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ARBITRATION AS A JUDICIAL PROCESS OF LAW.
A NEW ERA IN LEGAL PROCEDURE CREATED BY THE
NEW YORK AND NEW JERSEY STATUTES.
THE PRINCIPLES AND THE PRACTICE DEFINED

BY JOSEPH WHELESS*

MAGNA CHARTA, the most venerable charter of Anglo-American liberties, contains this signal declaration of basic right: "To no man will we deny, or delay or sell right and justice." This sovereign assurance of the most fundamental rights of man, one of the most important muniments of liberty and of civilization, is consecrated in the Bill of Rights of every American constitution today. Yet Shakespeare jibed jeeringly at "the law's delays" three hundred years ago; while today the slow, tedious and costly course of justice as administered in our courts is probably three-hundred-fold more serious and grievous than ever it was in the times of the "myriad-minded" bard of Avon.

Justice delayed is in every sense justice denied and as the heavy cost to the litigant of judicial remedy prevents the adjudication of his rights and protects legal wrongs, it is in a very practical sense justice sold. And these same delays and costs are all too often a virtual prohibition against seeking judicial justice, so that sacred and vital rights must go undefended and flagrant wrongs unredeemed, in the very tribunals established and maintained to do

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even handed justice to all men. Thus are the three cardinal guar-
danties of the Great Charter and of our modern constitutions violat-
ed, fundamental human rights made mockery, and the courts of
justice brought into undeserved disrepute.

The fault lies not indeed with the law nor with the courts, but is
rather in most part, the inevitable result of the vast accumulations
of litigation in the great commercial centers, which swamp the
courts and paralyze their otherwise effective machinery. For an
example: in New York City, in the one judicial district composed
of the boroughs of Manhattan and the Bronx, the calendars of the
Supreme Court (which is the court of first instance trial), are
clogged with some 23,000 pending cases; new issues for trial are
added at the rate of over 13,000 a year; while the greatest efforts
of the thirty trial judges enable them to dispose of only some 8500
cases each year. Thus is visualized the inevitable cause of the
"law's delays" and it is demonstrated that such delays from year
to year must become cumulatively more grievous and more hopeless
for the prompt and effective doing of justice.

Speaking of this acute situation, Mr. Justice Wagner, the able
presiding Justice of the District, said last year in an address before
the Academy of Political Science in New York City: "It takes
about three years for a case to reach trial. . . . . This accumu-
lation—which is progressively increasing—produces a situation
where the prodigious arrears cripple the efforts of the judicial
function, decisions and at times resulting in the virtual denial of
justice. For there is nothing truer than the oft-repeated aphorism
that justice delayed is justice denied."

Thus confessed by one of its ablest and most active ministers a
delay of quite three years is fated for every case before it can be
brought to trial and justice rendered by judicial procedure in its
ordinary course in New York City. In these three years of "law's
delays" rights suffer irreparable wrong; wrongs go unrighted;
parties and witnesses die, scatter and disappear; evidence is lost
or destroyed; memories fail and testimony loses its distinct value;
frauds and perjuries evolve and are matured; insolvencies and
bankruptcies intervene, so that when the tardy day of judicial
trial drags the often seriously weakened case to the bar of justice
justice oftentimes cannot be had or is very ineffective. As put by
Mr. Justice Wagner: "The loss of witnesses, the interpolation of
false defenses, subsequent financial irresponsibility, and many

1 Proceedings of the Academy of Political Science in the City of New York, Vol.
other causes hamper and at times prevent the successful prosecution of rights.”

Besides frustrated justice resulting from “the law’s delays” further vexatious delays come from appeals with frequent retrials, and may be further appeals, up and down through the judicial hierarchy. Added to the time lost, the heavy cost of courts and counsel, of appeals and the printing of records and briefs, all constitute a frightful aggregate of economic waste often ruinous in the individual case and all to the cumulative disrepute of the law.

While the serious situation just noted is thus acute in New York City, the evil is not local or peculiar, but exists in varying degree in every large center of population and business all through the country. Even smaller and less commercial communities suffer to some degree from the law’s delay and the burden of legal expense, and all alike suffer the even more deplorable—and easily remedied—by-products of litigation which we shall have occasion to note with some emphasis as we proceed.

So much for the grievous ill that gnaws at the vitals of the most important function of human society, which is the administration of justice between man and man—the *jus suum cuique tribuendi* of the Institutes and the Digest. The remedy, the sovereign remedy, lies at hand, potent for the fullest restoration of the atrophied functions of justice—speedily, cheaply, and satisfactorily administered. In the truest sense it is the sovereign panacea for the “law’s delays”—arbitration. And arbitration, in the form and manner of the New York and New Jersey arbitration laws, is the highest and most effective mode yet devised for the accomplishment of this ideal and thoroughly practical end—the prompt and economical rendering to every man his just due in law.

This contribution is not designed as a monograph on the common law of arbitration, therefore, it will not discuss, or but incidentally mention, the general principles of the law on this subject. They may be found in any digest or textbook. Indeed a great mass of such rules is quite obsolete under the comprehensive new statutes which we shall here consider. As appositely said by the Appellate Division of the New York Supreme Court in a unanimous opinion: “Such construction makes inapplicable as authorities the earlier cases decided prior to the enactment of the Arbitration Law.”

