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NEGOTIATION, MEDIATION AND ESPECIALLY ARBITRATION IN LABOR DISPUTES*

Marilyn E. Lugar**

Management-labor disputes annually cause many man-days of idleness through strikes and lockouts. A re-examination of methods whereby the parties may settle amicably their own complex problems seems to be in order. Small differences may become so magnified that lockouts and strikes result. Potentially any of the innumerable questions concerning wages, hours and working conditions, which arise daily, may result in substantial losses not only to the participants but also to the public.

Simply outlawing strikes and lockouts does not seem to be the answer. Even if such action were enforceable that would not promote efficient operation which is necessary for maximum production.

The knowledge of both parties that their disputes have been equitably settled should be the goal, and they must be con-

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1 "At the end of 1948 preliminary estimates of the Bureau of Labor Statistics show slight reductions in the year's strike activity as compared with 1947. The estimates indicate about 3,300 stoppages, which involved approximately 2,000,000 workers, and about 34,000,000 man-days of idleness as compared with 3,693 stoppages in 1947 involving 2,170,000 workers and 34,600,000 man-days of idleness." 68 Monthly Labor Rev. 58 (1949).

2 It may be only a question of seniority, or dismissal of one employee, or a question of back pay for one man. Three Years of Arbitrating Labor Disputes, 5 Arb. J. 65, 68 (1941).

3 Tongue, The Development of Industrial Conciliation and Arbitration under Trade Agreements, 17 Ore. L. Rev. 263, 264 (1938).

4 The existence of both the no-strike pledge and compulsory arbitration during the war did not prevent serious strikes.
vinced that this can best be accomplished without industrial warfare.\footnote{Diverse interests must be brought into line under conditions which satisfy both parties to the greatest possible extent. BRAUN, THE SETTLEMENT OF INDUSTRIAL DISPUTES 20 (1944).}

Responsible management and labor want to settle their differences promptly and without economic warfare, if possible, for frequently neither gains in the long run by asserting its economic strength since loss of production reduces profits.\footnote{One party may grant concessions under compulsion, but this creates a desire for retaliation at the appropriate time. Oliver, The Arbitration of Labor Disputes, 83 U. OF PA. L. REV. 206, 211 (1934).} Many alternative solutions are being suggested,\footnote{For example see TELLER, A LABOR POLICY FOR AMERICA (1945); GREGORY, LABOR AND THE LAW (1946); BRAUN, op. cit. supra note 5.} but if efficient and uninterrupted production is to be maintained, greater recognition must be given to the need for collective action by both parties for this common purpose.\footnote{This article assumes that collective bargaining has been recognized by the employer either through statutory compulsion or realization of its necessity in administering industrial relations. For a summary of the various aspects of the problem of joint responsibility, see PIERSON, COLLECTIVE BARGAINING SYSTEMS 7, 78 (1942).} Recognition of this need requires fairness in industrial relations after free discussion of differences. Third parties should not intervene except as a last resort.\footnote{BRAUN, op. cit. supra note 5, at 19; Oliver, supra note 6.} The following methods or combinations thereof\footnote{Fact-finding might be added to this group. It consists merely of a report based upon investigation or hearings and has no finality. The parties may accept or reject it for the purpose of further negotiation. It may be useful where one of the parties possesses information which he is not willing to disclose to the other in that a neutral fact finder's report may be acceptable. THREE YEARS OF ARBITRATING LABOR DISPUTES, 5 ARB. J. 65, 57 (1941).} are open to management and labor for settling their disputes amicably but equitably, and with-

\footnotetext[5]{Diverse interests must be brought into line under conditions which satisfy both parties to the greatest possible extent. BRAUN, THE SETTLEMENT OF INDUSTRIAL DISPUTES 20 (1944).}

\footnotetext[6]{One party may grant concessions under compulsion, but this creates a desire for retaliation at the appropriate time. Oliver, The Arbitration of Labor Disputes, 83 U. OF PA. L. REV. 206, 211 (1934).}

\footnotetext[7]{For example see TELLER, A LABOR POLICY FOR AMERICA (1945); GREGORY, LABOR AND THE LAW (1946); BRAUN, op. cit. supra note 5.}

\footnotetext[8]{This article assumes that collective bargaining has been recognized by the employer either through statutory compulsion or realization of its necessity in administering industrial relations. For a summary of the various aspects of the problem of joint responsibility, see PIERSON, COLLECTIVE BARGAINING SYSTEMS 7, 78 (1942).}

\footnotetext[9]{BRAUN, op. cit. supra note 5, at 19; Oliver, supra note 6.}

\footnotetext[10]{Fact-finding might be added to this group. It consists merely of a report based upon investigation or hearings and has no finality. The parties may accept or reject it for the purpose of further negotiation. It may be useful where one of the parties possesses information which he is not willing to disclose to the other in that a neutral fact finder's report may be acceptable. THREE YEARS OF ARBITRATING LABOR DISPUTES, 5 ARB. J. 65, 57 (1941).}

\footnotetext[11]{Compulsory arbitration generally refers to those instances in which the parties to a dispute are required by law to submit the dispute to a third party and abide by his decision. BRAUN, op. cit. supra note 5, at 128. The parties may have agreed to submit any differences on which they cannot reach an agreement to arbitration, at the request of either, but this is not thought of as compulsory but only as contractual. The parties by their acts create the binding force of the award.}
out compulsion that such means be used: (1) negotiation, (2) conciliation, (3) arbitration\(^{11}\) and (4) judicial action.\(^{12}\)

### Negotiation

Negotiation is the most desirable method since the parties find their own mutually satisfactory solution.\(^{13}\) Even though the parties cannot always agree or find a basis for compromise, many problems can be settled by this means. Government and private agencies have recognized the advantage of this type of settlement by not intervening so long as there is a possibility of the dispute being settled by negotiation.\(^{14}\)

Grievance procedures established under collective-bargaining agreements provide well known channels to facilitate negotiation of even the most trivial disputes which may arise under the agreements,\(^{15}\) and which may also be used in settling differences about matters not covered by the contract. These procedures alone will not create friendly industrial relations, but a good procedure will permit prompt settlement of most disputes before they accumulate as a mass of unsettled grievances which, even though relatively inconsequential, may become unduly magnified and result in industrial warfare. The dissatisfaction of many employees over small and varied controversies may be as dangerous to industrial peace as dissatisfaction of the employees with the proposed basic conditions of employment under a new contract.\(^{16}\) The parties, even in the absence of an existing collective-bargaining agreement establishing wages, hours and conditions of employment, may find the creation of an established procedure for negotiating disputes which

\(^{12}\) Although the scope of this method is much broader, it is limited in this article to enforcement of arbitration agreements and awards. The establishment of special courts to deal with labor problems is receiving consideration at the present time. See Teller, *op. cit.* supra note 7, at 203; Braun, *op. cit.* supra note 5, at 261.

\(^{13}\) For additional advantages see Oliver, *supra* note 6, at 210; Tongue, *Settlement of Labor Disputes under Trade Agreements*, 3 *J. Arb.* 34, 37 (1939).

