PROCEDURAL ASPECTS OF ARBITRATION

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There are three entirely separate and distinct procedural phases connected with arbitration. Two of these form part of legal proceedings—the steps necessary to obtain an arbitration and those required to enforce an award. The remaining, and perhaps the most important phase, is that of the proceedings before the arbitrators themselves.

No discussion of the subject is clear, however, without a reference to the various different kinds of arbitration which co-exist in most states and also to the great variety in the form of the statutes in force in various jurisdictions. Arbitrations may be classified as common law or statutory, revocable or irrevocable, voluntary or compulsory. It is important also to bear in mind that agreements to arbitrate future controversies are in most jurisdictions subject to rules quite different from those which govern agreements to arbitrate an existing dispute. At common law arbitration received little aid from the courts until after award,¹ and even then it was necessary to bring an action for the enforcement of the award.² Very early in the history of many of the states this was changed, so that if certain formalities had been complied with the award could be enforced by judgment obtained by summary proceedings.³ Almost all of the states now have such laws. Under many such statutes if an agreement to arbitrate an existing controversy is in the form required by law, an attempt by one of the parties to revoke is prohibited, and judgment will be entered upon the award.⁴ Until comparatively recent times, however, such agreements could be revoked in

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1. It was generally held that until an award had been rendered either party could revoke. For discussion of English cases see COHEN, *COMMERCIAL ARBITRATION AND THE LAW* (1918) 205-225. This doctrine was followed in the United States. *Insurance Company v. Morse*, 20 Wall. 445 (U. S. 1874). Under certain conditions today, however, breach of a contract for arbitration may be pleaded in bar to an action. *McCullough v. Clinch-Mitchell Construction Company*, 71 F. (2d) 17 (C. C. A. 8th, 1934). A similar result has been reached on the ground that a general arbitration statute had declared a policy favorable to arbitration, even though the agreement did not conform to the statute. See *Ezell v. Rocky Mountain Bean and Elevator Co.*, 76 Colo. 409, 232 Pac. 680 (1925); *Zindorf Construction Co. v. Western American Co.*, 27 Wash. 31, 67 Pac. 374 (1901).

2. See *Nay v. Boston, etc. R. R.*, 192 Mass. 517, 78 N. E. 547 (1906); *Rank v. Hill*, 2 W. & S. 56 (Pa. 1841). See also cases cited *infra*, note 112.

3. Examples of statutes so providing are: N. Y. CIV. PRACT. ACT (Cahill, 1931) §§ 1448-1469; PA. STAT. ANN. (Purdon, 1930) tit. 5, §§ 1-7.

4. The Uniform Arbitration Act is a statute of this type. It has been enacted in Nevada, NEV. COMP. LAWS (Hillyer, 1929) §§ 510-534; North Carolina, N. C. CODE (1931) § 898 (a)-(x); Utah, UTAH REV. STAT. (1933) tit. 104, c. 36, §§ 1-22; and Wyoming, WYO. REV. STAT. (1931) c. 7, §§ 101-124. For the states which also make agreements to arbitrate future controversies irrevocable, see *infra*, note 6.

some jurisdictions.⁵ It was not until 1920 that any state also enforced agreements to arbitrate future controversies, and even now only thirteen states have enacted such laws.⁶

The first things a lawyer must know, of course, are *when* and *how* he can compel arbitration and what to do if his opponent has brought an action in violation of an arbitration agreement. This paper will not concern itself with a discussion of *when* arbitration may be obtained nor of the issues which may be submitted to it. These subjects have been extensively treated elsewhere,⁷ and are also discussed in other articles in this issue of the REVIEW.

I

An arbitration may be initiated in several ways.⁸ If no antecedent agreement exists the consent of the parties is necessary in order to institute arbitration effectively. In nearly all jurisdictions, despite various statutory forms of arbitration, the parties may, if they prefer, carry on a common law proceeding.⁹ This method has but one advantage, namely, that no formal

5. When a submission has been made a rule of court it is irrevocable without leave of the court. See *Bray v. English*, 1 Conn. 498 (1816); *Haskell v. Whitney*, 12 Mass. 47 (1815); *Zehner v. Lehigh Coal Company*, 187 Pa. 487, 41 Atl. 464 (1898). In some jurisdictions agreements to arbitrate have been held irrevocable once the arbitrators have been sworn, on the ground that the common law right of revocation was inconsistent with the scheme of arbitration set up in the statute, although there was nothing on the subject of revocation in the law. See *Shroyer v. Bash*, 57 Ind. 349 (1877); *Carey v. Montgomery County*, 19 Ohio 245 (1850). Until 1920 N. Y. CODE OF CIV. PROC. (Parsons, 1911) § 2383 expressly permitted revocation under certain circumstances. See also *D. & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250 (1872). As to revocability under the Pennsylvania law see *Buckwalter v. Russell*, 119 Pa. 495, 13 Atl. 310 (1888).

6. Arizona, Ariz. Laws 1929, c. 72; California, CAL. CODE OF CIV. PROC. (Deering, 1931) §§ 1280-1293; Connecticut, CONN. GEN. STAT. (1930) §§ 5840-5856; Louisiana, LA. GEN. STAT. (Dart, 1932) §§ 405-422; Massachusetts, MASS. GEN. LAWS (1932) c. 251, §§ 14-22; New Hampshire, N. H. Laws 1929, c. 147; New Jersey, N. J. COMP. STAT. (Supp. 1924) §§ 9:21-36; New York, N. Y. ARBITRATION LAW (1921) §§ 1-10; Ohio, Ohio Laws 1931, no. 41, p. 137; Oregon, ORE. CODE (1930) §§ 21:101-113; Pennsylvania, PA. STAT. ANN. (Purdon, 1930) tit. 5, §§ 161-181; Rhode Island, R. I. Laws 1929, c. 1408; Wisconsin, WIS. STAT. (1931) c. 298.01-18. A similar law has been enacted by the United States, 43 STAT. 883-886 (1925), 9 U. S. C. A. §§ 1-15 (1927).

7. STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930); CODE OF ARBITRATION OF THE AMERICAN ARBITRATION TRIBUNAL (1931); Bulletins of the American Arbitration Service, issued monthly (1931 to 1933); Fraenkel, *The New York Arbitration Law* (1932) 32 COL. L. REV. 623. Mr. Philip G. Phillips has written a number of challenging articles in which various existing doctrines are criticized. See Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding* (1933) 46 HARV. L. REV. 1258; *Rules of Law or Laissez-Faire in Commercial Arbitration* (1934) 47 HARV. L. REV. 590; *Commercial Arbitration under the N. R. A.* (1934) 1 U. OF CHI. L. REV. 424; *A Practical Method for the Determination of Business Fact* (1934) 82 U. OF PA. L. REV. 230; *Arbitration and Conflicts of Laws: A Study of Benevolent Compulsion* (1934) 19 CORN. L. Q. 197.

8. Much of the following analysis is drawn from the writer's experience in New York practice. The rules vary greatly from state to state, and cannot be generalized. Particular statutes and decisions must be consulted.

9. *Modern System Bakery v. Salisbury*, 215 Ky. 230, 284 S. W. 994 (1926); *Fidelity and Deposit Co. of Md. v. Woltz*, 234 App. Div. 823, 253 N. Y. Supp. 583 (4th Dep't 1931); *Isaac v. Donegal & Conoy Mutual Fire Ins. Co.*, 301 Pa. 351, 152 Atl. 95 (1930); see also cases cited *infra*, note 112. However, in Washington it has been held that the statute has abolished the common law proceeding. *Dickie Mfg. Co. v. Sound Construction and Engineering Co.*, 92 Wash. 316, 159 Pac. 129 (1916); *Smith v. Department of Labor and Industries*, 30 P. (2d) 656 (Wash. 1934).

agreement is necessary and that even an oral agreement may be sufficient.¹⁰ However, if the parties desire to secure the right summarily to enter judgment on the award, they must comply strictly with the formalities required by the law of the state to whose courts they expect to apply.

These formalities vary considerably. In some states the agreement must be made an order of the court.¹¹ And there is difference of opinion as to the sufficiency of substantial compliance with the law.¹² In other states it is fatal if the agreement contains clauses not contemplated by the statute, as, for instance, that the award may be final.¹³ This may also be true if the agreement omits provisions required by law, as when it does not provide for the naming of the arbitrators¹⁴ or for the entry of judgment,¹⁵ or does not sufficiently define the controversy.¹⁶ In many jurisdictions the agreement must be acknowledged in the manner required for recording deeds¹⁷ and any slight defect will be sufficient to prevent summary enforcement of the award.¹⁸ Care should therefore be taken to comply strictly with the requisite formalities. Elsewhere, the only requirement is that the agreement be in writing and signed by the parties.¹⁹

If, however, a contract to arbitrate future controversies exists in a jurisdiction which enforces such contracts, then no formal agreement is

10. See *Smith-Schultz-Hodo Realty Co. v. Henley-Spurgeon Realty Co.*, 224 Ala. 331, 140 So. 443 (1932); *Dinerstein v. Shapiro*, 147 Misc. 37, 262 N. Y. Supp. 461 (Sup. Ct. 1933). But if the subject matter of the arbitration is an interest in real estate the award, even at common law, had to be in writing. See *French v. New*, 28 N. Y. 147 (1863).

11. FLA. COMP. LAWS (1927) § 4552; IND. ANN. STAT. (Burns, 1934) § 928.

12. In *Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*, 49 Idaho 303, 288 Pac. 641 (1930), it was held sufficient for the clerk to file the agreement. Cf. *Richards v. Smith*, 33 Utah 8, 91 Pac. 683 (1907). *Contra*: *Payne v. McEly*, 90 Fla. 900, 107 So. 241 (1925); *Steel v. Steel*, 1 Nev. 27 (1865).