The purpose here in mind is to challenge public attention to the

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2 *Idem* note 1, p. 185.
admirable process of arbitration as the most expeditious method for settlement of legal controversies, and especially to signalize the manifold advantages of the new status given to arbitration as a judicial process by the recent Arbitration Laws to be discussed.

In a sentence pregnant with all the force of an aphorism the New York Appellate Division, First Department, pays this tribute to the ideal realized by the New York statute: "'Arbitration is intended to be a short cut to substantial justice between the parties.'"

From the most ancient times arbitration has been a recognized and approved, a time honored mode of settlement of legal controversies dehors the courts, and has been very widely availed of by disputants in preference to the slower and more cumbersome procedure of the regular tribunals. It is beside the purpose to make display either of erudition of antiquarian lore or to cite historical instances which are readily available to the curious. On this interesting phase, as well as for the whole subject of arbitration prior to the new statutes, admirably handled, it is a pleasant duty to commend to the student and business man "alike Mr. Julius Henry Cohen's excellent and scholarly "Commercial Arbitration and the Law." Suffice it, for modern antiquity, to quote the Supreme Court of the United States in a notable recent decision under the New York Arbitration Law, which we will have occasion to particularly notice again: "'In England controversies were settled by arbitration as early as 1320. After the establishment of the Court of Admiralty about 1340, arbitration became a common mode of settling disputes in shipping cases.'"

The same high court has testified to the value and favor it holds for the arbitration process: "'Arbitrators are judges chosen by the parties to decide the matters submitted to them, finally and without appeal. . . . As a mode of settling disputes, it [arbitration] should receive every encouragement from the courts of equity. If the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact. A contrary course would be a substitution of the judgment of the chancellor in place of the judges chosen by the parties, and would make an award the commencement, not the end of litigation.'"

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Mr. Julius Henry Cohen⁸ quotes the ex-president of the London Chamber of Commerce and Chairman of its Arbitration Committee as thus stating several vital truths bearing upon arbitration and the relations between arbitration and ordinary judicial process:

"Arbitration is indeed the natural right of disputants to choose their own tribunal, and is the practical art of vindicating and reconciling disputants, and doing so at a minimum of expenditure of time and trouble.

"Except for arbitration there would be many cases in which justice would be denied. ....

"There is no rivalry in arbitration with the law or the administration of the law."

The former obsolescent—and under the new statutes obsolete—reluctant if not inhospitable attitude of some courts English, State, and Federal to the method of arbitration, is expressed in the trite dictum, "agreements for arbitration cannot oust the courts of jurisdiction." Acting upon this myopic pseudo-maxim the courts denied, in large measure, the aid of their processes to those seeking to enforce executory agreements to arbitrate disputes, and have declined to compel specific performance of such agreements. At any time before the announcement of the award, any party to however solemn agreement to arbitrate, and even after long and arduous hearings, might put on his hat and walk out of the audience and make a mockery of his covenant. But even then, as said by the Supreme Court:

"But an agreement for arbitration is valid, even if it provides for the determination of liability. If executory, a breach will support an action for damages. If executed that is, if the award has been made—effect will be given to the award in any appropriate proceeding at law, or in equity. And, although there is no federal legislation on the subject, an executory agreement, however comprehensive, will, if made a rule of court, be enforced in courts of the United States by an appropriate process."⁹

The revolt of enlightened and progressive judges against these illiberal and archaic holdings has been frequently voiced. To every intelligent person interested in this subject special recommendation is made to read the illuminating opinion of Judge Hough, for the United States District Court in the Southern Dis-

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⁸ Commercial Arbitration and the Law, p. viii, supra note 5.
⁹ Red Cross Line v. Atlantic Fruit Co., supra note 6.
district of New York on motion to stay an admiralty suit pending arbitration as per contract obligation. Among many wise saws and pregnant comments, Judge Hough says:

"It has never been denied that the hostility of English-speaking courts to arbitration contracts probably originated (as Lord Campbell said in Scott v. Avery, 4 H. L. Cas. 811)—'in the contests of the courts of ancient times for extension of jurisdiction—all of them being opposed to anything that would altogether deprive any one of them of jurisdiction.' A more unworthy genesis cannot be imagined. Since (at the latest) the time of Lord Kenyon, it has been customary to stand rather upon antiquity of the rule than upon its excellence or reason."

In fine, very reluctantly, in deference only to superior authority, Judge Hough concluded:

"The Supreme Court has laid down the rule that such a complete ouster of jurisdiction as is shown by the clause quoted from the charter parties is void in a federal forum. It was within the power of the Supreme Court to make this rule. Inferior courts may fail to find convincing reasons for it; but the rule must be obeyed, and these motions be severally denied."

The Supreme Court, be it said, as will be more fully noticed below, has upheld the abrogation of this ancient rule by the New York Arbitration Law; and of course would so defer to the declared public policy of any other state.

Citing Judge Hough's trenchant opinion and other like cases, Mr. Justice Cardozo, speaking for the Court of Appeals of New York in the first case coming before that Court involving the new Arbitration Law of 1920, rather triumphantly gave the coup de grace to the ancient anomaly:

"We think there is no departure from constitutional restrictions in this legislative declaration of the public policy of the State. The ancient rule, with its exceptions and refinements was criticised by many judges as anomalous and unjust (citing cases). It was followed with frequent protest, in deference to early precedents. Its hold even upon the common law was hesitant and feeble. We are now asked to declare it so imbedded in the very foundations of our jurisprudence and the structure of our courts that nothing less than an amendment of our Constitution is competent to change it. We will not go so far. The judges might have changed the rule themselves if

they had abandoned some early precedents as at times they seemed inclined to do. They might have whittled it down to nothing, as was done in England, by distinctions between promises that are collateral and those that are conditions (citing cases). No one would have suspected that in so doing they were undermining a jurisdiction which the Constitution had charged them with a duty to preserve. No different is the effect of like changes when wrought by legislation.

