

EXTRAJUDICIAL SETTLEMENT OF CONTROVERSIES
THE BUSINESS MAN'S OPINION: TRIAL AT LAW V. NONJUDICIAL
SETTLEMENT

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What is the business man's opinion of arbitration and other extrajudicial means of settling business disputes? We may try to answer this question directly by asking him, or by observing his actual use of these modes of settlement. We shall undoubtedly have to get beneath the surface of the arbitration problem itself, to see what business men think and do about the circumstances which control it. Indeed, it will even be necessary to refer to forces beyond the business man's control and to subconscious attitudes underlying his own behavior. And no answer to the question would be adequate without reference to the pervading influence of the law.

(I) *Available Points of Departure*

Two alternative theses, at least, may be set up regarding present-day tendencies in settling business disputes. On the one hand, the law reports have for years included business cases in an ever-increasing number and ratio, while legislation and political administration have become more and more directed toward the regulation of economic relationships. Furthermore, many of these laws and cases are so crucial in their import, so representative of many unrecorded items of similar character, that they set the standard for a great part of business behavior which never reaches the status of litigation. This would be the tenor of the first thesis, pointing out the persistent and perhaps even increasing control of business by law. On the other hand, there is the alternative thesis that business activity, like the great bulk of human behavior, has always gone untouched by political or legal control; indeed, it might be said that in such a field as business the very objectives would be thwarted by the expenses and delays of political or judicial machinery. A study of the law reports and of other legal literature, without a critical recognition of its essentially social-pathological character, easily inveigles one into believing that whenever the business man gets into trouble he runs to his lawyer's office and eventually gets into the court room. But a wider and more intimate experience with business men leads one to conclude that for the most part they prefer to fight out their battles on the economic front, that they are becoming increasingly willing to yield contro-

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versial points which might even be successfully litigated, and that even when they do "run to the lawyer's office" they are frequently persuaded to avoid carrying the case to the courts.

Nor is the business man to be given the whole credit for avoiding the judicial settlement of business controversies. It is apparent to observers of recent tendencies in the law that the lawyer himself is playing an increasingly important part in determining this attitude of the business man toward impending litigation. The temptation afforded the lawyer to encourage litigation, and the advantages to him of drawing it out at great length, provide a ready *a priori* basis for inferring the event; but such reasoning has always been dangerous and is particularly so in this connection. Such exceptional individual attitudes are opposed by the organized professional opinion of the bar, expressing itself in legislation, reforms of judicial procedure, control of members' conduct, and cooperation with organizations sponsoring such extrajudicial methods as arbitration.¹ As a matter of fact, and in spite of the increase in the absolute amount of litigation in the courts, a relatively increasing amount of the lawyer's time is being devoted to consultative work, an important result of which is the prevention of litigation. Indeed, a significant symptom of the situation is discoverable in the fact that one of the most crucial problems in the legal profession today is the distinction to be drawn, by the lawyer and for the client, between the avoidance of illegal acts and the evasion of the clear import of the law. The consulting lawyer provides a social mechanism for diverting even the pugnacious and litigiously inclined business client from his purpose to "fight it out" in the courts. And many lawyers take an active part in commercial arbitration activities.

(II) *The Business Man and the Law*

Business men have an almost instinctive fear of litigation, a fear which often is sufficiently intense to cause an avoidance even of consultation in the law office. During the hey-day of the recent period of prosperity, when the lawyer was being called to the business man's office, the strategic advantage of the business man enabled him to define the legal services he desired. But now that the business man is again going to the lawyer, he must first at least overcome the fear and awe he has of the law.