13. *Cochrane v. Forbes*, 257 Mass. 135, 153 N. E. 566 (1926). The new law enacted in 1925 has probably changed the rule in this case. See also *Kreiss v. Hotaling*, 96 Cal. 617, 31 Pac. 740 (1892); *Joshua Hendy Machine Works v. Gray*, 9 Cal. App. 610, 99 Pac. 1110 (1908).

14. *Kreiss v. Hotaling*, 96 Cal. 617, 31 Pac. 740 (1892). See also *Joshua Hendy Machine Works v. Gray*, 9 Cal. App. 610, 99 Pac. 1110 (1908).

15. *Lehigh Structural Steel Co. v. Rust Engineering Co.*, 59 F. (2d) 1038 (App. D. C. 1932), *cert. denied*, 287 U. S. 626 (1932). *Contra*: *City of Rahway v. Cleary*, 10 N. J. Misc. 545, 159 Atl. 813 (Sup. Ct. 1932), *aff'd*, 109 N. J. L. 348, 162 Atl. 590 (1932), *sub nom. Rahway Valley Joint Meeting v. Cleary*.

16. See *Putterman v. Schmidt*, 209 Wis. 442, 245 N. W. 78 (1932).

17. IOWA CODE (1931) § 12696; ME. REV. STAT. (1930) c. 122, § 1; MICH. COMP. LAWS (1929) § 15396; MINN. STAT. (Mason, 1927) § 9514; NEB. COMP. STAT. (1929) c. 20, § 2105; N. M. STAT. (1929) § 5:105; N. Y. CIV. PRACT. ACT (Cahill, 1931) § 1449.

18. In *re Ames-Farmer Canning Co.*, 190 Iowa 1259, 179 N. W. 105 (1920) (notary disqualified as being a stockholder of one of the parties); *Koht v. Towne*, 201 Iowa 538, 207 N. W. 596 (1926) (notary failed to affix seal); *Burkland v. Johnson*, 50 Neb. 858, 70 N. W. 388 (1897); *Matter of Buckley v. Lippman*, 223 N. Y. 539, 119 N. E. 1033 (1918) (judgment confirming award set aside at request of party who participated in hearing, there being a defect in his own acknowledgment). See also *Bender v. Bloom*, 223 App. Div. 644, 229 N. Y. Supp. 155 (1st Dep't 1928); *Matter of Finsilver, Still & Moss, Inc. v. Janan, Inc.*, 224 App. Div. 26, 229 N. Y. Supp. 338 (1st Dep't 1928); *Matter of Colwell Worsted Mills v. Glass*, 228 App. Div. 150, 239 N. Y. Supp. 281 (1st Dep't 1930).

19. See UNIFORM ARBITRATION ACT, enacted in states listed *supra* note 4.

required.²⁰ Sometimes it is preferable to execute such formal agreement in order to define the controversy, to indicate an approval of the chosen arbitrators, or to limit their procedure. Accordingly, the rules of some organizations sponsoring arbitration require the execution of such agreement, notwithstanding the enforceability of the basic contract. Care should be taken to see that the formal agreement conforms to all statutory requirements, as the courts may hold that the award rests upon it, rather than upon the original contract to arbitrate future controversies.²¹

It is advisable, and perhaps even essential, to demand arbitration as soon as the controversy arises.²² This should be done by calling to the attention of the other side the existence of the arbitration agreement, declaring the willingness of one's own client to arbitrate, and calling upon the other side to do whatever is required by the agreement. This step will sometimes result in a consent to arbitrate. A consent informally expressed in a letter is then sufficient to set the machinery of arbitration in action.

Should he fail to secure consent, the person desiring to arbitrate may in the "compulsory states" apply to the court for an order compelling arbitration,²³ or, under some statutes, may proceed to invoke the machinery provided for by the contract.²⁴ This last method is available only where, under the contract, no steps need be taken by the recalcitrant party. It is useless when the agreement calls for the appointment of arbitrators by the parties themselves, or when it gives to the recalcitrant party a choice of arbitration tribunals, unless a method of forfeiting the choice be provided.

The New York statute authorizes holding an arbitration without first obtaining a court order, but in such event also permits the defeated party to

20. *Matter of Yeannakopoulos*, 195 App. Div. 261, 186 N. Y. Supp. 457 (1st Dep't 1921); *Matter of Hines v. Ziegfeld*, 222 App. Div. 543, 226 N. Y. Supp. 562 (1st Dep't 1928). Indeed, under the New York statute it has been held that it is not necessary for the agreement to be signed by the parties. *Japan Cotton Trading Co., Ltd. v. Farber*, 233 App. Div. 354, 253 N. Y. Supp. 290 (1st Dep't 1931).

21. See *Matter of Finsilver, Still & Moss, Inc. v. Janan, Inc.*, 224 App. Div. 26, 229 N. Y. Supp. 338 (1st Dep't 1928).

22. See CODE OF ARBITRATION OF THE AMERICAN ARBITRATION TRIBUNAL (1931) 65; *California Walnut Growers' Ass'n v. Muller*, N. Y. L. J., Feb. 18, 1926, at 2018.

23. *E. g.*, N. Y. ARBITRATION LAW (1921) § 3; PA. STAT. ANN. (Purdon, 1930) tit. 5, § 163; 43 STAT. 883 (1925), 9 U. S. C. A. § 4 (1927).

24. THE UNIFORM ARBITRATION ACT, § 7, expressly provides that upon the non-appearance of one of the parties a default may be taken. Presumably this would authorize the conduct of an arbitration in accordance with the agreement, despite the attempt by one of the parties to withdraw. Other states have similar specific authorizations for proceeding on default. See, *e. g.*, MASS. GEN. LAWS (1932) c. 251, § 18. In New York after a decision indicating that an arbitration could not proceed without court order where one of the arbitrators withdrew, *Matter of Bullard v. Grace Co., Inc.*, 240 N. Y. 388, 148 N. E. 559 (1925), the law was amended by the addition of § 4-a. This clause permits a party who has not participated in the hearings to procure a determination whether there was a contract for arbitration or a default in compliance therewith, or whether the arbitrators had acted pursuant to the contract. The statute was interpreted to preserve the same right to a party who, having participated in the arbitration, had seasonably raised the jurisdictional questions, except that in such case there is no right to a jury trial. So construed, it was held constitutional. *Matter of Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., Inc.*, 253 N. Y. 382, 171 N. E. 579 (1930). See Phillips, *supra* note 7, 19 CORN. L. Q. at 222-223.

contest the obligation to arbitrate when he is served with the motion to confirm the award,²⁵ even though he has participated in the arbitration itself. Accordingly, such a procedure is undesirable in view of the possibility of subsequent opposition. It is to be recommended only when quick action is desired even at the risk of its later proving abortive, or when an order cannot be obtained because the opposing party is a non-resident.²⁶ No other state has a similar provision, and the question does not appear to have arisen elsewhere. Nevertheless, it is reasonable to suppose that a party abstaining from the hearings could, upon confirmation of the award, question the making of the agreement, since without a valid agreement there is no jurisdictional basis for the summary entry of judgment by the court.

In the ordinary case where no consent is forthcoming, a court order should, therefore, be obtained before proceeding with the arbitration. By this means, any issue as to the right to compel the arbitration will be finally disposed of before the arbitration itself is held, since the court will not, on application to confirm an award, review an order compelling arbitration.²⁷ These observations apply with equal force to the case where a party, although originally consenting, refuses to go ahead with the arbitration.

Many modern arbitration statutes contemplate summary proceedings instituted by petition and notice of motion returnable within a short time.²⁸ The proceedings must be instituted by service such as is required for a summons in an action.²⁹ Except when the arbitration agreement is formal and not subject to any possible dispute, it is wise to set it forth in the petition in full. In practice it has proven desirable to annex photostatic copies of the agreement in order to prevent the other party from resorting to ambiguous denials. And it is, of course, essential to state in the petition that there is a controversy,³⁰ and to describe it in sufficient detail to make clear that it is

25. See N. Y. ARBITRATION LAW (1921) § 4-a, and discussion thereof *supra* note 24.

26. See Phillips, *supra* note 7, 19 CORN. L. Q. at 223-228, pointing out complications where the contract does not specify where the arbitration is to be held.

27. Matter of Marchant v. Mead-Morrison Mfg. Co., 252 N. Y. 284, 169 N. E. 386 (1929). There is an intimation in that case that the original order might be reviewed if there was total lack of jurisdiction to make it. But *cf.* Petition of Jardine, Matheson & Co., 280 Pac. 397 (Cal. App. 1929).

28. N. Y. ARBITRATION LAW (1921) § 3 (eight days' notice); PA. STAT. ANN. (Purdon, 1930) tit. 5, § 163 (five days' notice); 43 STAT. 883 (1925), 9 U. S. C. A. § 4 (1927) (five days' notice). The Massachusetts law making agreements to arbitrate future controversies enforceable and irrevocable provides no summary method for its enforcement, but does, under § 15, provide for an application to the court for the appointment of arbitrators when necessary. The Uniform Arbitration Act, which applies only to submissions to arbitrate existing controversies, likewise has no express provision for the enforcement of such agreements, but does provide, in §§ 3, 5, for summary applications for the appointment of arbitrators when necessary.

29. N. Y. ARBITRATION LAW (1921) § 3; PA. STAT. ANN. (Purdon, 1930) § 163; 43 STAT. 883 (1925), 9 U. S. C. A. § 4 (1927). For application of the statute to a foreign corporation see Matter of Biddle Purchasing Co., Inc. v. Yung Hsing Trading Corp., 238 App. Div. 264, 264 N. Y. Supp. 157 (1st Dep't 1933).