"There is no merit in the contention that the statute violates Art. I Section 10 of the Constitution of the United States on the ground that it violates the obligation of a contract. The Obligation of the Contract is Strengthened, Not Impaired."

The foregoing sufficiently sets forth the previous "anomalous and unjust" rule of common law—so vainly called "the perfection of human reason"—whereby the solemn contract to arbitrate entered into by two competent contracting parties, was voided and annulled three hundred years ago in England by petulant big-wig judges who desired that their "jurisdiction should not be ousted" by the free-willed resort of parties to the most expeditious modes of obtaining justice and the settlement of their controversies.

THE NEW YORK ARBITRATION LAW.

Like no doubt all the states, New York has had from the earliest times a statute sanctioning "submissions to arbitration" and providing for the enforcement of awards fairly and regularly rendered. This statute is now Article 84, Sections 1448-1469 of the new Civil Practice Act. In itself it is very comprehensive and effective, providing full machinery for submission to arbitration by any competent parties of all manner of justiciable controversies, except sundry claims to real estate, and matrimonial and criminal actions and it prescribes the form and manner and contents of the submission, the appointment, oath, powers, hearings, fees and expenses of arbitrators, the requirements of the award, proceedings to conform or vacate the award, the entry of judgement on the award, the effect of judgment and enforcement, and certain forms of appeal. Section 143 provides: "The judgment so entered [on the award] has the same force and effect in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been entered in an action in the court in which it is entered." So satisfactory is the general scheme of this statute that it is expressly continued in full force and effect "so far as applicable and consistent" with the provisions of the new Arbitration Law of 1920. The only signal
deficiency of the previous statute was that it left the "agreement to arbitrate" in the "anomalous and unjust" situation of the freakish common law rule voidable by refusal to carry it out, and not subject to enforcement by order for specific performance.

The simple but cardinal "change wrought by legislation," through the Arbitration Law of 1920, was that it abolished the "anomalous and unjust" common law rule, and "put teeth" into the agreement to arbitrate by compelling the recalcitrant party to stand to and abide by his covenant under sanction of compulsion —just simply as any other lawful contract obligation will be enforced by the courts.

An "Editor's Note" to the Chapter is worthy of being quoted as it gives proper credit for the notable accomplishment of bringing about the enactment of this epoch-making legislation which raised arbitration to the status and dignity of judicial process of law.

The law first declares its new and revolutionary policy, then provides the sanction for the enforcement of the contract for arbitration made by the parties. Section 2 is the vital enactment, and reads:

"Validity of Arbitration Agreements.

"Sec. 2. A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to (the existing statutes), shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Controversies arising under two sets of circumstances are thus covered by the statute—these being indeed the only two ways in which arbitration agreements could possibly become operative:

1. Arbitration agreements contained in contracts existing at
the time of the passage of the law, and "thereafter" a controversy arises over such contract; and,

2. Controversies existing at the time of the passage of the law, and the agreement to arbitrate is "hereafter entered into."

Both these phases of origin of the controversy and submission have come up for adjudication since the law, and it has been fully sustained with respect to both. And the law as a whole has met not only the most cordial general approval and been widely called into operation, but the courts have sustained it in every feature, as we will briefly review before considering the practical benefits of the arbitral system now engrafted into the judicial procedure.

The second feature of the Arbitration Law, the one which effects the operation of "putting teeth" into the process by enforcing the agreement to arbitrate upon the recalcitrant party, is as follows:

"Sec. 3. Remedy in case of Default. A party aggrieved by the failure, neglect or refusal of another to perform under a contract or submission providing for arbitration, described in section 2 hereof, may petition the supreme court, or a judge thereof, for an order directing that such arbitration proceed in the manner provided for in such contract or submission. . . . . [Notice and manner of service].

"The court or a judge thereof, shall hear the parties, and upon being satisfied that the making of a contract or submission or the failure to comply therewith is not in issue, the court, or the judge thereof, hearing such application, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the contract or submission." [Here follow provisions for trying any issue raised as to the making of the contract or submission or of failure to comply therewith.]

Section 4 makes "provision in case of failure to name arbitrator or umpire," and provides that the method of choosing arbitrators specified in the contract for arbitration or in the submission shall be followed; but if no such method is therein provided, or if so provided any party shall fail or refuse to avail himself thereof, or there should occur any lapse or vacancy, then, in any such cases,

"upon application by either party to the controversy, the supreme court, or a judge thereof, shall designate or appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said contract or submission with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided, the arbitration shall be by a single arbitrator."
Section 5 provides that if any suit or proceeding be brought upon any issue otherwise referable to arbitration under a contract or submission as described in section 2, the court or judge, upon it so appearing, "shall stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement."

These four brief and simple sections of the Arbitration Law are "the changes wrought by this legislation" which change the whole procedure of arbitration from a haphazard voluntary attempt dependent wholly on the good faith of a party to a pending controversy, into a recognized and practically coordinate establishment for the administration of justice, potent for far reaching good and pregnant with the utmost possibilities for the relief of the congested courts, the preservation of good will and friendly relations between parties disputant; and the realization of the ideal of speedy, cheap and effective right and justice without "denial, delay or sale" to all parties concerned.