Some of this fear and awe is engendered by the lawyer's professional jargon and procedure—just as similar effects are produced by the ponderous diagnoses and undecipherable prescriptions of the doctor. But the jargon and procedure of the lawyer are merely symptomatic of a deeper phenomenon: in them the business man recognizes vaguely the evidences of a long history of legal-institutional developments and of thoroughgoing legal edu-

1. Witness the striking success of the arbitration of "negligence" cases by insurance companies in New York City, with the apparently enthusiastic approval of the bar association. During the first half-year just completed, 21 insurance companies submitted 700 cases.

cation, which have provided the lawyer with a better developed doctrine and a better trained mind than is the case with business and the business man. The very impatience of business men with legal "jargon" is frequently occasioned by the lawyer's relatively more precise use of language; only infrequently can a judge be found who is willing to read a business contract with what has been described as "that liberality of meaning which attaches to the laconism of business men".² And if "thinking" is to include behavior, as well as the employment of concepts, it is not insignificant that the presidents of so many of our large business corporations have been the products of law schools. Although business experience and direct business education provide a content which the lawyer so frequently lacks, neither has yet supplied the business man with a comprehension of social implications and the capacity for detailed analysis which are the long-time product of legal doctrine and legal education in this country. The business man may become highly exasperated at the factual ignorance of lawyer or judge; but whether he admits it or not, the situation which brings him into the lawyer's office is one in which his fear of the law has been overcome by a recognition of its more penetrating social doctrines and its more efficacious social methods. At such a relatively advanced stage of the business controversy, the avoidance of litigation rests largely in the hands of the lawyer. Only prior to this stage is the fear of the business man, that the determination of business policies will be shifted to the alien but more systematic mechanism of the law, the controlling factor.

There are also involved, in the business man's avoidance of litigation, the more obvious considerations of expense and time.³ The alleged cost of litigation and the size of lawyers' fees may even have a deterrent effect all out of proportion to any exact knowledge as to their totals or incidence. When the report of the Committee on the Cost of Medical Care was published,⁴ we knew for the first time with any approximation to accuracy the social cost of medical care; but no information at all comparable with this is available regarding the social cost of our legal system. As regards the legal expenses of individual persons or business companies, little more is generally known; but experience has burned enough fingers to warn many men against repetitions, and rumor and hearsay have contributed much of the rest which goes to make up the business attitude on the subject. Even where test or sample suits are involved, the actual expense frequently bulks

2. *Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E. 386 (1929), dissenting opinion of Justice Crane, at 306, 169 N. E. at 394.

3. Note that these are considerations which affect the attitude of the business man. In the absence of a contract to arbitrate, the arguments of expediency, *e. g.*, expeditiousness and cheapness, will not by themselves prevail in a court. Adjustments for fire losses are frequently subjected to arbitration, as the policy provides; these awards are seldom appealed to the courts because the expense is too great. In casualty cases, where, as in Massachusetts, the arbitration award can be appealed to the courts, arbitration merely doubled the expense and has been discontinued for that reason.

4. MEDICAL CARE FOR THE AMERICAN PEOPLE, the Final Report of the Committee on the Costs of Medical Care, Chicago (1932).

large in relation to the anticipated effects on other potential controversies.⁵ The deterrent effect of anticipated medical costs is well recognized; and yet the doctor has no such priority of claim on the payment of his fee as has the lawyer. Furthermore, to a business man especially, time is money; and the vexatious delays in litigation, the interruptions to business caused by recurrent consultations and legal hearings, and the mental disruptions accompanying controversies of this sort, are all inimical to the proper formulation of business policies and the efficacious pursuit of business activities.

In addition to these deterrents to litigation, largely objective in character, there are the more intimate and personal considerations. The business man very definitely has the opinion, indeed the conviction, that the lawyer and the judge are, after all, amateurs in matters of business controversy. This feeling is not confined to the legal machinery itself, but frequently is directed personally to the "dunderheadedness" of lawyer or judge. The business man has seen again and again that the lawyer who begins a new case is compelled to secure *ab novo* much technical information on matters of which he previously was largely ignorant;⁶ and frequently the judge has to be painstakingly informed regarding matters which to the litigants appear to be elementary.⁷ This situation undoubtedly is particularly irritating to business men, who are more at home in a milieu of action and behavior than in one of words and thoughts. Such irritations also undoubtedly contribute to the rancor and resentment of the defeated litigant⁸—attitudes which are

5. A number of such cases arising during the 1920-1921 business crisis, when cancellation of contracts was prevalent, were collected by the Division of Research of the Harvard Business School. The two leading cases are Randolph Shoe and Leather Company (fictitious name), 1 HARVARD BUSINESS REPORTS 244, and American Sugar Refining Company, 1 HARVARD BUSINESS REPORTS 248, and 2 *id.* 468.