30. See Matter of Webster v. Van Allen, 217 App. Div. 219, 216 N. Y. Supp. 552 (4th Dep't 1926); Newburger v. Lubell, 257 N. Y. 383, 178 N. E. 669 (1931). In accordance with the rule laid down by these cases it would appear that arbitration may not be used to obtain judgment by default. Consequently, if no controversy is alleged or if respondent admits the contentions of petitioner, the proceeding must be dismissed and the parties left to their action at law.

covered by the clause of the agreement.³¹ It is not, however, necessary to state the facts as formally as they would be stated in an ordinary pleading. So long as there is a *bona fide* controversy the courts will not refuse arbitration.³² However, there have been intimations that arbitration might be refused should it appear that, because the claim of one party is indisputable, no controversy actually exists.³³ It is good practice, although perhaps not necessary, to allege that the party seeking the order has offered to submit to arbitration and that the other party has refused.

If an action has been commenced by the recalcitrant party it may, according to various arbitration statutes, be stayed.³⁴ In New York the application for a stay may be made only in the Supreme Court³⁵ and may not be made in the action itself,³⁶ but should be part of a proceeding to compel arbitration. The petition in such cases should set forth enough information about the action to indicate that its subject matter comes within the arbitration agreement. Most states, however, permit the stay to be granted in the action itself.³⁷

Service of the arbitration papers on the respondent personally may not be necessary in New York in cases where an action has been brought, since the attorneys who have brought the action usually accept service. Moreover, as the statute does not require personal service in order to obtain a stay, service on the attorney is probably legally sufficient, at least for that purpose, and it might be difficult for an attorney to raise the technical point of non-service of the client himself. In the writer's experience, service has generally

31. The court will always determine whether the controversy alleged in the petition comes within the scope of the agreement. See *Matter of Kelley v. Bauer*, 240 N. Y. 74, 147 N. E. 363 (1925); *Matter of Buxton v. Mallery*, 245 N. Y. 337, 157 N. E. 259 (1927); *Buccini v. Paterno Construction Co.*, 253 N. Y. 256, 170 N. E. 910 (1930); *Matter of Rieb*, 205 App. Div. 517, 199 N. Y. Supp. 704 (1st Dep't 1923); *Matter of Goldberg Enterprises, Inc.*, 130 Misc. 887, 225 N. Y. Supp. 513 (Sup. Ct. 1927), *aff'd*, 222 App. Div. 729, 225 N. Y. Supp. 909 (1st Dep't 1927). The construction of the contract will, however, be a question for arbitration when the issue is whether there was a breach of the obligation of the contract. *Matter of Fabricand v. Nortz*, 252 N. Y. 524, 170 N. E. 129 (1929); *Itoh & Co., Ltd. v. Boyer Oil Co., Inc.*, 198 App. Div. 881, 191 N. Y. Supp. 290 (1st Dep't 1921); *Matter of Hines v. Ziegfeld*, 222 App. Div. 543, 226 N. Y. Supp. 562 (1st Dep't 1928); *Matter of Pine Street Realty Co., Inc. v. Coutroulos*, 233 App. Div. 404, 253 N. Y. Supp. 174 (1st Dep't 1931).

32. *Shanferoke Coal & Supply Corp. v. Westchester Service Corp.*, 70 F. (2d) 297 (C. C. A. 2d, 1934); *Matter of Wenger & Co., Inc. v. Propper Silk Hosiery Mills, Inc.*, 239 N. Y. 199, 146 N. E. 203 (1924).

33. See cases cited in note 32, *supra*.

34. N. Y. ARBITRATION LAW (1921) § 5; PA. STAT. ANN. (Purdon, 1930) tit. 5, § 162; MASS. GEN. LAWS (1932) c. 251, § 21; 43 STAT. 883 (1925), 9 U. S. C. A. § 3 (1927). The Uniform Arbitration Act has no provision on this subject. See Phillips, *supra* note 7, 19 CORN. L. Q. at 199-208.

35. See *Matter of Kipp v. Hamburg-American Line*, 134 Misc. 481 (N. Y. City Ct. 1929), *aff'd*, 228 App. Div. 802, 239 N. Y. Supp. 914 (1st Dep't 1929); *Matter of Chapman Kruge Corp. v. Jaffe*, 239 App. Div. 795, 263 N. Y. Supp. 737 (2d Dep't 1933). In New Jersey there is a similar limitation.

36. See *Gold v. Newburger*, N. Y. L. J., Jan. 20, 1930, at 1963; *Newburger v. Coutinho*, N. Y. L. J., April 28, 1931, at 551.

37. In Massachusetts the language of the statute (§ 21) would indicate that an application for a stay might be brought in the action itself. The Federal Arbitration Act (§ 3) and the Pennsylvania statute (§ 162) expressly provide for the granting of a stay by the court in which the action is pending.

been made on the attorneys in such instances. In one or two cases the attorneys attempted to question the service but never pressed the point. It is, of course, risky for an attorney to press such a point because he must appear specially in order to do so and may, if his objection is overruled, lose the opportunity of opposing the application on its merits. This can happen because the whole matter is generally submitted to the court at one time, and if the attorney touches on the merits at all he will be deemed to have appeared generally in accordance with the general rule on that subject.

Usually the application for a stay will be granted or denied in the same fashion as the application to compel the arbitration itself. There are, however, cases in which the courts will stay an action even though they cannot grant arbitration, as when an agreement provides for arbitration outside of the jurisdiction of the court.³⁸

The respondent in answer to the petition must set forth his position. The facts should be stated very much as in response to a motion for summary judgment, so as to show that an issue of fact exists which warrants a hearing. The better practice seems to be to submit both an answer to the petition and an affidavit setting forth the facts. Mere denials or affirmations that are but conclusions are insufficient.³⁹ Of course, this is not necessary if respondent raises legal questions which arise on the face of the petition, such as the sufficiency of the agreement relied on or that the issue does not come within the terms of the agreement.

It does not always follow that a hearing will be ordered because factual contentions are raised by respondent. The moving party may concede the facts and contend that they are irrelevant, and therefore urge that he is none the less entitled to a summary determination of the motion. When, however, relevant issues of fact are raised the court cannot summarily determine

38. See *Matter of Inter-Ocean Food Products, Inc.*, 206 App. Div. 426, 201 N. Y. Supp. 536 (1st Dep't 1923); *Estate Property Corp. v. Hudson Coal Co.*, 132 Misc. 590, 230 N. Y. Supp. 372 (Sup. Ct. 1928), *aff'd*, 225 App. Div. 798, 232 N. Y. Supp. 739 (1st Dep't 1929); *Danielson v. Entre Rios Ry.*, 22 F. (2d) 326 (D. Md. 1927). *Contra*: *The Silverbrook*, 18 F. (2d) 144 (E. D. La. 1927). On the question whether arbitration will be ordered where it is to be held outside the jurisdiction of the court see *Matter of California Packing Corp.*, 121 Misc. 212, 201 N. Y. Supp. 158 (Sup. Ct. 1923) (application denied); *Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 293, 169 N. E. 386, 389 (1929) (doubt expressed on the subject); *Nippon Ki-Ito Kaisha, Ltd. v. Ewing-Thomas Corp.*, 313 Pa. 442, 170 Atl. 286 (1934) (application granted). There is discussion of the subject also in *Shanferoke Coal & Supply Co. v. Westchester Service Corp.*, 70 F. (2d) 297 (C. C. A. 2d, 1934). See also *Katakura & Company, Ltd. v. Vogue Silk Hosiery Co.*, 307 Pa. 544, 161 Atl. 529 (1932). In New Jersey it has been expressly held that arbitration may be ordered wherever the contract calls for it on the ground that the New Jersey statute authorizes the enforcement of an agreement, according to its terms: *California Lima Bean Growers' Ass'n v. Mankowitz*, 9 N. J. Misc. 362, 154 Atl. 532 (Cir. Ct. 1931). It should be noted, however, that both the federal statute (§ 4) and the New York statute (§ 3) contain similar language, namely, that the order direct "that such arbitration proceed in the manner provided for" in the agreement. See Phillips, *supra* note 7, 19 CORN. L. Q. at 218-222.