\(^{14}\) Three Years of Arbitrating Labor Disputes, 5 *Arb. J.* 65 (1941).

\(^{15}\) For a description of the manner in which the machinery for adjusting grievances generally proceeds and the variations which have been used, see Pier son, *op. cit.* supra note 8, at 12; Braun, *op. cit.* supra note 5, at 257. Those interested in establishing a grievance procedure will find helpful the conclusions drawn from a rather comprehensive field survey made by the Bureau of Labor Statistics in 1944 and 1945; 63 *Monthly Labor Rev.* 175 (1946); also see the conclusions from a study of plans used in large industries, Tongue, *supra* note 13, Tongue, *supra* note 3.

\(^{10}\) Pier son, *op. cit.* supra note 8, at 9.
arise very helpful in expediting the settlement of differences. If satisfactory solutions cannot be found by such procedures, even after each party fully understands the position of the other, at least this will be known promptly and other action can be taken at once to settle the dispute. As in other personal relationships, delay in facing the issue usually serves only to aggravate employer-employee disputes.

Negotiation may not provide the answer, either because the parties refuse to discuss their differences or because they are unable to agree upon a solution. Here the parties are tempted to use self-help or direct action since the judicial remedies now existing are seldom adequate. In this event, action by an outsider becomes necessary if the dispute is to be settled without resort to the expensive and dangerous methods of economic warfare.

**Conciliation**

Conciliation or mediation may be the next step. It has been stated that conciliation consists of a third party's bringing the disputants together on a more friendly basis for negotiating and settling their disputes, whereas mediation involves active participation by the third party in the negotiation usually with the view of effecting a compromise. In practice, conciliation and mediation are often used interchangeably and generally refer to the efforts of a third party to induce the parties to settle their dispute peacefully. It will be used in that sense in this article.

The parties may accept the services of private persons who are experienced in this field, and many states have established authorities with the duty to attempt to settle labor disputes by means of conciliation and have imposed obligations on the parties to sub-

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17 This will save the time which would otherwise be needed in deciding whether the question should be negotiated, who should represent the respective parties, how far negotiation should be attempted, the procedure to be followed, and other related matters.

18 "There is no merit in the contention that by delaying the procedure an amicable settlement or a 'fading-out' of the dispute is likely to result. On the contrary, the differences thus may become so intense that the parties will abandon all attempts at settlement by any agency and resort to economic warfare." BRAUN, op. cit. supra note 5, at 129.

19 The parties may agree that any dispute which they cannot settle themselves shall be submitted directly to arbitration.

20 KELLOR, ARBITRATION IN ACTION 4 (1941).

21 "Mediation (or conciliation) is an attempt to settle disputes with the help of an outsider who assists the parties in their negotiations." BRAUN, op. cit. supra note 5, at 29.
mit to conciliation.22 No agency or department of the state government has this duty in West Virginia. However, the commissioner of labor does offer the services of his department for this purpose, but will mediate only when the offer is accepted by both parties.23 This is known as voluntary mediation.24 It seems to be the best form since the parties cannot be expected to submit the dispute to mediation through force and then accept the recommendation.25 The commissioner’s reports to the Governor indicate that many settlements have been peacefully effected where the services of his department were accepted.26

Much, however, might be done to improve the commissioner’s position in dealing with this phase of his work. He is laboring under the same difficulties experienced by other labor departments where there was no statutory basis for mediation of labor disputes.27 No official state policy towards industrial strife exists, and no state laws governing labor disputes have been enacted.28 There are no requirements that the department be notified of threatened strikes, and there is no waiting period required after notice before any change in conditions of employment can be made.29 These features make it difficult to find a satisfactory solution before work stoppages occur, which is highly desirable if mediation is to be most effective.

**Arbitration**

From either negotiation or mediation the parties may agree on arbitration. Arbitration is distinctly different in that it is a means by which the issues in controversy may be brought to final settle-

22 The statutes are summarized in BRAUN, op. cit. supra note 5, at 5 and 102.
23 Commissioner’s letter to writer dated September 17, 1946.
24 BRAUN, op. cit. supra note 5, at 40 and 48.
25 The use of pressure on the parties to accept the recommendation is not within the scope of this article. See BRAUN, op. cit. supra note 5, at 53.
26 Enclosure to Commissioner’s letter, supra note 23.
27 For a critical analysis of the Virginia system, see STARNES, A Survey of the Methods for the Promotion of Industrial Peace (1939). A concise summary of the problems in this type of conciliation is in BRAUN, op. cit. supra note 5, at 47.
28 State agencies designated to mediate labor disputes should be administrative instruments of the government to maintain industrial peace in accordance with that government’s policy. “A government mediation . . . board without any set policy therefore is absurd; its policy should be that of the government.” BRAUN, op. cit. supra note 5, at 297. West Virginia has no anti-injunction law, labor relations law, or anti-discrimination law.
29 Cooling-off periods have become rather frequent, both in law and agreements. BRAUN, op. cit. supra note 5, at 47.
The parties frequently provide in the collective-bargaining agreement that, if they cannot reach a settlement in their grievance procedure, the final step shall be submission of the dispute to arbitration, and that no strike or lockout will be permitted. Mediators generally recommend arbitration when no additional concessions can be obtained from either side. Many compromises may be obtained in negotiations or by a mediator, but compromise has no place in arbitration — the question is to be decided on the proof offered. This does not imply that an arbitrator should not be interested in the parties’ reaching a satisfactory solution even after submission to arbitration, and he may even encourage it; but if the decision is left to him, he must decide the case on the merits if arbitration is to serve its purpose.

Although relatively new in the labor field, arbitration has been perhaps more successful than can be proved. Little publicity is given to those activities which prevent disturbances in the economic pattern. It is news whenever economic warfare results from management-labor disputes, but little publicity has been given to the many disputes which have been settled by voluntary arbitration and even less publicity to the many differences which have been settled by negotiation between the parties where they would otherwise have been bound by an arbitration award. How-

30 LAPP, LABOR ARBITRATION; PRINCIPLES AND PROCEDURES 15 (1942).
31 The parties may also agree to submit to arbitration matters which they are not required by the collective bargaining agreement to submit. In addition, even though no collective bargaining agreement exists, the parties may agree to submit disputes to arbitration, either before or after they arise.
32 PIERSON, op. cit. supra note 8, at 10. In the absence of a specific agreement to abide by the decision of the arbitrator and not to use industrial warfare, such agreement may be implied; but legally and psychologically it is desirable to make the promise express.
33 This is also true where the mediator is a state official charged with the duty to settle labor disputes. ZISKIND, op. cit. supra note 10, at 10.
34 BRAUN, op. cit. supra note 5, at 65 and 119.
35 OLIVER, supra note 6, at 213; TONGUE, supra note 3, at 269.
36 “Peaceful change is not news and, consequently, these changes are not brought to public attention nor the example emphasized.” Holt, PEACEFUL CHANGE IN INDUSTRIAL RELATIONS, 2 ARB. J. 233, 237 (1938). “There has in the past been altogether too much emphasis upon the differences between employers and employees. Strikes and lockouts are news; the peaceful settlement of a labor dispute, in amity and without violence, is not.” Nicholls, MEDIATION, CONCILIATION AND ARBITRATION OF LABOR DISPUTES IN CANADA, 2 ARB. J. 375, 384 (1938).
37 In more than half of the instances where arbitration is provided for, particularly in agreements for the settlement of future labor disputes, the presence of an arbitration agreement, without resort to formal arbitration, is sufficient to effect a settlement. KELLOR, op. cit. supra note 20, at 8. For the
ever, where studies have been made of industries which use arbitration, it has been found that results were satisfactory in that unfair labor practices were eliminated, more amicable relations between employers and employees resulted, and strikes were reduced in all cases and almost eliminated in some.\(^\text{38}\)