The law compels no man to agree to arbitrate; this is voluntary—the "will to arbitrate" must preexist to be operative; but once the agreement is duly made, it holds the evader to his contract obligations and compels the due performance. As correctly said by the Federal Supreme Court in Red Cross Line v. Atlantic Fruit Company, "The Arbitration Law deals merely with the remedy in the State courts in respect of obligations voluntarily and lawfully incurred."

In a lumnious sentence, Judge Cardozo, speaking for the Court of Appeals of New York, defines the scope and effect of the Arbitration Law: "Section 2 of the statute declares a new public policy and abrogates an ancient rule." The highest court of New York, in this first case under the new statute, proceeds to vindicate this new policy of the modern law:

"Arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow. This statute did not attach a new obligation to the (contract) already made. It vindicated by a new method the obligation then existing.

"The statute is assailed as inconsistent with Article I, Section 2 of the Constitution of the State, which secures the right of trial by jury. The right is one that may be waived [cases]. It was [is] waived by the consent to arbitrate."

12 Supra note 6, at p. 277.
13 Supra note 11, at p. 286.
The Berkovitz Case just cited covered two different suits, presenting distinct phases of the application of the law to agreements to arbitrate and attempts to enforce such agreements. The validity of the Arbitration Law and its application to existing contracts and pending action, were the questions involved. In one case the arbitration clause was in a contract made before the passage of the law (April 19, 1920), and the controversy over alleged breach of contract arose just prior to the passage of the law. In the other case both contract with arbitration clause and breach antedated the law, and an action in the courts had long been pending which it was sought to stay in order to have recourse to the contractual arbitration under the new law. The court held: "We think the Arbitration Law is applicable to pre-existing contracts, but not to pending actions." Thus it is settled that no suit may be brought after the enactment of the law on any contract containing a clause for arbitration; but neither can an action pending when the law went into effect be taken out of the courts by virtue of the subsequent validation of the arbitration clause, disregarded by filing the suit.

The court further held in accordance with abundant authority:

"The common-law limitation upon the enforcement of promises to arbitrate is part of the law of remedies (citing cases). The rule to be applied is the rule of the forum. Both in this court and elsewhere, the law has been so declared."16

This rule is reaffirmed by the Supreme Court of the United States in the Red Cross Line Case above cited.17

The statute was assailed, moreover, as abridging the general jurisdiction of the Supreme Court under Art. VI, Section 1, of the State Constitution. But this contention is swept aside by the Court of Appeals in the Berkovitz case:

"Jurisdiction exists that rights may be enforced. Rights are not maintained that jurisdiction may exist. The People, in establishing a Supreme Court to administer the law, did not petrify the law which the court is to administer [citing cases]. . . .

"The Supreme Court does not lose a power inherent in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation.

14 Laws 1920, Ch. 275.
18 Supra note 15, at p. 270.
19 Supra note 6, at p. 277.
"For the Right to Nullify is Substituted the Duty to Enforce."\(^\text{18}\)

As above stated, the general arbitration statute of the State, continued in force and effect by the 1920 Arbitration Law, provides that the judgment entered on an award "has the same force and effect, in all respects as . . . a judgment in an action; and it may be enforced as if it had been entered in an action in the court in which it is entered."\(^\text{19}\) The Civil Practice Act further provides, in Sections 2374 and 2375, the sole grounds upon which an arbitration award may be vacated or modified; the grounds for vacating the same being detailed, in substance as summarized in Section 2 of the Arbitration Law, as "such grounds as exist at law or in equity for the revocation of any contract." Hence, it is consistently and uniformly held by the courts that "any finding of fact or conclusion of law of an arbitrator will not be reviewed."\(^\text{20}\)

These are instructive cases which may be read to advantage but need not be more particularly cited here. All agree also in awarding hearty judicial approval to the new and highly endowed process of arbitration which the Appelate Division terms in the Goff Case\(^\text{21}\) as a device "to insure a speedy and conclusive determination of disputes between parties."

As indicated, the Supreme Court of the United States, in the case of Red Cross Line v. Atlantic Fruit Co.,\(^\text{22}\) has by an all but unanimous decision, approved the "new public policy" declared in the New York Arbitration Law; and even reversed on writ of certiorari, the holding of the New York Court of Appeals that the Law could not be made applicable to enforce an arbitration agreement contained in a maritime charter party. This case is of very far reaching consequences, as in effect it extends the potentialities of arbitral jurisdiction to nearly every possible human controversy and broadens its field of action to the ends of the earth, "from the rising of the sun to the going down thereof."

In this case, proceeding under the Arbitration Law, the Red Cross Line applied to the Supreme Court of New York, in April 1921, for an order directing the Atlantic Fruit Company to join with it in the arbitration of a dispute growing out of the charter of the steamship Runa, under a charter party made in November

\(^{18}\) Supra note 15, at p. 274.

\(^{19}\) C. P. A. § 1463.


\(^{21}\) Supra note 20.

\(^{22}\) Supra note 6.
1919, before the enactment of the Arbitration Law. As stated by the Federal Supreme Court:

"The substantive claim was that the master had not prosecuted the voyage with the utmost dispatch, and hence that certain amounts paid by the charterer should be returned."