39. See *Berizzi Bros. v. Krawitz*, N. Y. L. J., May 13, 1933, at 2900; *Matter of Newburger v. Hatry Holding Corp.*, N. Y. L. J., March 21, 1934, at 1360, *aff'd*, 241 App. Div. 853 (1st Dep't 1934).

the matter.⁴⁰ An order must be entered providing for a hearing. Most statutes permit either party to demand a jury if respondent claims that no agreement to arbitrate was ever made.⁴¹ Such a demand must be made before the issues are submitted upon the return of the application or it will be deemed to have been waived.⁴² The hearing should be held promptly. The order for a hearing should frame the issues which are to be tried and, where calendar practice permits, direct that the issue be placed at the head of the day calendar for a definite day, thus obviating delays.⁴³

When a question of fact is set down for trial either with or without a jury the court may deny the arbitration without prejudice to its renewal after the trial of the issue of fact,⁴⁴ or it may make its decision upon the original application contingent upon the result of the trial.⁴⁵ This second form of order, although perhaps somewhat cumbersome in language, saves the party the necessity of making a second application to the court and also removes uncertainties as to the failure to appeal from the original order. For instance, in a case within the writer's experience, an order was entered denying the motion to compel arbitration without prejudice to its renewal after a jury trial; the jury trial was held and resulted in a decision favorable to the petitioner. Then a new motion was made to compel arbitration, and respondent presented certain legal objections to the petitioner's right to compel arbitration. Petitioner successfully contended that these objections had been disposed of by the first order, and, as no appeal had been taken, that they constituted the law of the case.⁴⁶ The matter was never passed on by a

40. N. Y. ARBITRATION LAW (1921) § 3; PA. STAT. ANN. (Purdon, 1930) tit. 5, § 163; 43 STAT. 883 (1925), 9 U. S. C. A. § 4 (1927). For applications of this section see *Matter of Palmer & Pierce, Inc.*, 195 App. Div. 523, 186 N. Y. Supp. 369 (1st Dep't 1921); *Matter of Gresham & Co., Ltd.*, 202 App. Div. 211, 195 N. Y. Supp. 106 (1st Dep't 1922); *Matter of Cyrus Tung Fang*, 227 App. Div. 766 (1st Dep't 1929); *Matter of Newburger v. Gold*, 229 App. Div. 572, 243 N. Y. Supp. 51 (1st Dep't 1930), *aff'd*, 255 N. Y. 532, 175 N. E. 301 (1930); *cf. Matter of Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., Inc.*, 253 N. Y. 382, 171 N. E. 579 (1930). See also California Lima Bean Growers' Association v. Mankowitz, 9 N. J. Misc. 362, 154 Atl. 532 (Cir. Ct. 1931).

41. CAL. CODE OF CIV. PROC. (Deering, 1931) § 1282; LA. GEN. STAT. (Dart, 1932) § 407; N. J. COMP. STAT. (Supp. 1924) § 9:23; N. Y. ARBITRATION LAW (1921) § 3; Ohio Laws 1931, no. 41, p. 137; ORE. CODE (1930) § 21:103; PA. STAT. ANN. (Purdon, 1930) tit. 5, § 163; R. I. Laws 1929, c. 1408, § 3; WIS. STAT. (1931) c. 298.03; 43 STAT. 883 (1925), 9 U. S. C. A. § 4 (1927).

42. See *Matter of Universal Film Exchanges, Inc. v. King*, 144 Misc. 708 (N. Y. Sup. Ct. 1932).

43. Such practice was adopted in the cases of *Matter of Newburger v. Gold* (order April 30, 1930, New York County Supreme Court Index #2512-1930); *Matter of Newburger v. Benjamin* (order May 3, 1933, New York County Supreme Court Index #10733-1933).

44. This was done in *Matter of Newburger v. Gold*, 229 App. Div. 572, 243 N. Y. Supp. 51 (1st Dep't 1930), *aff'd*, 255 N. Y. 532, 175 N. E. 301 (1930). While a point was made of the form of the order, this was not discussed in the opinions.

45. Such was the form of the order in *Japan Trading Cotton Co., Ltd. v. Farber*, 233 App. Div. 354, 253 N. Y. Supp. 290 (1st Dep't 1931). A similar order was entered in *Matter of Newburger v. Scharf* (New York County Supreme Court Index #14265-1930). In *Matter of Newburger v. Perlitch* (New York County Supreme Court Index #10733-1933), the application was held in abeyance pending the jury trial; upon a verdict in favor of petitioners an order was entered granting the original motion.

46. *Matter of Newburger v. Fichtenbaum* (New York County Supreme Court Index #2511-1930). A similar situation existed in *Matter of Newburger v. Gold* (New York County Supreme Court Index #2512-1930). The appeal to which reference has been made, *supra* note 44, was taken by petitioners.

higher court, but it is clear that had an order in the contingent form been entered, respondent would have had to make all of his objections at the one time or appeal from the contingent order if dissatisfied.

In many states appeals may be taken from an order granting or denying an application to compel arbitration.⁴⁷ Where there has been a preliminary trial the appeal will bring up for review any errors committed at such trial,⁴⁸ as well as the fundamental issues raised by the petition and answer. Where the order directs a trial, either party who contends that the application should have been granted or denied as a matter of law, should appeal from such an order without awaiting the result of a hearing.⁴⁹ Otherwise it may well be argued that the order is a legal adjudication either that petitioner, if right on the facts, is entitled to arbitration; or that respondent, if right on the facts, is entitled to a denial of the motion.

Such an order directing a trial is intermediate⁵⁰ and subject to the appellate restrictions applicable in various jurisdictions to intermediate orders. An order which definitely grants or refuses arbitration is, however, a final order.⁵¹

Before leaving the subject of court proceedings preliminary to the arbitration itself, it should be noted that a party who objects to an arbitration instituted without court order need not, at least under the New York statute, await the entry of the award to raise his objections. He may stop the proceedings at any stage by an application for a stay.⁵² Such application is the reverse of a proceeding to compel arbitration. The same issues can be raised, whether of law or of fact, and an order denying the application has the effect of an order granting arbitration, and *vice versa*.⁵³

II

There are, of course, many variations in arbitration procedure. First arises the question of the selection of the arbitrators, or under modern agreements, of the arbitration tribunal. The old method, whereby each party selected one arbitrator, and these two or a designated official selected the third, is not to be recommended. Besides frequent difficulty in selection of

47. See *Matter of Hosiery Mfg. Corp. v. Goldston*, 238 N. Y. 22, 143 N. E. 779 (1924). But cf. *Petition of Jardine, Matheson & Co.*, 280 Pac. 397 (Cal. App. 1929).

48. *Matter of Armstrong, Inc. v. Silverman*, 214 App. Div. 601, 213 N. Y. Supp. 153 (1st Dep't 1925).

49. See cases cited *supra* note 40. See also *Matter of Newburger v. Hatry Holding Corp.*, N. Y. L. J., March 21, 1934, at 1360, *aff'd*, 241 N. Y. App. Div. 853 (1st Dep't 1934).

50. See *Matter of Newburger v. Gold*, 255 N. Y. 532, 175 N. E. 301 (1930).

51. *Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc.*, 62 F. (2d) 1004 (C. C. A. 2d, 1933); *Matter of Hosiery Mfg. Corp. v. Goldston*, 238 N. Y. 22, 143 N. E. 779 (1924).

52. See N. Y. ARBITRATION LAW § 4-a; *Matter of Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., Inc.*, 253 N. Y. 382, 171 N. E. 579 (1930). See also *Kantner v. Bloom Co., Inc.*, 144 Misc. 602, 259 N. Y. Supp. 46 (Sup. Ct. 1932); Phillips, *supra* note 7, 19 CORN. L. Q. at 230-234.

53. See cases cited *supra* note 52.

the umpire,⁵⁴ this method has the disadvantage of making the two arbitrators chosen by the parties advocates rather than judges⁵⁵ and thereby leaving the decision to the umpire alone. A method of arbitration is needed by which all the arbitrators will be unquestionably impartial.

This has been made possible by bodies such as the American Arbitration Association and various chambers of commerce, which maintain permanent panels of persons in all walks of life who are available for service as arbitrators. By use of the facilities of these organizations it is possible to obtain three qualified arbitrators, no one of whom feels any allegiance to either party. For the sake of convenience the method of choice adopted by the American Arbitration Association will be here described.

Upon receiving notice of the commencement of an arbitration—either by written consent of the parties, by a court order, or by the request of one of the parties pursuant to an agreement which names the association—the American Arbitration Association sends to each of the parties or to their attorneys a list of thirty names. The parties may strike off on this list any names which they deem objectionable, and they may indicate preferences among those remaining. The arbitrators, however, are chosen not by the parties, but by the Association itself. It endeavors to choose them so that there will always be one arbitrator representative of any class or industry involved in the controversy.⁵⁶ If not enough names remain on the list returned by the parties, additional names are suggested. If one of the parties does not return the list, the Association has the right under its rules to make a selection from the names sent in by the other party. And if one of the chosen arbitrators should be unable to attend, the association likewise has the right to select a new arbitrator.⁵⁷

Where, however, the parties have not agreed upon the selection of the arbitrators or upon a tribunal capable of choosing them, the court will make the selection.⁵⁸ And the court will, upon confirmation of the award, pass upon the qualifications of the arbitrators, provided that an objection to further proceedings is noted as soon as the facts raising the question of quali-

54. See, *e. g.*, *Tutein, Inc. v. Hudson Valley C. & P. Corp.*, 249 N. Y. 84, 162 N. E. 592 (1928); *Matter of Buck, Kiaer & Co., Inc. v. Hartmann & Co., Inc.*, 243 N. Y. 591, 154 N. E. 618 (1926); *Matter of Marchant v. Mead-Morrison Mfg. Co.*, 252 N. Y. 284, 169 N. E. 386 (1929).

55. See the statement of Judge Pound in *Matter of American Eagle Ins. Co. v. New Jersey Co., Inc.*, 240 N. Y. 398, 405, 148 N. E. 562, 564 (1925): ". . . the practice of arbitrators of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitrations, and as calculated to bring the system of enforced arbitration into disrepute."

56. That a stockbroker might be an arbitrator in a case involving other stockbrokers was decided in *Matter of Newburger v. Rose*, 228 App. Div. 526, 240 N. Y. Supp. 436 (1st Dep't 1930), *aff'd*, 254 N. Y. 546, 173 N. E. 859 (1930).

57. See the rules of the American Arbitration Association for the American Arbitration Tribunal, particularly Rules IV and V.