6. "Lawyers never really seem to understand the case", writes a commodity merchant. "Lawyers don't understand our business, and they never will. They devote much time to trying to learn it before the case starts, but they get all mixed up. They place a great deal of emphasis on something that looks perfectly absurd to us, and points that are important they seem to ignore, because they don't understand them."

7. "What the courts do quite frequently is to try to find such an intent as the court thinks the parties should have had or which the judge himself thinks he would have had if he had been in the parties' place. . . . The court lays stress upon the legal rights and remedies and how the parties thought about surrendering those rights and remedies before arbitrators; but we believe that what they had in mind was not this at all. What they had in mind was the avoidance of litigation, escaping its delay, expense and technicalities, and . . . to substitute a speedy remedy which would dispose of the controversial matters in a business-like manner . . . a quick and fair, final and complete disposition of the business trouble with the least possible expense, by someone in whom he has confidence and who understands the nature of the controversy and the business in hand." ANNUAL REPORT, Committee on Arbitration, Chamber of Commerce of the State of New York, May 2, 1929, p. 7.

8. The party to a dispute which was arbitrated with the aid of lawyers writes: "The training of lawyers makes it almost impossible for them to be fair-minded. They are special pleaders. I don't see how the lawyers can fail to leave rankling sores, because they delight in being nasty. They understand it, of course, among themselves, but the effect on the layman is very disagreeable."

"To have a legal mind", said a trade-association secretary, of London, who has had considerable experience with arbitration, "is not so bad as kleptomania or dipsomania, but is even more oppressive to other people, although a source of great joy to the possessor". Such a mind, he continues, is incompatible with the spirit of commercial arbitration, especially when its possessor constantly insists on documentary evidence, drags in extraneous factors, and enjoys discussions with the disputants as he successively assumes the role of judge, jury, and counsel for both prosecution and defense.

conspicuously absent or minimized where settlements are made by arbitration or most other extrajudicial modes.⁹ More remote, and yet of grave import to the business man, is the possible loss of customer goodwill through the development of a reputation for resorting to legal methods of settlement. As a result of such undesirable effects, even of successful litigation, business men have even frequently become notoriously "soft"—in connection with collecting accounts, accepting returned goods, allowing unearned discounts, or permitting bank overdrafts—rather than assert even the minima of legal or moral rights which are essential to a sound political-economic society. Hence the welcome relief afforded by such an alternative as an arbitration board, not only because it is composed of experts in the subject matter of the controversy but also because so many personal elements, apparently inevitably connected with litigation, are absent or minimized.

(III) *Historical Position of Extrajudicial Settlement*

The present-day status of extrajudicial settlements among business men may be better understood by reference to historical developments, beginning as far back as the pre-legal or pre-judicial period of the medieval guilds. This period was characterized, not by a complete absence of judicial modes of settlement, but rather by the fact that a definitive legal method had not yet been separated from other social methods of control. The period during which the guilds flourished was marked by the administration of local customs—such as the *coutûmes* of France, or the *Gemeindegeseetze* in Germany—which comprehended practically all social behavior, including business, and struck deep historical roots, even though their incidence was largely functional or was at least territorially very much restricted. The "reception" of the Roman Law on the continent finally obliterated these local or functional jurisdictions—culminating in France in 1803 with the adoption of the Napoleonic Code, and in Germany in 1873 with the adoption of the Imperial Code—but the comprehensive character of continental European law still is evidenced by the prominence, in its administration, of chambers of commerce in France, of the corporative elements in Italian polity, and of merchant representatives on the bench in Germany. Law and business are not so definitively separated there as they are in the English-speaking countries.