The charter party contained one of the customary arbitration clauses, providing for the appointment of one arbitrator by each party, and the third by the two so chosen; the decision of the arbitrators, or any two of them, to be final and made a rule of court. The Red Cross Line duly appointed its arbitrator, but the Atlantic Fruit Company refused to join. Upon application by the Red Cross Line, the local Supreme Court ordered the Atlantic Company to proceed to arbitration as provided in the contract, and to appoint its arbitrator by a day fixed. This order was reversed by the State Court of Appeals under the opinion that "the controversy between the parties is one of admiralty; that under the Federal Constitution and the Judicial Code, such controversies are within the exclusive jurisdiction of the admiralty courts; and that the State has no power to compel the charter owner to proceed to arbitrate." But on certiorari to the Federal Supreme Court, these objections were forcefully overruled; and after an instructive review of judicial history and authorities, the Court ruled:

"This State statute is wholly unlike those which have recently been held invalid by this court.

"The Arbitration Law deals merely with the remedy in the State courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admirality [citing and distinguishing cases]. . . . .

"As the constitutionality of the remedy provided by New York for use in its own courts is not dependent upon the practice or procedure which may prevail in admiralty, we have no occasion to consider whether the unwillingness of the federal courts to give full effect to executory agreements for arbitration can be justified. Reversed."

The New York Arbitration Law is thus sustained and vindicated to its fullest extent, and its scope expanded to the utmost practicable limits. The general arbitration statute, above cited, excepts from the scope of arbitration only cases "where the controversy arises respecting a claim to an estate in real property in fee or for
life;” but expressly admits it in respect to all lesser estates and interests, and with respect to controversies over partition of real property, the boundaries of lands, and the admeasurement of dower.23 And, though not expressed, naturally divorce and separation, and criminal proceedings are by public policy excepted.

But with these limited exceptions, the scope of arbitral procedure and justice is all-comprehensive; its legitimate field is every other possible subject of controversy in contract and tort. There is no limitation, except those named, upon the competency of the parties to contracts to stipulate for arbitration of any and all subjects of controversy. And but one limitation has been set upon the power or the disposition of the courts to compel performance of the arbitration contract, to-wit, where the stipulation calls for arbitration outside the State. In such case, it has been held: “That while an agreement to arbitrate in a foreign jurisdiction, and before a foreign arbitrator, is not invalid or illegal, it cannot be enforced as between citizens of this State who are the parties thereto, by compelling them to go without the state in a foreign jurisdiction and before a foreign tribunal, there to arbitrate their disputes.”24 But in such case, the recalcitrant party does not dodge his obligation with entire impunity; he cannot maintain a suit in our courts in disregard of his agreement to arbitrate: “the remedy available under such circumstances in the courts of this state is to stay the trial of an action here by the party who refused to carry out his agreement to arbitrate, and who seeks the aid of our courts to enforce his claim therein.’’

This decision, denying recourse to the courts by the party who wilfully repudiates his contract obligation to arbitrate, will do much to discourage the dishonest practice in interstate cases, just as the statute makes it possible within the State. The case just cited was an interstate shipment from California to New York; and the contract contained a clause providing for arbitration of any dispute before the Arbitration Committee of the Fruit Growers Association in California. The New York party to the contract repudiated the arbitration clause. While the court held that it could not compel the repudiator to proceed to arbitration in another state, it did enforce the provision of Sec. 5 of the Arbitration Law which authorizes stay of any action brought in disregard of the agreement to arbitrate. The only recourse then, for either

23 C. P. A. § 1448, par. 2.
party, was suit in the courts of California, where specific performance of arbitration is not compelled.

At this point, and in this connection, attention may be called to two facts, which testify alike to the wide-spread appeal of the principle of arbitration and recognition of its merits, and to the importance of correcting anomalies in the law. Both indicate that such a situation will likely soon be impossible to occur, as arbitration promises soon to be interstate and country-wide in its operation and beneficent effects. One of these is the zealous work of the American Bar Association and of the Commissioners on Uniform State Laws, to bring about the adoption of a uniform Arbitration Law, containing the specific performance system of the New York Law, in all the States. The other is the Bill pending in Congress, with every prospect of passage into law, of a Federal Arbitration Law, with similar features, applicable in all cases of interstate and foreign commercial controversies. The successful accomplishment of one or both of these programs will be a signal triumph, giving increased sanction to the arbitral system, and greatly increasing its availability and use.

The radical reformation accomplished by the New York Arbitration Law, which has sufficiently been set forth, may be aptly summarized in the language of the unanimous decision of the Appellate Division, in the Berizzi v. Krausz case:25

"The Legislature (in enacting the Arbitration Law) manifested an unmistakable intention to establish a Forum for Arbitration in the place of the submissions to arbitrators which had hitherto been possible under the Code of Civil Procedure [now Civil Practice Act], and around which had grown up many fetters imposed by the courts in a laudable effort to protect the rights of litigants [citing cases].

"The disposition today is to afford the widest possible opportunity for arbitration confined only by those rules imposed by the Legislature. As was said in Matter of Berkovitz v. Arbib (supra), 'Section 2 of the Statute DECLARES A NEW PUBLIC POLICY.'"