58. See cases cited *supra* note 55. Most statutes have provisions on this subject: N. Y. ARBITRATION LAW § 4; MASS. GEN. LAWS (1932) c. 251, § 15; PA. STAT. ANN. (Purdon, 1930) tit. 5, § 164; 43 STAT. 884 (1925), 9 U. S. C. A. § 5 (1927); UNIFORM ARBITRATION ACT § 3.

fication have been ascertained.⁵⁹ In at least one case the issue was raised in advance of the award by an application to compel the objecting party to proceed with the hearings before the disputed arbitrator.⁶⁰

The American Arbitration Association usually arranges a date for hearing after conference with the parties and the arbitrators. An hour is set convenient to both parties concerned. Under this procedure it is possible to hold a hearing within two weeks of the initiation of proceedings and to continue thereafter without any loss of time on the part of the parties or their counsel. In many instances one full afternoon session disposes of the matter. Sometimes the arbitrators retire and announce their award immediately. At other times the arbitrators meet subsequent to the hearing. And, of course, there are more complicated cases in which numerous hearings are necessary.

For the conduct of the hearings there are few precise statutory provisions. Many states require that the arbitrators take an oath,⁶¹ but this provision may be waived.⁶² It is essential that the hearing be on notice so that

59. In general it is held that grounds for objection, known before the hearings were commenced, are waived if the parties continued with the arbitration. *Wechsler v. Gidwitz*, 250 Ill. App. 136 (1928); *Thomajanian v. Odabshian*, 272 Mass. 19, 172 N. E. 232 (1930); *Matter of Newburger v. Rose*, 228 App. Div. 526, 240 N. Y. Supp. 436 (1st Dep't 1930), *aff'd*, 254 N. Y. 546, 173 N. E. 859 (1930); *Putterman v. Schmidt*, 209 Wis. 442, 245 N. W. 78 (1932). Disqualification has been held to exist in the following cases: *Schwartzman v. London-Lancashire Fire Ins. Co.*, 318 Mo. 1089, 2 S. W. (2d) 593 (1928) (one arbitrator as an officer and stockholder in corporation whose employees, acting as agents for one of the parties, turned over to the corporation commissions they had earned); *Matter of Friedman*, 215 App. Div. 130, 213 N. Y. Supp. 369 (1st Dep't 1926) (one arbitrator accepted loan from a party while proceedings were pending); *In re Albert*, 146 Misc. 811, 262 N. Y. Supp. 795 (Sup. Ct. 1932) (office associate of petitioner held disqualified); *American Guarantee Co. v. Caldwell*, 72 F. (2d) 209 (C. C. A. 9th, 1934) (business relationship with one of the parties held sufficient ground for disqualification). However, it was held no disqualification that an arbitrator gave an affidavit to one of the parties after the award had been rendered: *Everett v. Brown*, 120 Misc. 349, 198 N. Y. Supp. 462 (Sup. Ct. 1923); or that he had subsequently been employed by one of the parties: *Matter of Robins Silk Mfg. Co. v. Consolidated Piece Dye Works*, 251 N. Y. 87, 167 N. E. 181 (1929); or that one of the arbitrators was an officer of a large corporation which did business with one of the parties: *Matter of Meinig Co. v. Kataura & Co., Ltd.*, 241 App. Div. 406 (1st Dep't 1934).

60. *In re Albert*, 146 Misc. 811, 262 N. Y. Supp. 795 (Sup. Ct. 1932).

61. Such is the New York requirement. CIV. PRACT. ACT (Cahill, 1931) § 1452. Neither Massachusetts, Pennsylvania nor the United States has a like requirement; nor does the Uniform Arbitration Act so provide. In New Jersey while the old law required an oath, it has been held that the adoption of the arbitration statute, which itself did not contain such requirement, rendered an oath unnecessary. *City of Rahway v. Cleary*, 10 N. J. Misc. 545, 159 Atl. 813 (Sup. Ct. 1932) *aff'd*, 109 N. J. L. 348, 162 Atl. 590 (1932), *sub nom.* *Rahway Valley Joint Meeting v. Cleary*; see also *Hall County v. Smith*, 178 Ga. 212, 172 S. E. 645 (1934), where the court held that the oath was not necessary unless required by the agreement. Where the oath is required by law its failure is a fatal defect unless waived. See *E. V. Benjamin Co., Inc. v. Royal Mfg. Co.*, 172 La. 965, 136 So. 19 (1931); *Matter of Horowitz v. Kaplan*, 248 N. Y. 547, 162 N. E. 519 (1928). For an example of strict compliance with requirements see *Sisson v. Pittman*, 113 Ga. 166, 38 S. E. 315 (1901).

62. See *City of Carlyle v. Village of Beckemeyer*, 243 Ill. App. 460 (1927); *Bridgeman & Holtzman v. Gondek*, 235 App. Div. 129, 256 N. Y. Supp. 491 (2d Dep't 1932). The latter case holds that the provision in the New York statute requiring a waiver in writing is not jurisdictional, so that where the fact of waiver is not disputed it may be proved otherwise than by a writing.

the parties may present proof.⁶³ But in some states, this requirement can be dispensed with in the submission agreement,⁶⁴ or will be deemed inapplicable according to circumstances.⁶⁵ Hearings may not be held on Sunday if objection is taken.⁶⁶

In an arbitration proceeding, the usual steps necessary in a law suit in preparation for trial have no place. It has been held that a party may have neither a bill of particulars,⁶⁷ nor an examination before trial or discovery.⁶⁸ These remedies are conducive to delays and formalities which are inconsistent with arbitration. Injustice seldom, if ever, results from their denial, since arbitrators have wide powers to require such disclosure of facts as may be necessary. In most states, however, a commission may issue to take the testimony of absent witnesses.⁶⁹ The extent to which provisional remedies, such as attachment and injunction, may be obtained has not been adjudicated, although some statutes have express provisions on this subject.⁷⁰

At the hearing before the arbitrators it is customary, but perhaps not essential, to have the witnesses sworn.⁷¹ Although frequently arbitrations are conducted without the presence of attorneys, the parties, unless they have

63. This has been generally held to be the law whether or not the statute expressly so provides. See *Stockwell v. Equitable Fire & Marine Ins. Co.* of Providence, 134 Cal. App. 534, 25 P. (2d) 873 (1933); *Modern System Bakery v. Salisbury*, 215 Ky. 230, 284 S. W. 994 (1926); *Second Society of Universalists v. Royal Ins. Co., Ltd.*, 221 Mass. 518, 109 N. E. 384 (1915); *Kopp v. Grobert*, 172 Atl. 733 (N. J. Sup. Ct. 1934).

64. See *Hall County v. Smith*, 178 Ga. 212, 172 S. E. 645 (1934).

65. See *National Surety Co. v. Board of Education of Clifton*, 11 N. J. Misc. 225, 165 Atl. 288 (Sup. Ct. 1933) (requirement inapplicable because the arbitrators were chosen to determine as experts a single fact); *Jacob v. Pacific Export Lumber Co.*, 136 Ore. 622, 297 Pac. 848 (1931) (inapplicable since the evidence was submitted in writing and necessity for a hearing not suggested until after award).

66. *Matter of Picker*, 130 App. Div. 88, 114 N. Y. Supp. 289 (1st Dep't 1909).

67. *Smyth v. Board of Education*, 128 Misc. 49, 217 N. Y. Supp. 231 (Sup. Ct. 1925).

68. *Matter of Isador Schwartz*, 127 Misc. 452, 217 N. Y. Supp. 233 (Sup. Ct. 1925).

69. PA. STAT. ANN. (Purdon, 1930), tit. 5, § 167; UNIFORM ARBITRATION ACT § 11. In New York the same result was reached after amendment to the Arbitration Law which makes an arbitration a special proceeding. See *Matter of Interocean Mercantile Corp.*, 207 App. Div. 164, 201 N. Y. Supp. 753 (1st Dep't 1923).

70. See CONN. GEN. STAT. (1930) § 5855; ILL. REV. STAT. (Cahill, 1933) c. 10, § 3; UNIFORM ARBITRATION ACT § 12 (see note 4 *supra*, for states which have adopted this Act); the federal act, 43 STAT. 884 (1925), 9 U. S. C. A. § 8 (1927), permits the filing of a libel in admiralty cases. In New York it was held, over the dissent of Judge Cardozo, that the filing of a mechanic's lien operated as a waiver of the right to arbitration. See *Young v. Crescent Development Co.*, 240 N. Y. 244, 148 N. E. 510 (1925). The legislature then promptly amended the law. See N. Y. LIEN LAW (Supp. 1934) § 35. There can be no doubt that all states having modern arbitration statutes should permit the use of provisional remedies. The Illinois statute on this subject, *supra*, is very comprehensive.

71. The New York law on this subject is in some uncertainty. In *Dater and McMurray v. Wellington*, 1 Hill 319 (N. Y. Sup. Ct. 1841), the failure to swear witnesses was held to be a mere irregularity. In *Matter of Grening v. Malcolm*, 74 Hun. 62, 26 N. Y. Supp. 117 (Sup. Ct. 1893) the court assumed that it was necessary to swear witnesses. However, in *Hano v. Isaac H. Blanchard Co.*, 199 N. Y. Supp. 227 (1922), the Appellate Term, First Dep't, held that the New York statute on the subject did not require that witnesses be sworn. In Pennsylvania the statute is otherwise: PA. STAT. ANN. (Purdon, 1930) tit. 5, § 166. Local statutes should be consulted on this subject. In any case, however, the swearing of witnesses may be waived: *Newcomb v. Wood*, 97 U. S. 581 (1878); *Hano v. Isaac H. Blanchard Co.*, *supra*.

agreed otherwise, have a right to their presence.⁷² Accordingly, an award may be set aside if, on appearance of one of the parties with counsel, the arbitrators refuse an adjournment to the other, sought so that he may obtain counsel also.⁷³

It is not necessary that a stenographic record be kept unless required by statute.⁷⁴ In the usual case the presence of a stenographer is undesirable, as it tends to slow up the proceedings and to suggest to counsel unfamiliar with arbitration methods the technicalities of an ordinary law suit. However, if the hearings are likely to continue for a period of time it is advisable to have minutes kept to which counsel and the arbitrators can refer. And, of course, in rare cases when a dispute arises after the award as to what transpired during the hearings, the absence of minutes may prove embarrassing.