The fact that we derived our legal system from England prevented us from having direct access to these continental sources and developments.

9. One arbitration board which has decided over 300 cases in the last 20 years reports that although "the losers have seldom been satisfied with the decisions", no litigation has followed, although substantial sums were involved. Of course, this board arbitrates cases for a fairly well-defined trade group, the members of which accept the awards probably in order to keep the goodwill of the group. Another arbitration board, also acting for a well-defined trade group, ruled in one case that the commission due a commission merchant was not collectible until the goods were accepted. Under the law, the commission merchant had a clear right to collect when the contract was signed. He accepted the decision of the arbitration board.

True, our political theories derived originally to a considerable extent from France and Holland, and the Napoleonic Code was established in certain Latin regions of our country; but the bulk of our non-British immigrants were largely concerned with religious and agrarian interests, and our tardy industrial and even commercial developments afforded meager soil for the integration of business law with political theory or legal system. Thus, the whole development of the law merchant on the continent, its prevalence during the flourishing periods of the guilds, and the conservation of much of its autonomous character in the later national legal codes, made little direct impress in this country. What we derived from Europe was what passed through the funnel of English legal development after the common law had asserted its supremacy, especially by absorbing the law merchant.

In England, commercial arbitration has been one of the most important extrajudicial methods of settling business controversies. Much has been made of the fact, however, that it was effectively estopped from functioning as a final court by the common law rule which rested on the misinterpretation of an early English case.¹⁰ The rule of the law thereby established was that the parties to a contract had no right or privilege of waiving their contractual rights by a blanket provision for the arbitration of disputed points. The failure to identify the two separate reports of the decision undoubtedly prevented subsequent judges from having an adequate basis for understanding its definitive character, and led them to extend its interpretation far beyond the original import of the decision itself. But to infer that such a mistake alone could defer the setting up of effective courts of commercial arbitration in England until the latter part of the 19th century, and still later in the United States, is to exaggerate the social power of a legal technicality and fails to take into account other effective social factors. For no such merely ritualistic deterrent could have withstood a real social need for the development of so allegedly desirable a business instrument as arbitration. What probably happened was either that business men were avoiding the courts and carrying on their activities independently of the legal-political system, or—and this is more likely—that the courts were in general satisfactorily handling business disputes; the middle ground, the development of an autonomous business instrument for settling such disputes, was practically not needed or at least was not worked out so as effectively to supplant the alternatives.

In accounting for the absence of a well-defined theory of extrajudicial settlement, it is important to realize that most of the social philosophy indigenous to England and America has been the philosophy of lawyers. The phenomenon of nationalism, which has dominated the attention of

10. *Vynior's Case*, 8 Co. 80a, 81b; Trin. 7 Jac. 1 Rot. 2629 (1609). The case was also reported in *Brownlow and Goldesborough's Reports* (1652), at 290, including items not reported by Coke, but under the title, "Vivion Against Wilde", and was not recognized as the identical case for a considerable period of time. For a fuller discussion of this case, see TAEUSCH, *POLICY AND ETHICS IN BUSINESS* (1931) 556-558.

Western Europe and America during the last few centuries, emphasized the factor of territorial integrity at the expense of a social alternative such as functional pluralism—certainly in the United States, where the newness of the country has not allowed functional or local customs to strike deep historic roots, and also in England, where the smallness of the country and the homogeneity of the population aided in the establishment of the supremacy of the common law and its territorial incidence. It is possible thereby to explain the fact that commercial arbitration was resorted to so little in these two countries, and that its eventual institution was effected in both countries by legislative fiat rather than by its organic incorporation or codification in law after an autonomous growth. No better evidence could be offered of the relatively greater vigor of legal and political doctrine in comparison with business or economic theory. In both countries, furthermore, the final acquiescence of lawyers, legislators, and judges in the arbitration method indicated not so much an admission of their inability to control social theory, as it did their basic confidence in the social supremacy of the law; they could well afford to allow that much freedom to non-legal social groups.¹¹ Indeed, the legal system itself has been straining and cracking under an accumulation of circumstances—the increase in the number of cases because of the increasing complexity of industrial and commercial activities, and the cluttering up of court calendars through appeal—so as to bring down upon the law the weight of public criticism and the need of reform, especially the expediting of the judicial process. The sloughing off of certain types of cases to arbitration, or other methods of settlement,¹² relieved this strain.