The advantages of arbitration over judicial action in some commercial transactions have long been recognized. The benefits to be derived from arbitration are especially noteworthy in management-labor disputes where the relationship of the disputants generally will not be dissolved and where the efficiency of the operation depends to a great extent upon the attitude of the parties. An adverse decision rendered by a person who has been selected by the parties because of his practical knowledge of the problem will generally be accepted more easily than an adverse decision imposed by a court. Further, the more serious differences do not involve justiciable controversies, and arbitration may be the only means of obtaining a solution peacefully. In addition, the matter may be decided more expeditiously and free from publicity — factors which should not be ignored in industrial relations.\(^\text{39}\)

Voluntary agreements to arbitrate labor disputes and awards resulting therefrom are generally observed.\(^\text{40}\) This is another reason voluntary action should be encouraged, but machinery should be available to enforce such agreements and awards if compulsion becomes necessary.\(^\text{41}\) If the agreement to arbitrate was made in good faith, compliance with what later develops to be an unfavorable agreement in a particular dispute must have been contemplated and enforceability adds no unexpected burden. To say that compliance should not be enforceable because this may discourage such

\(^{\text{38}}\) Tongue, supra note 13, at 42; Tongue, supra note 3, at 287; Oliver, supra note 6, at 221.

\(^{\text{39}}\) One of the weaknesses in the administration of the National Labor Relations Act had been the slow pace at which the board machinery moved. Pier- son, op. cit. supra note 8, at 107. For a concise summary of the advantages of arbitration over industrial warfare see Updegrove, Arbitration of Labor Disputes 18 (1946).

\(^{\text{40}}\) Braun, op. cit. supra note 5, at 132, 250 and 295; Parker, The Industrial Arbitration Tribunal Completes Its Second Year, 4 Arb. J. 34 (1940).

\(^{\text{41}}\) If means of enforcement do not exist, if needed, the decisions of arbitrators may be regarded as no different from the recommendations of conciliators. Braun, op. cit. supra note 5, at 132 and 295. Also see Gregory, op. cit. supra note 7, at 406; Fraenkel, The Legal Enforceability of Agreements to Arbitrate Labor Disputes, 1 Arb. J. 360, 368 (1937); Tongue, supra note 13, at 42.
agreements would indicate a belief that the parties will not agree to submit their differences in good faith. If submission by one of the parties is without good faith, enforceability is even more necessary. In addition, the fact that such agreements are generally observed is no indication that more disputes would not be submitted if arbitration agreements and awards were legally enforceable. One consideration in determining whether to arbitrate is the reasonable expectancy of a fair award, but it is equally important to know whether compliance with the award will be obtained.\textsuperscript{42} Often the parties may reasonably expect from past experiences that the award will be voluntarily performed,\textsuperscript{43} and in labor relations compliance from good faith is of special importance. However, speedy settlements of disputes is also important in labor relations, and submission to arbitration for this purpose is more likely if there is assurance that the award will be legally enforceable if necessary. This feature may be determinative in the early stages of collective bargaining between the parties. Likewise, the legal efficacy of the award will induce apparently voluntary compliance in many cases, especially if summary procedure for enforcement is available, and thus further improve relations between the parties. Therefore, even though increased use of arbitration in the United States in labor disputes may produce a larger group of experienced arbitrators from which selection may be made and may increase the probabilities of expecting a fair award, resort to arbitration in any state may be hindered by the lack of legal remedies to enforce the award.\textsuperscript{44} Neither economic warfare nor the threat thereof should be needed to enforce compliance with an award if arbitration is to replace those methods.

It is also important that the agreement to arbitrate be made irrevocable.\textsuperscript{45} If a party can withdraw before the award even after steps have been taken to submit the dispute to the arbitrator, it discourages both parties from abiding by the agreement, for submitting to arbitration may only be a waste of valuable time if the other party can withdraw when an unfavorable award appears

\textsuperscript{42} The foundation of arbitration law, which gives certainty and security to observance of arbitration, when good faith fails, is highly instrumental in inducing parties to make arbitration clauses or to submit existing disputes to arbitration. \textit{Kel}lo\textit{r, op. cit. supra} note 20, at 9.

\textsuperscript{43} \textit{Three Years of Arbitrating Labor Disputes, 5 ARB. J. 65, 69 (1941)}.

\textsuperscript{44} \textit{Updegraff, op. cit. supra} note 39, at 20.

\textsuperscript{45} See Fraenkel, \textit{supra} note 41, at 368.
likely. Agreeing to submit to arbitration for the purpose of a speedy solution is meaningless if revocation is permitted under these circumstances. Further, revocation should not be permitted at any time during the term of the agreement if peaceful settlement of disputes during that period of time are desired. If this is known by the parties when agreeing, no hardship is imposed and any reluctance to submit to arbitration which may arise at the time of a dispute may have subsided before the agreement is to be renewed—perhaps as the result of satisfaction with arbitration under the agreement. This is especially important concerning agreements to submit future disputes to arbitration for such agreements are more likely to be made than are agreements to submit existing disputes. Apart from being a necessary step to an enforceable award, enforcing the agreement to arbitrate may provide a solution which is acceptable by the parties in preference to economic warfare.

This is not an endorsement of compulsory arbitration—it is merely the expression of a belief that peaceful conditions in labor relations cannot be maintained unless agreements freely made are enforced by law if necessary. Little is lost to this objective by the parties' refusing to agree to arbitrate and to be bound by the award merely because they may be forced to comply with the agreement and the award.

When the parties have agreed to be bound by the decision of a third party, this ought to be legally enforceable if the decision or award is rendered in accordance with the procedure adopted by the parties. In addition, neither party should be permitted to withdraw from his agreement to arbitrate so long as the other

46 What may happen is illustrated in Stringer v. Toy, 33 W. Va. 86, 10 S. E. 26 (1889), where an attempt was made to revoke the agreement after the arbitrators had agreed on an award but had not reduced it to writing or announced it. Being a statutory agreement, the attempted revocation was held to be ineffective.

