Hall, Ltd., [1953] 2 Lloyd’s List L.R. 169 (Q.B.).
an affirmative or negative fact finding.\textsuperscript{135}

Unless the arbitration agreement contains a provision requiring the arbitrator to state a special case upon request of the parties, he may refuse to do so.\textsuperscript{136} The parties' only alternative in such a situation is to petition the court for an order compelling the arbitrator to state a special case.\textsuperscript{137} The court has the sole discretion to deny or grant this order. This discretionary power of both the court and the arbitrator serves to prevent clearly frivolous petitions for the statement of a special case and its use as a mere delaying factor. However, since the party has an additional opportunity in stating the award itself as a special case, meritorious claims are not likely to be overlooked.

When a special case is stated and referred during the course of arbitration, no appeal is allowed from the court's decision without its leave or permission of the appellate court that has jurisdiction over the matter.\textsuperscript{138} Once a final award is stated as a special case, however, an appeal lies without leave of the court.\textsuperscript{139} This distinction is drawn because only the final award is deemed ultimately to dispose of the rights of the parties.\textsuperscript{140} Any decision of the court on a special case stated before a final award is viewed as an interlocutory order and therefore not appealable since it is not determinative of the parties' final rights.\textsuperscript{141}

\begin{footnotes}
\item \textsuperscript{135} F. Russell 191, ex. 1.
\item \textsuperscript{136} Willers, Engel & Co. v. E. Nathan & Co., 30 Lloyd's List L.R. 208 (1928) (C.A.). If the arbitrator does refuse to state a case he must give the party desiring the statement of a special case a reasonable opportunity to apply to the court for an order directing him to do so. Ellenbogen, \textit{English Practice} 663. \textit{See} Schmitthoff, \textit{supra} note 131, at 323.
\item \textsuperscript{137} Arbitration Act of 1950, 14 Geo. 6, c. 27, § 21(1) (a); F. Russell 195-96.
\item \textsuperscript{138} Arbitration Act of 1950, 14 Geo. 6, c. 27, § 21(3); F. Russell 197.
\item \textsuperscript{139} Several suggestions have been made for modification of the special case procedure. One suggestion has been to adopt the procedure of judicial arbitration. This would allow the parties to select a judge as the arbitrator. It is suggested that this would allow retention of the advantages of arbitration while giving added stature to the award and allowing statement of a case by appeal directly to the Court of Appeals. Schmitthoff, \textit{supra} note 131, at 327. A second suggestion is to allow statement of the special case directly to the Court of Appeals in order to avoid delay in the lower court hearing. \textit{Id.} at 327. A third proposal would permit the parties to the arbitration to seek the jurisdiction of amicable compositors, who would not be required to follow the law, but could decide according to equitable concepts of fairness and justice. However, the Court of Appeals would have authority to set aside an award that it deemed unreasonable and render its own decision in the case. \textit{Id.} at 328.
\item \textsuperscript{140} F. Russell 198.
\item \textsuperscript{141} \textit{Id.}
\end{footnotes}
The most significant objection to present-day arbitration procedure is its unpredictability. This unpredictability has led some businessmen to distrust and therefore avoid arbitration.\textsuperscript{142} Allowing the arbitrator to resolve legal questions has been one of the largest causes of unpredictability. The special case removes this element of unpredictability by enabling a party to obtain a judicial determination of legal questions arising during the course of arbitration, thereby making legal standards here-tofore ignored by arbitrators binding upon them. The capacity to bind the arbitrator to standards which are ascertainable prior to his decision enhances the businessman's ability to predict the probable result of arbitration, thereby increasing his trust and confidence in the process. In addition, the businessman will be able to plan his future operations in order to comply with the standard of conduct which he knows will be imposed on him by the court through the arbitrator.

Adoption of the special case procedure would also attenuate many of the abuses of societal norms resulting from institutionalized arbitration. For example, arbitrators will no longer be able to decide legal questions while remaining completely autonomous from statutes and judicial decisions governing commercial conduct. Any attempt by the arbitrator to substitute his institutional bias for controlling legal precedent would be counterbalanced by requiring him to apply for and follow a judicial determination in the form of a special case. As a consequence, formulation of commercial norms by arbitration will adhere to those standards evolving from the legislatures and the courts.\textsuperscript{143} This development will enable and require businessmen to standardize their conduct to conform to uniform societal norms rather than individualized trade norms. It will also limit the arbitrator to his traditional role of determining

\textsuperscript{142} Lawyers choose the method of dispute resolution. One of the main reasons for their animosity towards arbitration is the lack of a judicial check on the arbitrator. See Resolving Business Disputes 113-20; Herzog, Judicial Review of Arbitration Proceedings—A Present Need; supra note 115, at 14, 31 (1955). See also Domke 14-16; Note, Predictability of Result 1023.

The desirability of this type of procedure is shown by the popularity of "London" arbitration among many of the world's businessmen. Cohn, supra note 115, at 31-32; Ellenbogen, English Practice 678; Ellenbogen, Commercial Arbitration, 1 Bus. L. Rev. 247, 265 (1954); Schmitthoff, supra note 131, at 326.