However much, therefore, the common law of England and America may be criticized for its ineptness in the settlement of certain kinds of business disputes, there can be little question that until comparatively recently it has been effective enough to satisfy the practical needs of business men and to prevent the formulation of a positive philosophy favoring extrajudicial settlement. Even the recent growth of adjectival law, in the form of administrative commissions or the executive appropriation of legislative or judicial functions in the “emergency”, are regarded by the business man as additional “legal” methods and not of his doing, however they may encourage or force

11. One must view with suspicion all cases of “magnanimity” on the part of lawyers who divert cases from their offices to non-judicial tribunals; many of these cases are trivial or inconsequential or relatively too complex for the fee involved.

12. The consolidation of British industries is a case in point, conspicuously those of ship-building, cotton textiles, and certain chemicals. This business expedient unquestionably prevented a considerable amount of bankruptcy and its attendant litigation; and the courts there have broadly interpreted the consolidation agreements. When, however, as in the case of the Irving Trust Company’s administration of bankruptcy cases in New York, this general relief of the law impinged too severely on the perquisites of the individual lawyer, the *status quo ante* was restored. In the most recent developments of this “line” or marginal situation, it is difficult to determine which was the louder, the protests of business men or the acclamations of the lawyers; but there is no uncertainty of the—in this case, unfortunate—victory of a systematic social theory over a mode of business behavior which, however effective, has not yet penetrated with understanding or conviction the region of its theoretical implications.

upon him "self-regulation". A merely negative opposition to such elements of legal supremacy cannot long sustain any business theory or institution establishing extralegal activities. And the most plausible available doctrine for positively establishing business or economic autonomy, namely, social-functional pluralism, is rejected by most business men for the monistic legal doctrine, with its basic tenets of territorial incidence and the supremacy of a nationalistic law. The theory lying at the basis of commercial arbitration must make its headway against a powerful adversary, well entrenched doctrinally and historically.

(IV) *Conditions Fostering Opportunism in the Present Use of Arbitration*

In observing the practical methods of instituting arbitration courts for business controversies, as well as the theory underlying them, one may discover certain fundamental conditions, physical and social, to which the practices have in a sense been automatically accommodated. Among these circumstances are those of space and time, and the character of the goods involved. Where distance intervenes between the parties, and direct adjustments are impossible, correspondence may become a very unsatisfactory method of eliminating the hard feelings, mistrust and dissatisfaction which prompted it. "Imagine trying to patch up a family quarrel by correspondence", writes an experienced arbitrator, "and one may get some idea of the difficulty confronting two business disputants separated by a considerable distance." The Boards of Arbitration of the London and New York Chambers of Commerce have become highly successful in settling disputes to which foreigners are parties; the New England Cotton Terms Board has also been conspicuously effective where the disputes so frequently are between the southern planter or shipper and the northern buyer. Where the parties both come from the same locality, the more formal phases of arbitration may not be necessary, although the tactful services of a third party frequently greatly facilitate the face-to-face conferences that are then possible. It has been this method which has been so successfully used by Mr. Charles Bernheimer in New York, and by Judge Fancher before him.