47 See note 11 supra.

48 The maintenance of industrial peace is primarily the task of the parties, but if they fail, the government should provide assistance. Braun, op. cit. supra note 5, at 12. It is essential for smoothly functioning labor-management relations that there be absolute adherence to all contractual obligations. See Braun, id. at 21; Teller, op. cit. supra note 7, at 170; Gregory, op. cit. supra note 7, at 406.

49 It is easier to enforce compliance by an employer than by a union. See Gregory, id. at 408. On the other hand, the employer can put his decisions into effect more easily than the union without the appearance of open con-
party has not given him a basis for such action.\textsuperscript{50} Is this the law, and if not, what changes are necessary?\textsuperscript{51} Before attempting to answer these questions, it will be helpful to ascertain what differences may be submitted to arbitration and which are being submitted.

**Scope of Arbitration**

Any dispute or controversy between the parties may be submitted to arbitration, if it is not a subject which involves public policy and is not illegal or criminal.\textsuperscript{52} It does not need to be a matter on which legal action could be instituted, but it may include questions of law. The real limitation is the extent to which the parties are willing to submit their differences to a decision by an outsider.

Normally employers and unions have not submitted to arbitration the more important problems of conflicting interests, such as new wage scales, union recognition, or union shop, preferring to use tests of strength to decide these questions.\textsuperscript{53} Questions of wage classification, hours, vacations, discharges, and seniority rights under collective-bargaining contracts are submitted with great frequency. In other words, controversies over *legal rights* have been submitted much more frequently than those concerning *interests* which involve no legal rights.\textsuperscript{54} Since arbitration comes only after the parties have been unable to agree, often even with the assistance of outsiders, it is highly desirable that the parties accept the decision of an impartial arbitrator on disputes concerning inter-

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\textsuperscript{50} For example, fraud during the original negotiation, conduct inconsistent with arbitration, or appointment of a biased arbitrator, may excuse the other party. See Updegraaff, \textit{op. cit. supra} note 39, at 71.

\textsuperscript{51} The discussion which follows is limited to the arbitration provisions of the contract. A summary discussion of the legal aspects of union agreements generally appears in Pierson, \textit{op. cit. supra} note 8, at 48, and in Ziskind, \textit{The Law Behind Union Agreements} 1 (1941).

\textsuperscript{52} Updegraaff, \textit{op. cit. supra} note 39, at 7. Under state general arbitration statutes, usually an agreement to arbitrate any dispute may be made irrevocable. Some of these statutes are limited to controversies which may be the subject of court action and some exclude labor disputes specifically. The special labor statutes may be limited to certain types of labor disputes or to specified industries. Ziskind, \textit{op. cit. supra} note 10. The problems relative to these statutes are discussed later.

\textsuperscript{53} Braun, \textit{op. cit. supra} note 5, at 121.

\textsuperscript{54} Braun, \textit{op. cit. supra} note 5, at 8.
— there being no legal rights involved, the only alternative is to test the strength by industrial warfare.56 There is evidence that such differences are being submitted where the parties have had greater experience with collective bargaining57 and every effort should be made to foster arbitration in such cases.58

It must be remembered that the arbitrator's decision, though final (unless the parties alter it by mutual agreement), is the judgment of an expert who is not limited in the evidence which he may consider by any technical rules, and the issues preventing the settlement of the dispute may be so limited and defined that an intelligent judgment can be made. It has been demonstrated that this type of arbitration can be used successfully.59 Unlike commercial arbitration, settlement of a dispute even under an existing labor contract usually involves determining a rule for future con-

56 Some persons believe that labor and management will not accept arbitration for such disputes. LAPP, op. cit. supra note 30, at 44; GREGORY, op. cit. supra note 7, at 402, but see at 410.

However, current thinking is not all pessimistic. Many believe that arbitration will be accepted in disputes concerning interests if good arbitration machinery is established. BRAUN, op. cit. supra note 5, at 20, 120, and 129; Isaacs, The Implementing of Industrial Arbitration, 17 N. Y. U. L. Q. REV. 564 (1940) (this article contains pertinent suggestions for planning such arbitration); Fraenkel, supra note 41; Tongue, supra note 13.

The agreement to submit disputes over interests may be contained either in the collective-bargaining agreement or may be made after the parties have found no other way to break the stalemate. Especially in these disputes, negotiation and conciliation should be used to reach a settlement if possible, for by these means each party may be more easily satisfied that it is getting all its bargaining position merits.

57 The tendency today is to broaden the scope of labor disputes arbitration since organized labor has apparently learned that its opposition to voluntary arbitration was miscalculated. Teller, op. cit. supra note 7, at 173. See also Montgomery, Let's Arbitrate, 4 Ann. J. 31 (1940). Arbitration of labor disputes was stimulated under the National War Labor Board.

58 This may be the labor law of the future, wherein arbitrators as experts will set the pace for the legislature. See BRAUN, op. cit. supra note 5, at 120.

59 It should be recognized, however, that obligations are likely to be disregarded, especially under newly established systems of collective bargaining, if the agreements do not accurately reflect the relative bargaining strength of the two parties or if one of the parties feels this to be true. PIERSON, op. cit. supra note 8, at 199. Accordingly, in these disputes, both mediators and arbitrators must aim at creating the basis of the prospective relations between the parties by using the best possible estimate of the subsequent trends in the factors involved, thus considering events which are possible in the near future. BRAUN, op. cit. supra note 5, at 13. Evidence of this nature should be presented to the arbitrator. In these cases, the arbitrators act more like agents for both parties than in disputes under existing contracts. See Phillips, The Function of Arbitration in the Settlement of Industrial Disputes 33 COL. L. REV. 1366 (1933).
duct, at least until the agreement expires, so that only a difference in degree is involved in submitting to arbitration disputes concerning the terms of a new contract. Often the issue may be so narrowed that even the most that could be lost under the arbitrator's award would be less than the loss which would result from industrial warfare. When each party has obtained all the concessions its bargaining position can demand through negotiation and mediation, the remaining points of disagreement may be relatively unimportant, especially if the contract is to be made for only a short period of time. The bargaining position may have so changed by the end of that contract that no doubt on the issue will arise on negotiating its renewal.

**ENFORCEABILITY OF ARBITRATION**

Although a great variety of disputes are submitted to arbitration, they fall into a few general classifications for the purpose of analyzing the enforceability of (1) agreements to arbitrate or (2) the awards made pursuant thereto. The disputes may be (a) in existence when an agreement is made to submit them to arbitration, or (b) the agreement may apply to future disputes, and the disputes may relate (a) to the interpretation of an existing collective-bargaining agreement (disputes concerning *legal rights*) or (b) to what the terms of such an agreement or a renewal thereof shall be (disputes concerning *interests*). There are thus four possibilities to consider though each of these is subject to three approaches: (1) common law, (2) general arbitration statute, and (3) special labor arbitration statute.