Arbitrators are not bound by rules of evidence,⁷⁵ and objections are, therefore, usually futile unless a line of inquiry is being pursued which is so obviously irrelevant or cumulative that an objection may be successfully interposed in order to save time. The arbitrators are, however, required to hear any testimony which is offered and which appears to be relevant, so that an award will be set aside should they fail to allow its production or should they refuse an adjournment for such a purpose.⁷⁶ The arbitrators may bring to their decision their knowledge of trade conditions.⁷⁷ They may, with the consent of the parties, examine in their absence property involved in the controversy;⁷⁸ but they may not in the absence of one party hear evidence from another, nor, without the consent of the parties, may they seek out information on their own account.⁷⁹

In general attorneys should be prepared with all their witnesses and documents at the first hearing, as arbitrators often come right to the heart of the controversy and cover much more ground than is possible in an

72. See *Wechsler v. Gidwitz*, 250 Ill. App. 136 (1928). It has been held otherwise where it did not appear that any prejudice resulted: *Gardner v. Newman*, 135 Ala. 522, 33 So. 179 (1902); *Pennsylvania Iron Works Co. v. St. Louis Ice and Cold Storage Co.*, 96 Mo. App. 563, 70 S. W. 903 (1902); *Dodge v. Brennan*, 59 N. H. 138 (1879). This also is a right which may be waived. See *Gardner v. Newman*, *supra*.

73. *Matter of Picker*, 130 App. Div. 88, 114 N. Y. Supp. 289 (1st Dep't 1909).

74. *Matter of Anderson Trading Company, Ltd. v. Brimberg*, 119 Misc. 784, 197 N. Y. Supp. 289 (Sup. Ct. 1922). Local statutes should, however, be consulted.

75. *Dana v. Dana*, 260 Mass. 460, 157 N. E. 623 (1927); *Koepke v. E. Liethen Grain Company*, 205 Wis. 75, 236 N. W. 544 (1931). See *Phillips*, *supra* note 7, 82 U. of Pa. L. Rev. 230 ff.

76. *Rexburg Investing Co. v. Dahle & Eccles Construction Co.*, 36 Idaho 552, 211 Pac. 552 (1922); *Second Society of Universalists v. Royal Ins. Co.*, 221 Mass. 518, 109 N. E. 384 (1915); *Dickens v. Luke*, 2 S. W. (2d) 161 (Mo. App. 1928); *Itoh & Co., Ltd. v. Boyer Oil Co., Inc.*, 198 App. Div. 881, 191 N. Y. Supp. 290 (1st Dep't 1921); *Giannopoulos v. Pappas*, 80 Utah 442, 15 P. (2d) 353 (1932). See also *Matter of Newburger v. Ross*, 235 App. Div. 833 (1st Dep't 1932).

77. *The Guldberg*, 1 F. Supp. 380 (S. D. N. Y. 1932); *Koepke v. E. Liethen Grain Co.*, 205 Wis. 75, 236 N. W. 544 (1931).

78. *Matter of Robins Silk Mfg. Co. v. Consolidated Piece Dye Works*, 251 N. Y. 87, 167 N. E. 181 (1929).

79. *Berrizzi Co. v. Krausz*, 239 N. Y. 315, 146 N. E. 436 (1925).

ordinary law suit. Opening remarks are usually encouraged for the purpose of fully informing the arbitrators as to the contentions of the parties, although if a statement of claim has been filed, these may already have been disclosed. It is seldom that the arbitrators will require briefs or closing arguments. For that reason it is frequently advisable for counsel to point out the purpose of testimony as it is offered. It is usual for the attorneys to remain seated while questioning the witnesses and addressing the arbitrators, thus maintaining comparative informality.

In some jurisdictions, arbitrators are not bound by the rules of substantive law but are only required to decide according to their ideas of what is right and just.⁸⁰ References to statutes and decisions of the courts are therefore of little value, except in so far as they are well known and declaratory of general public policy. Counsel, accordingly, should concentrate on the equities in presenting the case and should endeavor to simplify the presentation of the facts as much as possible. It should be observed, however, that in some states questions of law may be submitted to the court for an advisory opinion during the pendency of the arbitration,⁸¹ and that in some of these states as well as in others the court will upon motion to confirm the award review errors of law committed by the arbitrators.⁸²

Unless a definite time for the rendition of the award be fixed,⁸³ whether in the submission agreement, the court order, or the rules of the tribunal, there seems to be no restriction upon the length of time the arbitrators may take for their decision except in certain states.⁸⁴ However, decisions are usually rendered very quickly after the termination of the hearings. No

80. See *Itoh & Co., Ltd. v. Boyer Oil Co., Inc.*, 198 App. Div. 881, 191 N. Y. Supp. 290 (1st Dep't 1921); *Matter of Pine Street Realty Co., Inc. v. Coutroulos*, 233 App. Div. 404, 253 N. Y. Supp. 174 (1st Dep't 1931). See also *The Hartbridge*, 62 F. (2d) 72 (C. C. A. 2d, 1932); *Everett v. Brown*, 120 Misc. 349, 198 N. Y. Supp. 462 (Sup. Ct. 1923). In *Matter of Wilkins*, 169 N. Y. 494, 62 N. E. 575 (1902), the court held that even though the only question was one of law nevertheless it would not be reviewed.

81. Such is the rule in several states. CONN. GEN. STAT. (1930) § 5847; ILL. REV. STAT. (Cahill, 1933) c. 10, § 6; MASS. GEN. LAWS (1932) c. 251, § 20; NEV. COMP. LAWS (Hillyer, 1929) § 522; N. C. CODE (1931) § 898 (m); PA. STAT. ANN. (Purdon, 1930) tit. 5, § 177; UTAH REV. STAT. (1933) tit. 104, c. 36, § 13; WYO. REV. STAT. (1931) c. 7, § 113. For an application of one of these statutes see *Boston Molasses Co. v. Molasses Distributors Corp.*, 274 Mass. 589, 175 N. E. 150 (1931). Mr. Phillips, *supra* note 7, 47 HARV. L. REV. at 609-619, advocates an extension of the practice of permitting the courts to pass on questions of law during an arbitration.

82. As, for instance, in Illinois [ILL. REV. STAT. (Cahill, 1933) c. 10, § 11], Massachusetts [MASS. GEN. LAWS (1932) c. 251, § 10], Minnesota [MINN. STAT. (Mason, 1927) § 9517], Nebraska [NEB. COMP. STAT. (1929) c. 20, § 2115], Washington [WASH. REV. STAT. (Remington, 1932) § 424]. Some states also permit the review of questions of law, either where the submission provided that the arbitrators should decide according to law, or where it appears that the arbitrators intended to decide according to law. See Phillips, *supra* note 7, 47 HARV. L. REV. at 602-604.

83. When such time is fixed a party may, after the expiration of such time, terminate the proceedings before an award has been made. See *Willis Finance & Construction Co. v. Porter*, 88 Cal. App. 523, 263 Pac. 842 (1928).

84. Local statutes should be consulted. Where a time limitation exists a waiver will be inferred either by participating in the hearings after the expiration of the time: *Andrews v. Jordan*, 205 N. C. 618, 172 S. E. 319 (1934); or by acceptance of part of the award: *Ames Canning Co. v. Dexter Seed Co.*, 195 Iowa 1285, 190 N. W. 167 (1922).

particular form is required for the award itself, except that in many jurisdictions it must be acknowledged by all the arbitrators who have accepted it.⁸⁵ The award should be as simple as the nature of the case permits and should be preferably merely a general finding that party *A* has no claim against party *B*, or that party *A* is entitled to recover from party *B* a fixed sum of money or specific property, as the case may be. It is unwise for the arbitrators to state reasons in their awards. Such practice has sometimes led to the rejection of the awards.⁸⁶ Unless otherwise agreed by the parties, the award need not be unanimous.⁸⁷ And an award may be rendered even if only one of the parties attended the hearings, provided notice was duly given to the other.⁸⁸

The arbitrators may award themselves fees, which, however, are subject to scrutiny by the court.⁸⁹ They may also apportion the costs of the arbitration among the parties as they see fit,⁹⁰ but unless specifically authorized to do so they may not award counsel fees to the successful party.⁹¹ The award, signed and acknowledged by the majority of the arbitrators, should be delivered to the successful party or filed in court.⁹²

Perhaps a word should be said about the expense of arbitration proceedings. When the arbitrators are privately selected their fees are a matter of agreement and have sometimes been unnecessarily large.⁹³ The various

85. See *Gibson v. Burroughs*, 41 Mich. 713, 3 N. W. 200 (1879); *Matter of Greeting v. Malcolin*, 74 Hun. 62, 26 N. Y. Supp. 117 (Sup. Ct. 1893). Local statutes should, however, be consulted. At common law where the submission was oral the award might be oral. See *Moore v. Collins*, 24 N. M. 235, 173 Pac. 547 (1918); *Gay v. Waltman*, 89 Pa. 453 (1879).