This case of Berizzi v. Krauz well illustrates the great facilities of the arbitral system under the statute, and the entire freedom of the procedure in the regular courts. It may be taken as a convenient text for passing now from the legal phases of the New Arbitration to some of its more salient practical advantages in the

25 Supra note 3.
expeditious administration of justice, at the minimum of time, expense and legal uncertainty.

The case was that of the sale of a lot of bamboo meat skewers, made in China and imported under a contract containing the arbitration clause. Upon arrival, the skewers were rejected by the buyer as not merchantable because of bad quality. The seller thereupon sold the skewers on the market at a low price, and claimed the difference up to the contract price as damages for breach of contract. The other party refusing to arbitrate, the Supreme Court, on application, ordered the arbitration to proceed and appointed the arbitrator. The hearing was had, the award was rendered, and was confirmed by the court. A motion for re-argument was granted, and the award was vacated by the court,

"on the ground that the arbitrator has made extensive investigations upon his own initiative, and hence precluded cross-examination with respect thereto."

It appeared, that after the parties had presented their evidence and closed the hearing, the arbitrator had taken a number of the skewers, exhibits in the case, and had gone out into the market, interviewed numerous buyers, and ascertained that in fact the skewers were of bad quality and not marketable; the same facts were also reported to him by an assistant whom he had sent out on a like quest. The arbitrator himself presented an affidavit on the motion, in which he admitted: "It was on the strength of the personal investigation which the arbitrator made, in addition to the testimony and facts presented on the actual arbitration before him, that the deponent's decision was reached."

The lower court therefore vacated the award for the alleged misconduct of the arbitrator. On appeal to the Appellate Division, that Court, by unanimous opinion, reversed the order and sustained the award and the actions of the arbitrator. The Appellate Court said:

"In reaching his conclusion, the learned justice at Special Term would seem to have overlooked the fundamental difference between an arbitration and a trial.

"In an arbitration the arbitrator is frequently selected because of the knowledge which he has acquired of facts relating to matter in dispute from sources other than the parties to the controversy.

"To compel the arbitrator to follow the rules of evidence, such as the right of cross-examination in connection with all the
evidence considered by the arbitrator, . . . . in the end we will have some sort of modified trial. . . .

"While the respondent's contention might have carried much force when arbitrations were looked at askance, yet since the enactment of the Arbitration Law, it would seem that said section, to be consistent therewith, should be held as intending simply to provide the elementary requirements of honesty, full hearing, and impartiality [citing cases].

"In other words, the clear path would seem to require that the section above quoted (i.e. specifying grounds for vacating awards)—permitting the court to vacate an award, should be strictly construed in favor of the award."

With arbitration raised thus to a legal status, and the law itself having provided a "Forum for Arbitration" as a "new public policy," in the carrying out of which simply "the elementary requirements of honesty, full hearing, and impartiality" are the only essentials, let us notice some of the manifest advantages which the arbitral system affords in the settlement of legal controversies, whether of law or of fact or mixed or both.

Instead of three years, or a year, or any indefinite delay, it is apparent that arbitration may be fully effected and a final decision rendered, within a very few days. There is no loss of time, or the very minimum; the parties can meet at their convenience, by day or night, at the office or home of either or of the arbitrator. They bring their proofs, witnesses or documents, and their counsel or attorneys, if they so desire. There, in an atmosphere of quiet and peace, conducive to conciliation and harmony, the matters are submitted, and discussed, and decided, and the parties may go about their other affairs.

In going into a trial before a judge in court or before judge and jury, what a haphazard chance it is. The judge is a lawyer, may be quite unfamiliar with business, or totally ignorant of the special matter, or trade custom, or quality of goods brought before him. The jurors are gathered here and there, from every line of business or none at all; and are equally if not more unfamiliar with the intricacies or special features of the matter they are required to pass judgment upon. But the arbitrator is chosen by the parties, most often from the same line of business; and chosen, not only for his admitted fairness and impartiality, but because of his special or expert knowledge of the very business involved. In a word, he is chosen to decide, because he especially knows that business, and knows how to decide. Instead of having to call numerous, and often conflicting expert witnesses, to prove to a jury questions of
quality, or process, or trade custom, etc., the arbitrator, chosen from that particular business, knows in a moment all about the matters in dispute. He can decide not only more quickly, but far more surely and exactly right than judge or jury, for he decides as an expert upon the subject in dispute. Hence both parties are more likely to be satisfied with his award.

Arbitration itself suggests conciliation and harmony, and if held before a mutual friend, or a recognized expert, in the same line of business as the parties, in the office or the home, away from the atmosphere of the court room charged with the spirit of hostility, the previous friendly relations of the parties are much more certain to be maintained, and the course of their business relations continue uninterruptedly. There usually is no disagreeable or hurtful publicity given to the fact of a dispute between the parties, as is inevitable in a public lawsuit in court. When a difference arises over a business transaction, perhaps between parties long friendly and with important business relations, and they rush off to their respective attorneys, and each declares the attitude of the other party unjust and indefensible, and suit is filed, containing frequently charges of bad faith and dishonesty, the end of personal and business relations usually is abrupt, and ill-will and acrimony take their place in the feelings of both. But where a clause for arbitration exists in the contract, the initial disagreement is inevitably much less acute in its reactions, and the parties look forward to a speedy adjustment in closed hearings by arbitrators, rather than to a long and often bitter fight in court. So the moral, as well as the economic value of the principle of arbitration is estimably great and important as making for peace and good will.