At common law an agreement to arbitrate any dispute, whether it is one which has arisen or one which may arise, is not enforced by the courts until it is completed by an award, even though the parties clearly intend to be bound by the agreement. The court will take jurisdiction of the matter in dispute irrespective of the agreement, leaving the party who revoked liable for only nominal

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62 Kohlsaat v. Main Island Creek Coal Co., 90 W. Va. 656, 112 S. E. 213 (1922).
damages since no actual damages can be proved. An exception is sometimes recognized by the courts where an agreement is made to submit preliminary questions of fact to arbitration prior to suit. This exception might be applied to certain types of disputes under labor contracts, but courts do not ordinarily refuse to proceed prior to arbitration where the agreement cannot be construed as a condition precedent to the right to maintain an action and then only if the question does not involve general liability.

However, most states have statutes under which agreements to arbitrate existing disputes may be made irrevocable and few of these statutes exclude labor agreements. Only a few states have statutes under which agreements to submit future disputes may be made irrevocable; and most of these expressly exclude collective-bargaining agreements or personal service contracts, thus leaving labor arbitration agreements for future disputes generally unenforceable by the courts under these statutes whether referring to disputes under an existing contract or disputes as to terms of one to be made. Further, most special labor arbitration statutes contemplate only existing disputes, so that agreements to submit future labor disputes to arbitration are generally enforceable by the courts only in those few states having general arbitration statutes applying to future disputes which do not exclude labor agreements — it is clear that in these latter states agreements concerning disputes which may arise under existing contracts are enforceable; the uncertainty arises concerning agreements to arbitrate in the future the terms of a contract.

The leading case on this question is In re Buffalo & Erie Railway Co., decided by the New York court in 1929. Under a statute

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63 Riley v. Jarvis, 43 W. Va. 43, 26 S. E. 566 (1896); Udegraff, op. cit. supra note 39, at 130. For a detailed discussion of the rule and the problems related thereto see Prager, Arbitration Bonds — An Old Device Re-examined, 5 Arb. J. 317 (1941). It is questionable whether any damages could be recovered for breach of an agreement to arbitrate future disputes. Sturges, Commercial Arbitration and Awards 82 (1930).
65 As a guide to the states which have the types of statutes discussed here, see Ziskind, op. cit. supra note 10. For a more detailed analysis of these statutes, see Fraenkel, supra note 41. Also see Udegraff, op. cit. supra note 39, at 25.
66 This is unfortunate, since in collective bargaining arbitration of future disputes is the most important phase of arbitration.
providing that a controversy which might be the subject of an action might be submitted to arbitration under the statute, the court refused to enforce an agreement to arbitrate the terms of a collective-bargaining agreement on the basis that the arbitration statute applied only to justiciable controversies. Only an agreement to arbitrate a dispute arising under an existing contract would be enforced. The court emphasized that "controversies" as used in the arbitration statute referred to "the same kind of controversies that are dealt with by the courts." This law was changed by an amendment to the New York statute in 1940.

This same uncertainty exists also under general arbitration statutes which do not exclude labor agreements and special labor arbitration statutes covering agreements to submit existing disputes if the agreement is to submit to arbitration what the terms of the contract shall be. If the New York case is followed under such statutes, the agreement would not be irrevocable. It must be remembered, however, that in any event these statutes do not prohibit such arbitration, and awards resulting therefrom are enforceable by the courts.

Arbitration awards may be enforced either by actions at law or suits in equity or by summary statutory procedure. Awards at common law are enforceable by the former two means, but summary enforcement may usually be obtained where the arbitration proceeded under a statute. Since prompt settlement of a difference is especially important in labor disputes, summary procedure to enforce an award is highly desirable.

The effectiveness of awards in labor arbitration can be improved not only by extending summary procedure to their enforce-

08 CLEVENDER'S PRACTICE MANUAL OF N. Y. § 1448 (1929).
09 N. Y. CIVIL PRACTICE ACT § 1446.
10 Where the dispute concerns interests rather than legal rights, the argument is plausible that the court should enforce the agreement to arbitrate without the aid of a statute, since here the court has no jurisdiction of which it might be deprived. This was the historical basis of the rule that agreements to arbitrate disputes may be revoked. However, the West Virginia court has committed itself so firmly to the position that agreements to arbitrate are revocable prior to awards, in the absence of a statutory change, that this argument probably would not prevail. See Fraenkel, supra note 41, at 363.
12 Ibid.; Fraenkel, supra note 41, at 365.
13 Some of the special labor arbitration statutes merely direct a state official to stimulate arbitration and do not provide summary procedure to enforce arbitration awards in labor disputes. ZISKIND, op. cit. supra note 10, at 20.
ment but also by establishing sanctions specially adapted to labor relations. This may promote the submission of some labor disputes to arbitration which at present probably are not submitted because of uncertainty of the sanctions which may be used to enforce compliance. The use of arbitration in labor disputes could be stimulated also by the enactment of statutes specially designed to enforce compliance with agreements to arbitrate labor disputes. At present, the parties must rely for compliance largely on good faith of the other party or the threat of economic warfare since general arbitration statutes, even where available, are not well designed to meet labor relations problems.

**COMMON LAW OR STATUTORY ARBITRATION**

In any event, if it is desired that the agreement to arbitrate and the award thereon be enforceable under a statute, care must be exercised in drafting the agreement to satisfy the satutory requirements. Most of the statutes require the arbitration agreement to be in writing. A few mention the necessity of signatures, but formal acknowledgment is rarely required. Only a few statutes make specifications as to the substance of the agreements, such as, it must state the issues in dispute or contain an agreement to abide by the award. Some do require a promise not to lockout or strike pending the award or for a limited number of days after the arbitration has begun. Few statutes require the arbitrators to be named in the agreement. Some require the agreements to be made rules of court. Since the agreement to arbitrate is considered procedural and is governed by the law of the forum, it should be drawn to comply with the statutes of as many of the states as possible in which litigation is likely.

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74 The special labor arbitration statutes contain a variety of sanctions, but there is no evidence that a comparative study has been made of their effectiveness or their influence on inducing submission to arbitration. *Ibid.*

75 Will a fine be imposed? Will imprisonment be used? Will the employees be required to work? Will the employer be forced to reinstate employees? How long will the award be binding? Will it be retroactive?


77 *Wheeling Gas Co. v. City of Wheeling, 5 W. Va. 448 (1872)*, opinion starts at 492.

78 As a guide to the states which have these requirements, see Ziskind, *op. cit. supra* note 10, at 8.

79 *Urbegraff, op. cit. supra* note 59, at 140. This emphasizes the need for uniformity in state arbitration statutes if management and unions in nationwide industries are to be encouraged to use arbitration. See Gregory, *op. cit. supra* note 7, at 404. For requisites under the West Virginia statute, see Bill-
So persistent has been the resort to arbitration that there are no less than 116 separate methods of labor arbitration authorized by state statutes. The state arbitration statutes usually do not provide a complete procedure. The few statutes dealing specifically with arbitration of labor disputes are usually more lacking in details than the general arbitration statutes. These statutes merely supplement the common law method of arbitration. Common law and statutory arbitration must therefore be considered together, remembering that both systems permit the parties great latitude in setting up their own special system. This is desirable since plans may be varied to meet the needs of a particular industry, but any agreement to arbitrate should provide a definite procedure to be followed. This is essential in labor arbitration since a good procedure will avoid cause for additional provocation when a dispute arises.