86. In jurisdictions following the rule that an award will be set aside where arbitrators showed they intended to follow a rule of law and failed properly to do so, the indication of the grounds upon which the award was arrived at may result in its vacation. See *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N. Y. 392 (1875); *Moore v. Luckess*, 23 Gratt. 160 (Va. 1873); *Mathews v. Miller and Quarrier*, 25 W. Va. 817 (1885). In the last case, however, the award was upheld because the error was on a doubtful point. On the other hand, in *Corrigan v. Rockefeller*, 67 Ohio St. 354, 66 N. E. 95 (1902), the award was not vacated because of the fact that the opinion of the arbitrators was filed separately. See Phillips, *supra* note 7, 47 HARV. L. REV. at 603-604.

87. This is generally provided by statute. See *Matter of American Eagle Fire Ins. Company v. N. J. Ins. Co.*, 240 N. Y. 398, 148 N. E. 562 (1925); *Pittsburgh Union Stock Yards Co. v. Pittsburgh Joint Stock Yards Co.*, 309 Pa. 314, 163 Atl. 668 (1932). In both of these cases it was held that an attempt by one of the arbitrators to prevent an award by a withdrawal after the conclusion of the taking of evidence was ineffectual.

88. Many statutes expressly so provide. See *supra* note 24.

89. See *James v. Southern Lumber Co.*, 153 Mass. 361, 26 N. E. 995 (1891); *Matter of Blaikie*, 119 Misc. 791, 198 N. Y. Supp. 291 (Sup. Ct. 1922), *aff'd*, 206 App. Div. 740, 199 N. Y. Supp. 911 (2d Dep't 1923). If the award is vacated on grounds other than the misconduct of the arbitrators they are entitled to receive their fees. See *Shaw v. Gwin*, 154 So. 392 (La. App. 1934); *Everett v. County of Erie*, 148 Misc. 778, 266 N. Y. Supp. 299 (Sup. Ct. 1933). The arbitrators are not allowed interest on their fees except from the date of the entry of the judgment on the award. *The Hartbridge*, 57 F. (2d) 672 (C. C. A. 2d, 1932).

90. *New York Lumber Co. v. Schneider*, 119 N. Y. 475, 24 N. E. 4 (1890); *Young v. Shook*, 4 Rawle 299 (Pa. 1833).

91. *Warner v. Collins*, 135 Mass. 26 (1883); *Matter of General Footwear Corp. v. A. C. Lawrence Leather Co.*, 233 App. Div. 665, 249 N. Y. Supp. 852 (1st Dep't 1931).

92. These matters are generally regulated by statute.

93. The classic case on this subject is *Electrical Research Products, Inc. v. Vitaphone Corp.*, 171 Atl. 738 (Del. Sup. Ct. 1934). In *Everett v. County of Erie*, 148 Misc. 778, 266 N. Y. Supp. 299 (Sup. Ct. 1933) a fee of \$6,000 was upheld even though the award was vacated for errors of law.

arbitration tribunals have schedules of fees, sometimes dependent upon the amount in controversy. The Chamber of Commerce of the State of New York pays both its arbitrators and a stenographer and, therefore, requires a minimum deposit of sixty dollars from each party, some of which is returned if there is but one hearing of moderate length. The American Arbitration Association, which does not require a stenographer and does not pay its arbitrators, charges a minimum fee of five dollars per side, but makes no refund. For additional hearings or in cases which involve large amounts further sums are required.

While the fees required in arbitration proceedings are somewhat larger than the fees which a plaintiff need pay to place a case upon the calendar, and are also larger than the fee which a defendant must pay if he asks for a jury trial, it is probable that, all things considered, the costs of arbitration are far smaller than those of litigation. The saving in time alone for both counsel and witnesses is a large item on the credit side of arbitration. And considerable sums are also saved by the impossibility of appealing from the award on the merits.⁹⁴ There can be no doubt that the great increase in the use of arbitration tribunals during recent years is proof that the business community finds arbitration less expensive and more satisfactory than litigation in a good proportion of cases.

III

At the end of the arbitration, as prior to its commencement, statutory provisions govern. In some states the award is made a judgment of the court as a matter of course⁹⁵ and in others it may be confirmed or vacated by summary proceedings initiated by either party. Except in the case already referred to, where no consent to arbitration has been given nor any order obtained in advance, the right to compel arbitration cannot be litigated on the application to confirm the award,⁹⁶ nor, as already noted, can the merits be reviewed.⁹⁷

It is customary, although not necessary, for the successful party to move to confirm. Where the award grants no affirmative relief to the successful party, such a motion may be unnecessary, since most laws limit the time in

94. But see discussion *supra* note 82.

95. See, e. g., CAL. CODE OF CIV. PROC. (Deering, 1931) § 1289; FLA. COMP. LAWS (1927) § 4560; IDAHO CODE (1932) § 13-906; MONT. REV. CODES (1921) § 9977.

96. See note 27 *supra*. For a discussion of the enforceability of an award rendered in a foreign jurisdiction see Phillips, *supra* note 7, 19 CORN. L. Q. at 226-230.

97. See cases cited *supra* note 80. Under certain statutes questions of law can be reviewed; see notes 81 and 82 *supra*. In South Carolina the statute permits a review of the facts and the law by a judge sitting without a jury. S. C. CODE (1932) § 7041. In Texas the statute authorizes the parties to reserve a right to appeal in their submission agreement, in which case the defeated party can have a new trial of the entire matter as an ordinary action. TEX. STAT. (1928) tit. 10, arts. 233, 234.

which a motion may be made to reject.⁹⁸ Consequently, the party who has had a claim against him disallowed may be better advised to do nothing, in the hope that the other side may fail to move for rejection within the time allowed. However, the party in whose favor an affirmative award has been rendered must, in order to carry that award into effect, obtain an order of confirmation. And he should remember that he also has but a limited period of time in which to do this.⁹⁹

The application to confirm or reject need not in some jurisdictions be made by personal service, since it is treated as a continuation of the arbitration itself. Consequently, service on attorneys who have appeared at the arbitration is sufficient, or if there were no such attorneys, service may be made on the opposing party by mail or by any other method permitted for the service of papers in a litigation.¹⁰⁰ A motion to confirm need contain little besides a reference to the holding of the arbitration. It is generally essential to submit as part of the motion the original award, the agreement and other papers as well.¹⁰¹

An award may be vacated on certain general grounds, such as fraud, partiality, misconduct or evident error.¹⁰² Whoever desires to upset an award must make specific allegations of fact sufficient to show a case within one of the grounds recognized by the statutes.¹⁰³ If the motion to confirm is made before the time has expired in which the defeated party might move to reject, the latter must, in answer to the motion to confirm, set forth any objections he may have.¹⁰⁴ However, in some states, since the judgment of confirmation is a mere formality, this rule does not apply, and the defeated

98. This is generally fixed at three months. See UNIFORM ARBITRATION ACT § 18; N. Y. CIV. PRACT. ACT § 1459; PA. STAT. ANN. (Purdon, 1930), tit. 5, § 173. But in Florida the period is 30 days, FLA. COMP. LAWS (1927) § 4557. In *American Guarantee Co. v. Caldwell*, 72 F. (2d) 209 (C. C. A. 9th, 1934), the court affirmed the vacating an award because of the improper selection of one of the arbitrators although no motion had been made to confirm the award, and the motion to vacate was made after the expiration of the three-month period fixed in the statute.

99. This period is generally one year. See MASS. GEN. LAWS (1932) c. 251, § 19; N. Y. CIV. PRACT. ACT § 1456; PA. STAT. ANN. (Purdon, 1930) tit. 5, § 169. In the Uniform Act § 3, however, the period is three months. Local statutes should be consulted to be sure of the exact limitation which is applicable.

100. See Phillips, *supra* note 7, 19 CORN. L. Q. at 229, 230, n. 126, for a list of statutes not requiring personal service. In New York the Civil Practice Act § 1456 expressly provides that notice of the application to confirm must be served as a notice of motion might be served in an action. This section is not, however, applicable to awards made under the laws of another state. See *Matter of United Artists Corp. v. Gottesman*, 135 Misc. 92, 236 N. Y. Supp. 623 (Sup. Ct. 1929). It should be noted that the decision rested upon the authority of a case decided prior to the decision of the Court of Appeals in *Gilbert v. Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931). See on this subject Phillips, *supra* note 7, 19 CORN. L. Q. at 227-228.

101. See UNIFORM ARBITRATION ACT § 20.

102. The grounds for vacation are similar in most of the statutes. See Phillips, *supra* note 7, 47 HARV. L. REV. at 598.

103. See *Tinsley v. Maddox*, 176 Ga. 471, 168 S. E. 297 (1933); *Thompson v. Edwards*, 220 Ky. 239, 294 S. W. 1095 (1927).

104. *The Hartbridge*, 57 F. (2d) 672 (C. C. A. 2d, 1932).

party may move to vacate within the time allowed him by law.¹⁰⁵ But when a defeated party has let his time to vacate go by he may, according to some authorities, nevertheless urge any grounds which exist for upsetting the award¹ in opposition to a motion to confirm it.¹⁰⁶

The issues raised on a motion to confirm or vacate are usually determined by the court as on any other motion, although a few states provide for the framing of issues and a trial.¹⁰⁷ Even in states which have no such provision the court might order a reference in order to save its own time. In these proceedings affidavits or testimony of an arbitrator are admissible to show what matters were considered,¹⁰⁸ but not to establish acts which might vitiate the award.¹⁰⁹

Under certain circumstances the award may be modified, as where there has been an error of computation.¹¹⁰ In some cases the award will be sent back to the same arbitrators for correction, but more often if a new hearing is ordered it will be before different arbitrators.

As practically all statutes provide for entry of judgment upon an award if the formalities have been complied with, it is somewhat amazing to find high authority denying the right to obtain such judgment solely because the submission agreement did not expressly authorize the entry of judgment.¹¹¹ While the Supreme Court of the United States refused to review this ruling, it is to be hoped that if opportunity arises that Court will not sanction so illiberal a construction of the United States Arbitration Act.