\textsuperscript{143} The use of the special case in England is based partially on the practical consideration of keeping the law uniform and avoiding its being interpreted differently by various special tribunals. Czarnikow & Co. v. Roth, Schmidt & Co., [1922] 2 K.B. 478. See Schmitthoff, supra note 131, at 325.
factual disputes of quality and quantity rather than his expanded present task of determining the "legal" obligations of the members of a particular industry. Furthermore, the inability of some parties to obtain copies of awards of precedential value or to participate meaningfully in the selection of arbitrators by an institution will become unimportant to the extent the significance of these factors is germane to any legal question arising in the dispute. Businessmen also hesitate to use arbitration because of the delay which can result from frequent resort to the courts in those cases where the delaying party is attempting to obtain a judicial determination of his legal rights. By using the special case a party may obtain such a judicial determination within the framework of the arbitration procedure without disrupting the arbitration proceedings or casting discredit upon the arbitrator or the proceedings.

It is often objected that a more active judicial role in arbitration will remove many of the practical advantages associated with arbitration such as speed, economy, privacy, and maintenance of goodwill. As indicated above, however, the speed of the process will be increased by the avoidance of delaying tactics in cases where the judicial determination of legal rights is desired. In other situations any delay would be relatively minor since the special case would be heard as a motion rather than at a de novo trial hearing. It is probable that complete privacy will be lost to the parties, although the hearing of a special case would not be publicized as widely as would a full trial on all the issues. Essentially the same observations may be made with respect to the maintenance of goodwill between the parties. Under the special case procedure, the parties would probably tend to avoid sensation on legal issues, thus approaching these questions more rationally than they would under present procedures. Although arguments over factual questions could still degenerate into emotionalism, overall goodwill between the parties would ostensibly be maintained at a higher level than at present. Besides, little goodwill can be maintained if one party feels that the other is attempting to deprive him of a judicial determination of his legal rights and to impose a unique standard of conduct upon him. The special case procedure will help to maintain goodwill here by giving this party an opportunity to have a judicial determination of his rights. Arbitration may become less economical in some cases, however, due to the slight increase in time spent in preparing

144. See Note, Judicial Review 681-82.
and presenting the special case and the additional printing costs required to present the special case and legal briefs to the court. But this increase in cost must be balanced against the present cost of delaying actions and appeals as well as the cost of judicial proceedings in cases presently tried in court rather than in arbitration due to the unpredictability of arbitration and the accompanying desire for a judicial determination of legal questions. The balance seemingly weighs heavily in favor of the special case procedure.

It has further been objected that since the parties have voluntarily contracted for an extrajudicial decision of their disputes any judicial interference is an alteration of their contract and intent.145 This is a valid objection where the parties have voluntarily agreed to arbitrate after the dispute has arisen. However, it ignores the fact that many contracts to arbitrate future disputes may be imposed on a party through unequal bargaining strength, duress, or a form contract.146 This objection also ignores the fact that many parties voluntarily sign contracts containing arbitration clauses without foreseeing that any disputes unsuitable to arbitration will arise.

It has also been argued that any method whereby the courts would review questions of law creates complex problems of separating and dealing with mixed law-fact questions.147 This argument is premised on the assumption that to allow the courts to review awards under these circumstances will open up a whole host of controversial questions to litigation and would defeat some of the important advantages of arbitration.148 However,

145. See id. at 682. See also Note, The Role of Public Policy 556.
146. See notes 115–117 supra and accompanying text.
148. Id. at 74H–75H. These remarks were made in response to an objection to the lack of a provision allowing judicial review of arbitration awards on questions of law. Id. at 46H–48H, 49H–50H, 51H–52H. See id. at 54H–55H. Some American statutes have provided a procedure somewhat like the special case. CONN. GEN. STAT. ANN. § 52-415 (1958) allows the submission of questions of law to a court on the request of all parties if they agree in writing to be bound by the decision. This procedure is probably too restrictive since it allows one party to block a judicial determination of legal questions. Nevada, North Carolina, and Utah have enacted statutes based on the old Uniform Arbitration Act § 13. See Nev. Rev. Stat. § 38.140 (1987); N.C. GEN. STAT. § 1-556 (1953); UTAH CODE ANN. § 78-31-13 (1953). Although it was predicted that the availability of a referral provision would cause much litigation, such has not been the case. See Sturges, Arbitration Under the New North Carolina Arbitration Statute—The Uniform Arbitration
this objection focuses only on judicial review of an award without a record of the arbitrator's specific factual conclusions. The special case procedure requires the arbitrator to state the facts upon which the question arises; it also requires the party to state the legal question which is to be decided, thereby minimizing law-fact problems and avoiding a general review of the proceedings.

The special case procedure will solve many of the predictability problems in arbitration but not all. The arbitrator will still be able to color the fact findings and thereby foreclose meaningful review of legal questions. In addition, entities frequently involved in arbitration will still be able to produce previous arbitration cases as precedent for factual determinations. The problem of unequal bargaining power is also inherent in arbitration, but its effect would be attenuated by allowing legal questions to be referred to the court. These problems cannot be completely resolved by the special case procedure, but must be accepted as the small inherent risks of arbitration. In any event, the special case procedure represents a significant step toward solving many of the existing problems of arbitration, and the arbitration procedure can be greatly improved if each state includes in its appropriate statute a clause providing a procedure patterned after the special case example.

Act, 6 N.C.L. Rev. 363, 407-08 (1928). The lack of cases under this procedure may be due to the fact that these statutes apply only to agreements to arbitrate made after the dispute arises and therefore any legal questions will probably be taken directly to the courts.