It is not within the scope of this article to review in detail the law concerning arbitration and awards, either at common law or under the various statutes. Much has been written concerning this subject, as well as practical considerations in arbitration, such as, drafting agreements to arbitrate, selecting arbitrators, using lawyers to present the case, preparing the case for hearing, and other related matters. Those who are interested in particular problems


80 ZISKIND, op. cit. supra note 10, at 1.

81 ZISKIND, op. cit. supra note 10, at 3.


83 A study of plans used in various industries revealed that a plan of conciliation and arbitration which was successful in one industry might not be successful in another industry of a different nature and with a different background of experience. Tongue, supra n. 13, at 37.

84 Braden, Sound Rules and Administration in Arbitration, 83 U. of Pa. L. Rev. 189 (1934); Tongue, supra note 13, at 40.

85 If it is desired that rules established by government or private agencies be followed, this procedure may be adopted by reference; for example, the dispute to be submitted to arbitration "under the Voluntary Labor Arbitration Rules, then obtaining, of the American Arbitration Association." Consideration should be given to the points mentioned in Arbitration Provisions in Labor Agreements, 1 Am. J. 333 (1937); also see Tongue, supra note 13.
may find helpful the treatises and articles cited in the footnote hereto.\textsuperscript{88}

In general, however, the more important principles in common law arbitration have been summarized as follows:

"Common-law arbitration rests upon a voluntary agreement of the parties to submit their dispute to an outsider. The submission agreement may be oral and may be revoked at any time before the rendering of the award. The tribunal, permanent or temporary, may be composed of any number of arbitrators. They must be free from bias and interest in the subject matter and may not be related by affinity or consanguinity to either party. The arbitrators need not be sworn. Only existing disputes may be submitted to them. The parties must be given notice of hearings and are entitled to be present when all the evidence is received. The arbitrators have no power to subpoena witnesses or records and need not conform to legal rules of hearing procedure other than to give the parties an opportunity to present all competent evidence. All the arbitrators must attend the hearings, consider the evidence jointly and arrive at an award by an unanimous vote. The award may be oral, but if written all the arbitrators must sign it. It must dispose of every substantial issue submitted

\textsuperscript{88} On arbitration generally, see Sturges, Commercial Arbitration and Awards (1930); Note, Arbitration Case Law of the Last Decade, 26 Va. L. Rev. 327 (1940); Symposium on Arbitration, 83 U. of Pa. L. Rev. 119-245 (1934); Symposium on Commercial, Industrial and International Arbitration, 17 N. Y. U. L. Q. Rev. 495-677 (1940); Cohen, Commercial Arbitration and the Law (1918); Morse, Arbitration and Award (1872); Dott and Dineen, The Lawyer's Stake in Arbitration, 6 ARB. J. 108 (1942); Peters, Arbitration Serves Both Lawyer and Client, 6 ARB. J. 116 (1942); Popkin, Arbitration Benefits the Lawyer, 6 ARB. J. 118 (1942), and many other articles in the Arbitration Journal which the American Arbitration Association began publishing in 1937.

On industrial arbitration generally, see Lapp, Labor Arbitration: Principles and Procedures (1942); Braun, The Settlement of Industrial Disputes (1944); Gregory, Labor and the Law (1946); Kellor, Arbitration in Action (1941); Udegraff, Arbitration of Labor Disputes (1945); Kaltenborn, Governmental Adjustment of Labor Disputes (1943); Oliver, The Arbitration of Labor Disputes, 83 U. of Pa. L. Rev. 206 (1934); Fitzpatrick, How to select a Labor-Management Arbitrator, 1 ARB. J. (N. S.) 306 (1946); Tongue, The Development of Industrial Conciliation and Arbitration under Trade Agreements, 17 Ore. L. Rev. 263 (1938); Phillips, The Function of Arbitration in the Settlement of Industrial Disputes, 33 Col. L. Rev. 1366 (1933); Tongue, Settlement of Labor Disputes under Trade Agreements, 3 ARB. J. 34 (1939).

On statutory arbitration, see Sturges, Summary of the Statutes Governing Arbitration, in Kellor, op. cit. supra note 20, at 217-346; Ziskind, Labor Arbitration under States Statutes (1943) (a comprehensive analysis of all the significant provisions of such statutes, including analytical charts and digests); Fraenkel, The Legal Enforceability of Agreements to Arbitrate Labor Disputes, 1 ARB. J. 360 (1937); Fraenkel, Recent Developments in the Arbitration of Labor Disputes, 17 N. Y. U. L. Q. Rev. 549 (1940).
to arbitration. An award may be set aside only for fraud, misconduct, gross mistake or substantial breach of a common-law rule. The only method of enforcing the common-law award is to file suit upon it and the judgment thus obtained may be enforced as any other judgment. In so far as a state arbitration statute fails to state a correlative rule and is not in conflict with any of these common-law rules, it may be said that an arbitration proceeding under such statute is governed also by these rules.”

The advantages of arbitrating under the statutory law have been stated as follows:

“Statutory law grants to parties the affirmative legal right to arbitrate, thus giving arbitration a legal foundation and the parties legal security in their proceeding. Under most arbitration laws, a submission is legally binding, and under many of them any action or suit in the same matter may be stayed until the arbitration has been held.

“Under many of these statutory laws, if a party defaults, the court may, upon application of the other party, direct the arbitration to proceed or appoint arbitrators. Under most statutory laws a hearing is assured, and the arbitrator must be free from bias or corruption or the court will not confirm the award as a judgment. A future dispute may be submitted under arbitration laws that grant such authority, in the same manner as an existing dispute. Under a consent decree, failure to arbitrate or carry out an award may be held to be contempt of the court issuing such decree. None of these safeguards and remedies is available under a common-law arbitration.”

Arbitration in West Virginia

To supplement these summaries and the general treatises on the law of arbitration, a few observations on the West Virginia law may be helpful for those particularly interested in arbitration in West Virginia. On problems heretofore discussed, the West Virginia decisions have been indicated in the footnotes and will not be repeated. This information may be helpful not only in considering possible amendments of the West Virginia statutes, but also in deciding whether it is desirable to submit labor disputes to arbit-

87 Ziskind, op. cit. supra note 10, at 8. This summary was based upon principles enunciated in (1) Sturges, Commercial Arbitration and Awards (1930), (2) Morse, Arbitration and Award (1872), and Cohen, Commercial Arbitration and the Law (1918). Also see Braun, op. cit. supra note 5 at 125 and 227.

88 Kellor, op. cit. supra note 20, at 10.
tration in West Virginia under the current law, and if so, what the agreement should provide.