The other factor, time, is equally important in determining the development of arbitration. Long-term contracts, running into shifting market conditions, especially where price changes are involved, are fruitful sources of arbitration as well as of litigation. Conversely, the New York Committee on Arbitration,¹³ noting a recent decline in the number of arbitrations over previous years, attributes it in large part to the recent increase and prevalence of hand-to-mouth buying. Wherever the future delivery of goods is involved, however, and changes in the price-level occur, there will arise the cry of "sanctity of contracts". This cry is raised by the seller in times of

13. ANNUAL REPORT (1933) 2.

falling prices or business crises, and by the buyer in periods when prices are rising. The law may have to take a hand in the matter; but the situation is also productive of arbitration cases.

Arbitration has also been particularly necessary and desirable where certain commodities are involved—necessary, as in the case of cotton, where the quality of the commodity varies from year to year as well as from place to place, and desirable, as in the case of perishable commodities, where delay would be as disastrous to either party as an adverse decision. “Conformity” to sample or to specifications is an issue which varies in acuteness with the nature of the commodity. The increased standardization of a product, like cement, or of the specifications of business contracts, *e. g.*, building contracts, may reduce the number of arbitrable points but may also make them of sharper import.

In the face of all these conditions determining arbitration practices, it matters less what business men think or do directly about arbitration than what they think and do about the circumstances which control it. These circumstances, to the observant student of business behavior, are conducive to and have been met largely by opportunism. Probably the chief reason why the lawyer and the business man are never going to understand each other fully regarding commercial arbitration, is that the business man’s “thinking”, so readily understood by the “behavior” psychologist, shows little evidence of the comprehensive and systematic doctrine which the psychology of the lawyer would be prompted to discover. Furthermore, although hand-to-mouth buying, like a series of definitive arbitrations, may afford material for an outsiders’ observations and comments, neither affords much opportunity for the conscious application from within of a sustained business philosophy. At any rate, neither systematic doctrine nor a sustained and consistent philosophy are uppermost in the business man’s mind, generally or specifically in his attitude toward arbitration.

A similar attitude among business men is discoverable in connection with arbitration precedent and review. Precedent occupies no such place in business practice or theory as it does in law; indeed, its observance has more frequently than not been declared to be a deterrent to success in business. So also in commercial arbitration: whereas, in some fields, precedent has been recorded and followed,¹⁴ in many others it has been as scrupulously avoided,¹⁵ on the ground that particular content, and not form or method, is the main point of the controversy. In the midst of this opportunism the

14. As in the interpretations of the Board of Appeal regarding the New England Terms of Buying and Selling Cotton. Sometimes the new cases merely elaborate the Terms; sometimes they require revision of the Terms. The accumulated decisions and the successive revisions—now fourteen in all—constitute an organic body of regulations similar to that of a legal system.

15. As in the decisions of the Board of Arbitration of the National Wholesale Grocers’ Association. Here the decisions are largely definitively *ad hoc*, and the records are either incomplete or very informally “stuck away in a drawer”.

business man perhaps has forgotten that the rejection of the rule of *stare decisis* carries with it the minimizing of rules of pleading and of evidence, and that all of these rules increase the stability as well as the rigidity of the legal system. He forgets that a social-economic system which, like ours, stresses property rights, becomes inevitably involved in the necessity of certainty in regard to their vindication, and that it is doubtful whether such certainty can be secured through a series of sporadic arbitrations which purposely avoid precedent. Furthermore, the finality which characterizes most arrangements for arbitration settlements—and which is regarded by most business men as a distinctive virtue—contrasts radically with the method of judicial review and still further prevents the reflective development of business doctrine. Business men in ordinary times profess little concern with such developments, historic or systematic, however vociferous they may at times become when the social implications of such doctrines, previously unanticipated, materialize and expressly thwart business objectives.