Moreover, very valuable and important trade secrets or secret processes may be involved in the prospective controversy. If the case goes into the courts, the testimony disclosing these valued secrets is public and may be heard by any interested competitor, and through the press may be broadcasted to the public, so that the very valuable trade secret becomes public property and its special value to one or both parties is destroyed. Unless one of the parties resists compliance with the award, so that it becomes necessary for the other to file the award in court to compel performance, or unless both parties freely consent, there is no public record made at all of the whole matter; and even where the bare record of submission and award are filed in court, the evidence on which it is founded is not filed or published—so that the personal or business
harm, and maybe great damage to credit, which might result from public court proceedings, are eliminated.

The foregoing are among the most salient and apparent advantages of the arbitral procedure over the delays, costs and harmful publicity of court procedure. Moreover, with the award, rendered after a full and fair hearing, the matter is ended. There are no further long delays of costly appeals. All these are important among "the fundamental differences between an arbitration and a trial," as pointed out in the Berizzi-Krausz Case. These differences are well specified in another recent New York case. On a motion to confirm an arbitral award, the court said:

"There is no provision authorizing the court to vacate an award because it is against the weight of evidence or because perchance there is no evidence to support it.

"The strict rules governing an action are not applicable to a proceeding of this nature. An arbitration, while it partakes of the nature of a quasi judicial proceeding, is not such a proceeding in a technical sense. It is a domestic tribunal, as distinguished from a regularly organized court. The very existence of the of the tribunal depends upon the voluntary act of the disputants. They select their own judges. Its object and aim is to arrive at a just determination of the matters in dispute, and finally dispose of the same in a speedy and inexpensive way, and thus avoid any future litigation between the parties.

"The arbitrators are usually laymen, inexperienced in the technical rules of law, but usually possessed of a fund of common sense which enables them to do substantial justice between the parties. To require an arbitrator to follow the fixed rules of law in arriving at his award would operate to defeat the object of the proceeding. The proper court would still have to pass upon and decide the law and the facts as if no award had been made.

"The court has no supervisory powers over an award. If the arbitrators keep within their jurisdiction, their award will not be set aside because they have erred in judgment either upon the law or the facts."

This is the common law rule everywhere applicable to the proceedings and awards or arbitrators, and long antedates the special enforcement features of the new Arbitration Law. As the rule and its reason are stated by the Court of Appeals and the Appellate Division:

"The merits of an award, however unreasonable or unjust it

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may be, cannot be reinvestigated, for otherwise the award, instead of being the end of the litigation, would simply be a useless step in its progress."

"The Arbitration Law expressly provides that sections 2374 and 2375 (now Secs. 1457 and 1458, C. P. A.), among others shall apply to arbitrations. Those Code sections state the grounds on which an arbitration award may be vacated or modified: vacated for fraud, partiality, misconduct, or exceeding powers; modified for evident miscalculation of figures, mistake of person or matter of imperfection of form."

Thus are defined the scope, powers, procedure, and high efficiency of this "domestic tribunal," of the "forum for arbitration," existing from earliest times, and now given added dignity and status by the new Arbitration Law of New York, the greatest commercial state of the union and of the world. This sketch is already too full and too long to permit special review of the very similar statutes of England or New Jersey as they are modeled on the same broad and effective lines.

New Jersey has enacted an arbitration law modeled upon the New York Statute which went into effect on July 4th of last year. Within another twelve months a uniform arbitration law, embodying the provisions of the New York and New Jersey statutes will be submitted, beyond doubt, to the legislatures of all other states. Hence a thorough understanding of the subject by the entire legal profession is vitally important.

THE ARBITRATION SOCIETY OF AMERICA.

It remains but to make brief and special reference to a highly unique and very efficient organization dedicated to the single purpose of promoting the cause of arbitration under the new law, and of affording special facilities for the operation of its procedure, conducting a fully organized "Forum for Arbitration." Unique it is; for while there are today forty-seven of the largest organized industries and commercial organizations in New York City alone, which maintain and operate arbitration tribunals of their own within their respective lines of business, the Arbitration Society of America is organized to maintain and operate a special forum for arbitration open to all lines of business and to all men; and it has already sixty-five trade divisions for arbitration organized among the leading trades and industries of the city, a number

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steadily increasing, besides many filial organizations throughout
the state and generally over the country.

Many great institutions have had their origin in the inspiration
and initiative of one man. In like wise the Arbitration Society of
America is the concept and pre-dilect offspring of thought and
zealous activity of one man, former Judge Moses H. Grossman of
New York City. Always earnest in promoting the principle and
practice of friendly arbitration rather than litigation, he recognized
the great potentialities of the new arbitration law of New York,
and conceived the plan of an incorporated institution devoted to
the sole purpose of promoting that principle and practice. So was
it that on May 13, 1922, in association with a number of the lead-
ing factors in the public and commercial life of the city, the Arbi-
tration Society of America was incorporated, under the Mem-
bership Corporation Laws of the State, and at once began its
very active and altruistic career.