The West Virginia statute reads as follows:

"Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court. Upon proof of such agreement out of court, or by consent of the parties given in court, in person or by counsel, it shall be entered in proceedings of such court; and thereupon a rule shall be made that the parties shall submit to the award which shall be made in pursuance of such agreement . . . ."

"No such submission, entered or agreed to be entered of record, in any court, shall be revocable by any party to such submission, without the leave of such court; and such court may, from time to time, enlarge the term within which an award is required to be made . . . ."\(^9\)

For the purposes of this study\(^9\) that is the material part of the statute except that it also provides for the summary entry of an award made under such an agreement as "the judgment or decree of the court."\(^9\)

This statute was designed for commercial arbitration, but agreements to arbitrate labor disputes have not been excluded by the legislature.\(^92\) Being limited to the submission of existing disputes, it offers no means of making the typical labor agreement to arbitrate irrevocable\(^93\) — the agreement usually found in collective-bargaining contracts to submit future disputes arising thereunder to arbitration. To obtain a binding agreement in these cases it would be necessary to obtain one after the dispute arose, which may not be expedient in labor relations. However, there is no language in the statute which would preclude the court from holding that it applies to agreements to submit existing disputes concerning what the terms of a collective-bargaining contract shall be.\(^94\)

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\(^9\) W. VA. CODE, c. 55, art. 10, §§ 1 and 2 (Michie, 1943).
\(^9\) Consideration should be given to several auxiliary West Virginia statutes. One provides that an umpire or arbitrators may issue summons for witnesses. W. VA. CODE, c. 57, art. 5, § 1 (Michie, 1943). A subpoena \emph{duces tecum} to compel the production of documents in the possession of a person not a party to the matter in controversy may be used. \emph{Id.} at § 4. Bribery of an arbitrator or umpire is a felony. \emph{Id.} at c. 61, art. 5, § 7.
\(^9\) W. VA. CODE, c. 55, art. 10, § 3 (Michie, 1943).
\(^9\) See note 65 \emph{supra}.
\(^9\) See note 66 \emph{supra}.
\(^9\) See note 68 \emph{supra}.
On the other hand, if an award is made pursuant to an agreement to submit a future dispute, whether relating to the application of an existing collective-bargaining contract or to what the terms of such an agreement shall be, a judgment or decree of the court cannot be entered summarily on the award for such agreements are not within the coverage of the statute. Even though awards made pursuant to such agreements are recognized as valid, they can be enforced only by cumbersome actions at law or suits in equity.

A few decisions concerning arbitration under the West Virginia statute should be mentioned. First, the return of an award to court does not alone give it the effect of a judgment. It must first be made a decree of court after a rule to show cause why it should not be entered has been issued, although it has the effect of a common law award until it is entered as a judgment. Further, the court may either enter or refuse to enter the award, but cannot alter it. If a clerical error has been made, the court may recommit the award for correction and may do so at the request of the arbitrators, but the court cannot recommit the controversy to the same or other arbitrators if it sets the award aside, unless the time within which the submission requires the award to be made has not expired.

Except where otherwise indicated, the following principles are applicable to arbitration in West Virginia whether under the statute or not. An attorney at law, as such, has no authority out of court to submit his client's case to arbitration or to change the terms of his client's agreement of submission. Even though a submission to arbitration will not bind those persons who do not join it, those who join are bound although others with joint interests do not join.

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95 See note 73 supra.
96 See note 71 supra.
99 Henley v. Menefee, 10 W. Va. 771 (1877).
100 Raleigh Coal & Coke Co. v. Mankin, 83 W. Va. 54, 97 S. E. 299 (1918).
101 W. Va. Code, c. 55, art. 10, § 5 (Michie, 1943). Note that this section refers to the time set by the submission and does not mention an extension of that time by the court. See note 89 supra.
103 O. J. Morrison Stores Co. v. Duncan, 110 W. Va. 289, 158 S. E. 174 (1931) (presence of president of company represented by attorney when change was made held not to be authorization or ratification); but see Hughes v. National Fuel Co., 121 W. Va. 592, 5 S. E. 2d 621 (1939).
In the absence of specific agreement, certain questions concerning the formalities relative to hearing the evidence frequently arise. The West Virginia court has decided many of these questions. Although the parties must generally be given a reasonable notice of hearings\textsuperscript{106} and are entitled to be present when all of the evidence is received, the arbitrators may proceed to hear the evidence if a party does not appear after receiving such notice\textsuperscript{107} or after he knows of the meeting although he received no notice.\textsuperscript{108} Further, no additional notice of a continuance is necessary even though the party was not present at the original hearing.\textsuperscript{109} Nor does notice need be given of the meeting at which the arbitrators will decide the case after all the evidence has been submitted.\textsuperscript{110}

Arbitrators may not refuse to hear competent witnesses.\textsuperscript{111} Much evidence may be admitted that would be inadmissible in court,\textsuperscript{112} if the submission does not limit the evidence which may be considered.\textsuperscript{113} However, arbitrators must not receive evidence of one of the parties without knowledge of the opposite party, regardless of the effect given to it,\textsuperscript{114} even though it rests within the discretion of the arbitrators to admit further evidence after the case has been closed on both sides.\textsuperscript{115}

The West Virginia court has taken the following positions relative to the arbitrator's interest in the case. Arbitrators not only must be fair, but must maintain the appearance of fairness.\textsuperscript{116} An arbitrator cannot act as an advocate for either party and must act with a high degree of impartiality regardless of how appointed. However, the award will stand if the party against whom an arbitrator was prejudiced knew of his partiality or interest when the

\textsuperscript{107} Boring v. Boring, 2 W. Va. 297 (1867).
\textsuperscript{109} Boring v. Boring, 2 W. Va. 297 (1867).
\textsuperscript{110} Broadhead-Garret Co. v. Davis Lumber Co., 97 W. Va. 165, 124 S. E. 600 (1924).
\textsuperscript{112} Broadhead-Garret Co. v. Davis Lumber Co., 97 W. Va. 165, 12 S. E. 600 (1924); Eureka Pipe Line Co. v. Simms, 62 W. Va. 628, 59 S. E. 618 (1907).
\textsuperscript{113} Goff v. Goff, 78 W. Va. 423, 89 S. E. 9 (1916).
\textsuperscript{114} Fluharty v. Beaty, 22 W. Va. 698 (1883).
\textsuperscript{115} Tennant v. Divine, 24 W. Va. 387 (1884).
\textsuperscript{116} Providence Washington Ins. Co. v. Board of Education of Morgantown.
case was heard.\textsuperscript{117} An arbitrator will not be disqualified merely by having previously served in the same capacity for one of the parties,\textsuperscript{118} nor by having engaged in business transactions with him,\textsuperscript{119} nor by being related to him by affinity.\textsuperscript{120}

The following decisions indicate the views of the West Virginia court on additional grounds frequently used to attack awards. An award is complete when it has been signed and made known to the parties;\textsuperscript{121} and if the submission is silent, no particular form of notice of the award is necessary.\textsuperscript{122} Awards will be liberally construed to give them effect;\textsuperscript{123} and although they must be certain, if they are understandable by an ordinary man who is familiar with the subject matter, that is sufficient.\textsuperscript{124}