Then, too, one detects in the attitude of business men, or of organizations such as chambers of commerce or the American Arbitration Association, a characteristic enthusiasm in behalf of a relatively new social instrument such as commercial arbitration. This enthusiasm takes too little account of the fact that such a device, no matter how vigorous or desirable it may appear to be at its inception, may easily meet the fate of other similar social innovations. Thus, the law merchant, the canon law, and marine law, each developed in England to a point where it was all the more readily absorbed by the common law; and Equity, although it still maintains its identity, has so outgrown some of its more plastic forms as to become very nearly like the more rigid common law forms it was intended to supplant. Already one finds evidence of this latter phenomenon in connection with commercial arbitration. In enumerating the "safeguards" which, significantly, "the arbitration law has erected for arbitration", Miss Kellor¹⁶ includes several items which, if they do not irritate the informally-minded business man, at least show evidence of the formalization of a method which aims to avoid the formal features of the law. And if, in the meantime, some method has been evolved for speeding up the courts and otherwise improving procedure—perhaps even in response to increased extrajudicial activities!—one of the main reasons for instituting arbitration courts would be removed. In this connection, it is not idle to speculate on the remote possibility of a textbook law, supplanting to some extent the exclusive rule of *stare decisis* and the case method, and speedily incorporating into judicial procedure much that is now praised by the exponents of arbitration as distinctively advantageous in the latter.

Academic and partisan advocates of commercial arbitration may even have to face the particular manifestation of a recurrent social phenomenon:

16. KELLOR, ARBITRATION IN THE NEW INDUSTRIAL SOCIETY (1934) 28.

that institutional efforts to wrest from the law the settlement of business disputes "o'er leap themselves". In one large metropolitan area, where the local chamber of commerce was instrumental several years ago in setting up a commercial-arbitration court, only a few cases have actually materialized; business men, seeing how informal the proceedings were and realizing how easily such matters could be adjusted, learned to settle their own difficulties directly without even resorting to arbitration. All such suicidal results of the activities of the advocates of arbitration, if they be but recognized as such, are a tribute to the leadership of the American Arbitration Association and chambers of commerce in diverting business men from the courts. But they make difficult any attempt to assess the present status of institutionalized extrajudicial methods, and even more difficult the determination of the amount of business adjustments informally made.

(V) *Mechanics of Modern Settlements: Their Capacity to Satisfy the Business Man's Requirements*

The courts have made much of the distinction between an arbitration agreement, on the one hand, which is entered into only after a controversy has arisen and which definitely applies to the particular situation, and, on the other, the inclusion in a contract of an arbitration clause which applies generally to all possible future disagreements.¹⁷ The legal argument, following *Vynior's Case*, was that the courts could not countenance the general waiver of contractual rights which is implied in the latter arrangement. The English Arbitration Act finally changed this ruling, and the federal Arbitration Act and many state arbitration laws now sanction the general clause. But it is quite obvious that behind these developments in legal rules and decisions are the attitudes of the business men entering into the contracts. Comparatively few business men have, until recently, been willing to subscribe to blanket arbitration clauses. And so long as business men, even after agreeing to a general arbitration clause before a controversy had arisen, could then, after a disagreement had arisen, refuse to abide by such a clause, the clause was of little value. Furthermore, under such circumstances, the courts were not going to refuse a case which enhanced the power of the courts. It is just within recent years that business men, driven by irritations over the law, and prompted by expediency and a better spirit of fair play, have been willing to enter into such general agreements.

Similarly, business men have until recently been unwilling to accept as final the decisions of an arbitrator; it was not strange, therefore, that the courts were able to subject many arbitrations to judicial review. Business opinion may be said now to occupy the position of having just crossed the

17. See, e. g., *Gonzales v. Gonzales*, 163 Pac. 993, 174 Cal. 588 (1917). Most of the more recent cases have been interpreted more liberally, especially in the New York courts.

threshold of business self-regulation in this matter; first, by incorporating general arbitration clauses in their contracts and, second, by accepting their implications, namely, going through with the arbitration and accepting the award. It was this positive event, of a change in business men's attitudes, and not the mere removal of the obstruction of the courts, which was the determining factor in establishing commercial arbitration on a firm social basis.