A graphic idea of the recognized importance of the movement
inaugurated by the Arbitration Society of America may be had
from the names of its Board of Governors, all men who are leaders
in the great financial, commercial and legal interests of the city
and state. They are: Jules S. Bache, Banker; Henry Ives Cobb,
Architect; Robert Grier Cooke, President of the Fifth Avenue As-
association; Moses H. Grossman, Former Judge, head of Law firm of
House, Grossman and Vorhaus; Charles L. Guy, Justice of the
Supreme Court of the State of N. Y.; Robert Lee Hatch, President
of the Rotary Club of New York; Almet F. Jenks, Former Pre-
siding Justice of the Appellate Division, Supreme Court, Second
Department, of New York; William B. Joyce, Chairman of the
Board, National Surety Company; Frederick Kernochan, Chief
Justice of the Court of Special Sessions; Samuel McCune Lindsay,
of Columbia University and President of the New York Academy
of Political Science; Marion McMillin, Banker and Vice-President
of the American Light and Traction Company; Samuel McRoberts,
President of the Metropolitan Trust Company; James A. O’Gor-
man, Former U. S. Senator—former Supreme Court Justice;
Thomas I Parkinson, Vice-President of Equitable Life Assurance
Co.; William C. Redfield, Former Secretary of Commerce in the
Cabinet of President Wilson; David A Schulte, President of the
Schulte Cigar Stores; Franklin Simon, President of Franklin
Simon and Co.; Frank H. Sommer, Dean of the Law School of
New York University; Harlan F. Stone, Dean of Law School of
Columbia University.
The first President of the Society, Mr. Emerson McMillin, died shortly after assuming the office, and his great influence and assistance were lost to it. His successor has not yet been selected from among the eminent men under consideration for the vacancy. In the meanwhile Vice-President Lindsay discharges the duties of the office; while the active executive work is directed by Judge Grossman, its founder and Vice-President of the Society.

Now with over one thousand of the leading business organizations of the City in active membership, it has conducted successfully over five hundred arbitration cases, involving every variety of question of law and of fact, and from a few thousand to over half a million dollars in money; and this is to the all but universal satisfaction of the parties concerned. The Society maintains executive offices at 115 Broadway, and a series of specially adapted audience rooms where the hearings are held. In each of the 65 trades or business organizations affiliated with it, the Society has lists of official arbitrators including the recognized leaders in those several branches, and the best known lawyers at the New York Bar, to act and who do act, to a large extent gratuitously, or for very nominal fees, as arbitrators in the various classes of controversies, as they arise and are submitted to the good offices of the Arbitration Society for settlement.

The Arbitration Society and its work have been endorsed by formal resolution by a meeting of 64 judges representing all the state and federal courts of the state, by the Commercial Law League of America, and by representatives of nearly every large trade and industry of the city, the latter as evidenced by the 65 trade guilds belonging to it and providing arbitrators for its work. Winners and losers alike in its many arbitrations bear witness, in hundreds of letters in its files, to the wide satisfaction which has resulted from the procedure. Every newspaper of the Metropolitan, and many in other cities and states, as well as most of the great metropolitan magazines, have united in giving the widest publicity to this new organ of judicial efficiency, and the most cordial endorsement and approval to its plan and work.

But one criticism, and that in a very friendly and regretful tone has been made, and that not against the principle of arbitration or its operation under the Law; but against the warp in human nature which leads so many to prefer the "law's delays" to the speedy and just procedure of arbitration. As this objection comes from a friendly and fair-minded source of much well-deserved influence; and as a like objection may have occurred to many other
minds, a few words may be here devoted to a practical reply to the criticism implied in the article referred to.

The New York Law Review, in a recent editorial article on arbitration, points to the great congestion of the court calendars in this District, with some 27,000 undisposed of cases and the consequent long delays before justice can be had; also to the number of active organizations maintaining arbitration machinery for the trial and settlement of controversies; and from this it draws the conclusion that arbitration as a means of settlement is not popular nor effective in relieving the critical conditions in the courts. The editor concedes that a main reason for this reluctance to resort to arbitration is that at least one party to every controversy feels that he is in the wrong and does not want speedy justice done, but prefers to take the chances of long delayed litigation. This then is not a defect of an arbitral procedure, but a defect of human nature consciously in the wrong, and hoping in the contingencies of delay to escape the rendering of right.

But the objection itself suggests remedy and cure for the evil. Naturally, such men, feeling themselves in the wrong and seeking advantage by delay, will not enter into an ex post facto stipulation to submit the controversy to arbitration. The remedy is very simple and complete: the clause for arbitration of any disputes which may arise, should be incorporated in the original contract between the parties. This simple device will, under the Arbitration Law, compel the parties to arbitrate, and the courts will enforce performance. No formal or technical words are required; any words such as "any dispute arising under this contract shall be subject to arbitration," fully ousts the law's delays and makes arbitration compulsory. It is of an ever-increasing custom to insert such clauses in contracts, or order forms, in letters which evidence the contract, even on letter-heads or bill-heads, or among the "conditions" frequently printed on the reverse side of such documents. The constant use of the "arbitration clause" in all kinds of written and printed contracts and correspondence forming contracts and in all memoranda of agreements is strongly urged by the Arbitration Society and by all the bodies actively interested in arbitration as a means of settlement of disputes among their members. When a contract, contemplating advantageous business, is being formed between two parties, they are in good humor and disposed to fair dealing; then is the time to insert the simple "arbitration agreement" which both will readily accept, as neither contemplates or desires dispute or litigation over the matter. Then if dispute does
thereafter arise, both parties must and may submit with good grace and good will to the arbitral settlement agreed to in advance and will likely go into and come out of it satisfied with its expeditious and inexpensive and just results, and with their previous good dispositions and business relations preserved.

This is arbitration under the New York Arbitration Law. The Arbitration Society of America welcomes communications in regard to its program and its work, and will give prompt and helpful response to any seeker after knowledge of the benefits of the arbitral method which it so earnestly advocates and promotes.