If there was a general submission of the controversy to arbitration, the court will not look to the record for errors of law or fact, including the weight or admissibility of the evidence, in the absence of misbehavior or corruption.\textsuperscript{125} In such cases, the award will be set aside only if errors appear on the face of the award.\textsuperscript{126} However, if a written opinion of the arbitrators shows that they intended to decide the case according to the law, even though not

\begin{quote}
\textsuperscript{117} Hughes v. National Fuel Co., 121 W. Va. 392, 3 S. E. 2d 621 (1939); Wheeling Gas Co. v. City of Wheeling, 5 W. Va. 448 (1872). This would permit the parties to appoint partisan arbitrators, but this may not be good procedure. See Van Winkle v. Continental Fire Ins. Co., 55 W. Va. 286, 47 S. E. 82 (1904); Three Years of Arbitrating Labor Disputes, 5 ARB. J. 65, 69 (1941).
\textsuperscript{119} Broadhead-Garret Co. v. Davis Lumber Co., 97 W. Va. 165, 124 S. E. 600 (1924).
\textsuperscript{120} Ibid.
\textsuperscript{122} Boomer Coal & Coke Co. v. Osenton, 101 W. Va. 683, 133 S. E. 381 (1926).
\textsuperscript{124} Rogers v. Corrothers, 26 W. Va. 238 (1885).
\textsuperscript{126} Boring v. Boring, 2 W. Va. 297 (1867).
\end{quote}
required to do so by the submission, the award will be set aside if there is a clear and palpable mistake in law — if the mistake is on a doubtful point, the award will not be set aside even though the court would have decided the law differently.\textsuperscript{127}

If the arbitrators consider more than the matters referred to them in reaching a decision, the award will be set aside on the basis of either mistake or misbehavior.\textsuperscript{128} What may have been the effect of the 1931 amendment of the statute on this principle has not been decided.\textsuperscript{129} Likewise, if the award is to stand, it must decide all matters submitted to the arbitrators.\textsuperscript{130} However, the West Virginia statute does not require the arbitrators to specify the evidence upon which the award was based even though the parties request it;\textsuperscript{131} but if the submission requires special findings, the award must make them or it is void.\textsuperscript{132} In addition, if the parties agree that a particular method shall be followed by the arbitrators in deciding a controversy, it must be followed.\textsuperscript{133}

If private parties do not expressly or impliedly authorize a smaller number to decide a case, all the arbitrators must agree,\textsuperscript{134} although a majority vote may be sufficient where the arbitrators are appointed or authorized by statute to act in a matter of public

\textsuperscript{127} Broadhead-Garret Co. v. Davis Lumber Co., 97 W. Va. 165, 124 S. E. 600 (1924); Mathews v. Miller & Quarrier, 25 W. Va. 817 (1885).


\textsuperscript{129} W. Va. Code, c. 55, art. 10, § 6 (Michie, 1943) provides that if the submission was under the statute, any party to it may move to modify or correct the award where the arbitrators have awarded upon some matter not submitted to them, nor affecting the merits of the decision of the matter submitted.


\textsuperscript{131} Broadhead-Garret Co. v. Davis Lumber Co., 97 W. Va. 165, 124 S. E. 600 (1924); Henley v. Meneefee, 10 W. Va. 771 (1877).

\textsuperscript{132} Lawson v. Williamson Coal & Coke Co., 61 W. Va. 669, 57 S. E. 258 (1907).

\textsuperscript{133} Bailey v. Triplett, 83 W. Va. 169, 98 S. E. 166 (1919).

concern. Nevertheless, absence of one of the three arbitrators at the meeting where the decision was made will not invalidate an award, if a decision by two is authorized and the third received notice of the meeting.

Although it is better practice, if an umpire is to be appointed to decide differences between the two arbitrators, to name him before the hearing, the award is valid if signed by both the arbitrators even though an umpire was not appointed.

An award may be impeached if the submission was procured by fraud, and affidavits may be considered by the court in determining whether to set aside the award. However, an arbitrator cannot contradict an award which he has signed.

The fact that one of the parties or his attorney prepares the award, in the absence of the other party, after the arbitrators have reached a decision, will not vitiate the award but it will cast suspicion on the award.

If a submission at common law requires an award within a specified time, the award to be valid must be made within that time. However, if a party appears before the arbitrators after that time and argues for an award in his favor, he waives the limitation.

An equity court may set an award aside for causes not appearing on its face, such as fraud, or partiality, or misconduct, but a law court cannot set an award aside for such causes unless it is a statutory award.

135 Stewart v. County Court of Monongalia County, 99 W. Va. 640, 130 S. E. 271 (1925); Austin v. Clark & Crump, 8 W. Va. 236 (1875).
137 Rogers v. Corrothers, 26 W. Va. 238 (1885).
142 Bean v. Bean, 25 W. Va. 604 (1885); cf. Henley v. Menefee, 10 W. Va. 771 (1877). Where the submission is under the statute, the court may enlarge the term within which an award is required to be made. See note 89 supra.
143 Mathew v. Miller & Quarrier, 25 W. Va. 817 (1885).
The emphasis which has been placed on voluntary arbitration in this article does not indicate a belief that it is the only method whereby management-labor disputes may be settled without industrial warfare nor that other methods may not be preferable. The stress has been placed on arbitration because it appears that additional consideration should be given to this means where the parties have not been able to agree or find a basis for a compromise either by direct negotiation or through mediation.

Where industries have made use of this device, the results have been satisfactory even though reliance was placed largely upon the good faith of the parties for enforcement. Where the parties from past experience believe they can rely upon the good faith of the opposite party, they may be willing to submit their disputes to arbitration under the existing law. However, as heretofore indicated, the writer believes that even though the parties have not from past experience learned to place such faith in the opposite party, nevertheless they might be induced to submit their disputes to arbitration rather than resorting to industrial warfare if legal sanctions were available to assure compliance with the agreement to arbitrate and the award made pursuant thereto. It is difficult to see how those parties who would voluntarily comply could be injured by the availability of such sanctions or how it would discourage them from continuing to use arbitration to settle their differences. In addition, the proposal is limited to the enforceability of voluntary agreements to arbitrate, and it seems that objection to such legislation could come only from those who would make such agreements with the idea of not complying if it later appeared that more could be gained by asserting their economic strength than could be gained through arbitration. It is not believed that there are many in this group. Is it sound policy not to use legal sanctions to encourage those who are seeking a peaceful solution to their disputes because there may be some who make such agreements in bad faith?

If this question is answered negatively, as the writer believes it should be, serious consideration must be given to the means of implementing that policy. It is not within the scope of this article to recommend specific sanctions, but when it is determined which
labor arbitration agreements and awards are to be made legally enforceable, it will be possible to devise adequate machinery for that purpose; the remedies selected being integrated with the existing labor policy of the state.