Appeals may be taken from orders vacating awards, but not, in some jurisdictions, from orders of confirmation, as in such cases it is the judgment rather than the order which forms the proper basis for appeal.¹¹² A different

105. See *Utah Construction Co. v. Western Pacific Ry.*, 174 Cal. 156, 162 Pac. 631 (1917); *Idaho Gold Dredging Corp. v. Boise Payette Lumber Co.*, 49 Idaho 303, 288 Pac. 641 (1930).

106. In *Shores v. Bowen*, 44 Mo. 396 (1869), and *Missouri Bridge & Iron Co. v. Pacific Lime & Gypsum Co.*, 290 Mo. 170, 234 S. W. 797 (1921), the right to object was limited to grounds appearing on the face of the motion. But in *Hinkel v. Harris*, 34 Mo. App. 223 (1889), *Matter of Picker*, 130 App. Div. 88, 114 N. Y. Supp. 289 (1st Dep't 1909), and *Matter of Conway v. Roth*, 179 App. Div. 108, 166 N. Y. Supp. 182 (1st Dep't 1917), it was held permissible to oppose the award on any grounds allowed by the statute. See doubts expressed in *The Hartbridge*, 57 F. (2d) 672 (C. C. A. 2d, 1932), and *Matter of Wilkins and Allen*, 169 N. Y. 494, 62 N. E. 575 (1902).

107. In some jurisdictions a jury trial may be had on issues so raised. See *Boyden v. Lamb*, 152 Mass. 416, 25 N. E. 609 (1890); *Bowden v. Crow*, 2 Tex. Civ. App. 591 (1893). See also GA. CODE (1926) §§ 5049, 5050.

108. See *Stowe v. Mutual Home Builders' Corp.*, 252 Mich. 492, 233 N. W. 391 (1930); *Giannopoulos v. Pappas*, 80 Utah 442, 15 P. (2d) 353 (1932).

109. See cases cited *supra* note 108, and also *Bisnovich v. British America Assurance Co.*, 100 Conn. 240, 123 Atl. 339 (1924); *Johns v. Security Ins. Company*, 174 S. E. 215 (Ga. App. 1934); *Wechsler v. Gidwitz*, 250 Ill. App. 136 (1928); *Collins Carriage Co. v. German American Ins. Co.*, 86 N. J. Eq. 53, 97 Atl. 726 (1916).

110. See for instance UNIFORM ARBITRATION ACT § 17; N. Y. CIV. PRACT. ACT § 1458; PA. STAT. ANN. (Purdon, 1930) tit. 5, § 169.

111. *Lehigh Structural Steel Co. v. Rust Engineering Co.*, 59 F. (2d) 1038 (App. D. C. 1932), *cert. denied*, 287 U. S. 626 (1932). *Contra*: *City of Rahway v. Cleary*, 10 N. J. Misc. 545, 159 Atl. 813 (1932), *aff'd*, 109 N. J. L. 348, 162 Atl. 590 (1932), *sub nom. Rahway Valley Joint Meeting v. Cleary*.

112. See *Matter of Picker*, 130 App. Div. 88, 114 N. Y. Supp. 289 (1st Dep't 1909).

rule applies, however, in those states in which the judgment of confirmation is entered as a matter of course.¹¹³ Orders vacating awards and judgments of confirmation are, of course, final; whereas an order directing a new hearing is intermediate only.

When the courts refuse to enter judgment summarily for failure to comply with statutory requirements, nevertheless an action may, according to the weight of authority, be instituted upon the award as though it originally had been a common law proceeding.¹¹⁴ In most jurisdictions such an award has the same conclusive effect as foundation for an action or for a plea in bar as though the proceeding had been statutory.¹¹⁵ There is, however, difference of opinion in respect to the enforceability, even by action, of an award obtained in a foreign arbitration when the defeated party had not been served with process and had taken no part in the hearings.¹¹⁶

Conclusion

There seems to be no satisfactory reason why all these differences in procedure should be perpetuated. Why an agreement to arbitrate an existing controversy should be more formal than an agreement to arbitrate future controversies is difficult to understand. These formalities were evidently required at a time when the courts were more reluctant to enforce arbitration agreements than they are today. It is, therefore, suggested that the statutes be simplified so that whatever form of agreement is deemed sufficient as the basis for compelling arbitration of future controversies should also be sufficient to permit the entry of judgment summarily when the agreement calls for arbitration of an existing controversy.¹¹⁷ In other words, one form of agreement should be required; one summary method provided for securing adherence to the agreement and enforcing any award which has been rendered. Even in those states which do not enforce agreements for future controversies, the law should be changed, simplifying the procedure necessary to obtain the benefit of judgment by summary proceeding. While it may not be advisable to give parties the benefit of compulsory processes on

113. *Supra* note 105.

114. See *Fuerst v. Eichberger*, 224 Ala. 31, 138 So. 409 (1931); *Matter of Kreiss v. Hotaling*, 96 Cal. 617, 31 Pac. 740 (1892); *Johns v. Security Ins. Co.*, 174 S. E. 215 (Ga. App. 1934); *Ames Canning Co. v. Dexter Seed Co.*, 195 Iowa 1285, 190 N. W. 167 (1922).

115. *New York Lumber & Wood Working Co. v. Schneider*, 119 N. Y. 475, 24 N. E. 4 (1890); *Putterman v. Schmidt*, 209 Wis. 442, 245 N. W. 78 (1932). In some jurisdictions it is indicated that if a proceeding is commenced as a statutory proceeding it cannot be enforced by action as though it had been a common law proceeding: *Franks v. Battles*, 147 Ark. 169, 227 S. W. 32 (1921); *Wright, Graham & Co. v. Hammond*, 41 Ga. App. 738, 154 S. E. 649 (1930) (proceedings complied with statutes of a foreign jurisdiction); *Cochrane v. Forbes*, 257 Mass. 135, 153 N. E. 566 (1926); see *Phillips, supra* note 7, 19 CORN. L. Q. at 228-230.

116. *Gilbert v. Burnstine*, 255 N. Y. 348, 174 N. E. 706 (1931), upheld the right to bring such action in a case in which the parties agreed to arbitrate in a foreign country and the requirements of that jurisdiction as to notice had been complied with; *Shaffer v. Metro-Goldwyn-Mayer Distributing Corp.*, 36 Ohio App. 31, 172 N. E. 689 (1929), denied the right to bring such action at a time when there was no compulsory arbitration statute in Ohio. See also *Wright, Graham & Co. v. Hammond*, 41 Ga. App. 738, 154 S. E. 649 (1930); *Phillips, supra* note 7, 19 CORN. L. Q. at 227-228.

117. This is indeed now the case in all of the states listed *supra* note 6, except New York.

agreements as informal as those recognized by the common law, nevertheless if the parties have actually participated in the arbitration and an award has been rendered, it is submitted that summary judgment should be permitted regardless of the form of the agreement itself.¹¹⁸ Parties who have not participated in the arbitration can be adequately protected by a reservation of the right to question the making of the agreement upon motion to confirm the award. They can also be given the right to stay an arbitration on the ground that no agreement exists. Such changes in the law would do much to simplify arbitration procedure and to eliminate the possibility of decisions as technical as some of those which have been rendered. Arbitration should not be encumbered by technical rules. The time for being jealous of the jurisdiction of the courts has passed.

It should, of course, be remembered that arbitration cannot be used in all cases. It is a method peculiarly suitable to the determination of controversies between persons in the same trade, where the facts are simple and the hearings need not be extensive. Arbitration is of doubtful value when the facts are so complicated that they cannot be easily carried in mind, so that stenographer's minutes must be consulted and briefs must be written. Few men can be found who will give consecutive time to a lengthy arbitration. In such cases, accordingly, frequent adjournments tend to defeat one of the chief purposes of arbitration: a final conclusion speedily arrived at.

The courts must, therefore, ever remain the chief forum for the determination of controversies. The difficulties in the way of delay and expense which have driven the parties to arbitration can only be remedied by careful thought on the part of bench and bar. Even when much needed reforms shall have been accomplished, arbitration should continue to be favored as an informal method of settling disputes. All the technical aspects which have encumbered arbitration in the past should be removed, however, so that less and less resort to the courts will be possible in connection with the arbitration proceedings themselves.

118. The following is suggested as a provision which would cover the subject:

"An award may be confirmed and judgment entered thereon by summary motion without any previous adjudication that there was an obligation to arbitrate. It shall not be an objection to the confirmation of such award that there was no agreement between the parties for arbitration, or that the agreement between the parties was not in the form required by statute, or that there was any failure on the part of the opposing party to comply with the provisions of the agreement requiring arbitration, or that the arbitrators or any of them were not appointed pursuant to the agreement, except as herein expressly provided. Any party who has in no respect participated in such arbitration may raise any of the foregoing issues, either upon an application to confirm or vacate the award or by a motion for a stay of the arbitration which, if a notice shall have been personally served upon him of an intention to conduct the arbitration, must be initiated within ten days thereafter. Where such party sets forth evidentiary facts indicating the existence of any such issue, a summary trial of the same shall be had and such party shall have the right to demand a jury trial provided such demand is served with his affidavits. In the event that such party is unsuccessful he may, nevertheless, participate in the arbitration if the same is still being carried on."

That a statute which prevents a party who has participated in an arbitration from questioning the jurisdiction of the arbitrators would be constitutional was intimated by Chief Judge Cardozo in *Matter of Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., Inc.*, 253 N. Y. 382, 393, 171 N. E. 579, 583 (1930).