The crux of the problem of arbitration, in the mind of the business man, lies in the character of the arbitrator, whether individual or board. Most business men prefer the single arbitrator or the permanent arbitration board, so as to insure neutrality as well as decisiveness. This reduces to a minimum the wrangling and debate which so frequently accompany the attempts at settlement by representatives of the parties to the dispute. Not only are many such controversies generated by the very mechanism for settlement rather than by the merits or content of the case, but it is also as difficult for a business man as it is for a lawyer to forget that he is acting as an appointed representative in such proceedings. The representative method of selecting an arbitration board, by virtue of the fact that it introduced the factor of agency, historically gave the courts a pretext for insisting on the judicial review of arbitration; by objecting to the delegation of contractual rights, the courts not only utilized the social doctrine of individualism, but also played on the business sentiment attaching to that shibboleth. It was not until December, 1931, that the by-laws of the arbitration rules of the Chamber of Commerce of the State of New York were revised so as to make the previously exclusive rule of "one arbitrator chosen by each party" merely an alternative to the appointment of a single arbitrator.¹⁸ The wave of opinion which swept the country a few years ago, especially among business men and their sons in college, that "what the country needed was a dictator", has become less prevalent as a general principle of social philosophy. It still remains, however, as a basic doctrine to justify the definitive solution of particular business disputes. On this point the business man is clear; he wants a definite decision of the matter, and he wants it made final. He is inclined to the view that "the award should give no reasons for the decision, for, although the decision may be good, the reasons will probably be bad. The ideal award is in the form: A shall pay B ten pounds."¹⁹ The apparent resemblance between "arbitration" and "arbitrary" may not appeal to a

18. In *Marchant v. Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E. 386 (1929), the appointment of a third arbitrator by the court virtually amounted to the selection of a single arbitrator. In form, the court accepted the decision of the majority of the arbitrators, but in substance this was the decision of the third arbitrator. Judge Cardozo held, at 295, 169 N. E. at 389, that the appointment of this third arbitrator by the court, and not by the other two arbitrators as specified in the agreement, was not a nullification of the contract but its enforcement "by discarding the subordinate and preserving the essential". It is to be noted here that the court accepted the decision of the arbitrators, but not the amount of the award.

19. Clark, W. J., *LONDON CHAMBER OF COMMERCE JOURNAL* (1928).

philologist, but the connection is very close in the mind of the business man. He wants an arbitrator who will patiently listen to matters which a lawyer or a judge would regard as irrelevant; he feels that, if a disputant weakens his case by saying too much, that is his lookout. Business is like that. And the skillful and successful arbitrator will pick from a great mass of chaff the few grains of wheat which are necessary and sufficient to settle the controversy.

Conclusion

Commercial arbitration in the United States has had very much the same experience as has the principle of "privileged communications" in the practice of medicine. Both faced the opposition of the common law, neither was courageously enough advanced by the business or professional group, respectively, to overcome that opposition; and both were finally recognized by statutory legislation, beginning with that of the State of New York, and from there spreading to other states of the Union. In both, the problem of expert testimony looms large, with business men showing more impatience with the courts than have the doctors. And the former are now possessed of a federal statute, whereas the latter are not. It is difficult to say how much of the present legal status of these two principles is attributable to an expression of functional autonomy and how much is the result of internal legal development.

The status of commercial arbitration has in great measure been determined by the courts, but it has also depended largely on the attitude of the business men. This attitude has long been one of neglect or indifference, broken now and then by sporadic waves of impatience with legal machinery. In this sense, commercial arbitration has suffered the fate of most social functions following the decline of social pluralism and functional autonomy in the late Middle Ages and the subsequent rise of legal control. Western civilization thereafter became addicted to social monism, at least in a nationalistic sense; the energy necessary to develop autonomous forms of social control was not forthcoming, especially where, as in business, its direction elsewhere was at least materially more productive. To the business man, commercial arbitration is primarily an instrumental factor; he is much less concerned with its implications in the form of principles of social autonomy or business self-regulation, than with its usefulness in the furtherance of immediate business objectives. How much more extensively commercial arbitration will be used, now that it has been initiated as a social-economic instrument, or how permanent even its present status will be, will depend largely on business men themselves.