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Fritz Moses

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ARBITRATION IN INTERNATIONAL DISPUTES

TRADITIONALLY the settlement of disputes is a state function. Yet through the institution of arbitration the state is being more and more replaced in the exercise of its jurisdiction by private parties.

The development of arbitration, especially during the last decade, has been rapid in regard to its territorial extension as well as its intensity within most countries. Various governmental agencies and national and international associations of merchants and of lawyers have given it a great deal of attention with a view to its furtherance.¹

We should not close our eyes to the fact that the arbitration movement is the strongest possible expression of dissatisfaction with the existing jurisdictional machineries in the various countries. Lawyers and merchants, not satisfied with criticism, have been driven to self-help. In no other way can the arbitration movement be explained.

¹ *GOVERNMENTAL AGENCIES*: See especially in regard to the enforcement of foreign awards the Arbitration Protocols of the League of Nations of 1923 and 1927, and various treaties between European states since the War, furthermore resolutions of the Pan-American Congress in Cuba, 1928.

ASSOCIATIONS: Congress of the International Chamber of Commerce in Stockholm, 1927, Congress of the "Federation of Chambers of the British Empire" in Capetown, 1927. Conventions of the International Law Association in 1926 and 1928 and many more associations of national significance.

IN THE UNITED STATES: Statutes, favorable to arbitration, have superseded in the majority of states the common law doctrine of the revocability of arbitration agreements. Especially the New York Arbitration Law of 1920 and the Federal Arbitration Law of 1925 have given the arbitration movement an increased impetus. As Judge Cardozo says in *Berkovitz et al. v. Arbib & Houlberg, Inc.*, 230 N. Y. 261, 130 N. E. 288 (1921), the New York statute "declares a new public policy and abrogates an ancient rule." An ancient rule indeed, if we consider that it goes back to the decision in *Vynior's Case*, decided in 1609 (Coke's Reports, Part VIII, 81), and that the underlying reason for its hostility to arbitration was a very egoistic opposition of the courts to anything that would deprive them of jurisdiction. (See for the genesis and development of the common law rule on arbitration Judge Hough's opinion in *U. S. Asphalt Refining Co. v. Trinidad Lake Petroleum Co., Ltd.*, 222 Fed. 1006 (S. D. N. Y., 1915).

But even where the common law rule is still applicable, its doctrine of revocability is crumbling under the attack of the "new policy." Where Judge Hough in 1915, in spite of his own better opinion, felt duty-bound to adhere to the *stare decisis* rule, the Supreme Court of Colorado in a decision in 1925 has thrown overboard at least to some extent the common law rule, because "the reason upon which it was based does not appeal to us." *Ezell v. Rocky Mountain Bean and Elevator Co.*, 76 Colo. 409, 232 Pac. 680 (1925).

Whether arbitration will develop still further and maintain its place of importance, whether and to what extent its development deserves assistance, and how far state, law and lawyer should participate in the regulation of its function, depends upon its ability to exercise jurisdiction better than the court organizations as they exist today, and as they may exist after future reform.

Thus arbitration is a challenge, the greatest challenge that was made to the Anglo-Saxon law system since equity knocked at its door. That challenger was strong enough to establish itself as an equal beside the challenged system, although not strong enough to overthrow it; for law, invigorated by the new competition, had lifted its dusty wigs just in time to let in some of the new-fangled ideas. The result was on the whole a great improvement, but also a division into two systems of what was, by its very nature, one and indivisible, and with its new confusion and new technicalities which have not even yet been entirely overcome.

This experience, applied to the case of arbitration, tends to show, first, that we should be grateful to have in arbitration a means of re-examining our old court systems in the light, not only of a new theory, but of a new practice, and that the state should alleviate the way for arbitration so that it may develop unhampered and thus show its mettle; secondly, that the results of both systems should be compared carefully and without prejudice and the principles which have been proven successful in either system applied in the other where they fit into its structure; thirdly, that after arbitration has been developed sufficiently so that its advantages and disadvantages can be fully recognized, one system—whether it be more similar to the court-system or to the arbitration system—should be established on the basis of past experience without jealousies and without the dead weight of historical considerations.

There is, however, a kind of dispute which seems to be in a special class. These are disputes arising out of international trade. Whatever the outcome of the arbitration development in general will be, whether or not it will finally be absorbed by a reformed court-system, arbitration of international disputes seems to be destined to stay at least as long

as there are no international courts established for the settlement of private international cases; and the organization of such courts seems to be far off.²

International trade extends over the whole world, but courts—as they exist today—reach only as far as the boundaries of the state from which they derive their power. Court-systems being nationally bound, can work, if at all, in international cases only through complicated time- and money-taking methods of interlocking the legal systems of the countries involved. Arbitration, through its basic principle, its private character, seems to be better able to overcome the difficulties resulting from the international aspect of international trade disputes.

Where service is to be made outside of the jurisdiction of the court, where witnesses must be heard who do not reside in the country of the court, and where execution must be obtained in a country other than that where judgment has been rendered, the obstacles are often exasperating, and they are inherent in the nationally bound systems of courts. Some relief, it is true, has come from the Hague Conventions and various treaties concluded between European states after the World War. But the Anglo-Saxon countries have kept in proud but harmful isolation.³

If in the course of court proceedings witnesses have to be heard in another country, the time required, even where there are no difficulties in finding the witness and where the witness is willing to testify, ranges from three to six months. The procedure of setting in motion the machinery for hearing the witness in the foreign country differs in the various countries, and other difficulties are caused occasionally through the difference in the methods of hearing witnesses. All these difficulties become aggravated in some countries which have very technical rules of evidence.

² The idea of such courts is, so far as the writer knows, discussed now only by a few German lawyers, and not in very definite form. There may come a time where such plan will become a practical proposition. "If you only believe it, it is no fairy tale." Then the unique experience with the state and federal court-organizations in the United States and their relations to each other may be of great value.

³ England, though, has begun in 1929 to conclude treaties with continental countries concerning mutual legal assistance and has also signed the Arbitration Protocols of the League of Nations.

When a judgment has been obtained in another country than that where it must be enforced, not only is the procedure for having the foreign judgment recognized often cumbersome, but in many countries foreign judgments will be recognized only where there is a treaty between the countries or where reciprocity is guaranteed.

Arbitration has, in this respect, considerable advantages. The matter of service is ordinarily much simplified, and this applies also to the hearing of witnesses. And often for their testimony, there can be substituted other forms of evidence which are barred in some countries by over-technical rules of evidence, in defense of which nothing else can be said but that they have existed some hundreds of years.

Furthermore, it is possible to obtain in some countries execution on a foreign award, where execution on a foreign judgment could not be had.

Naturally, the rules in regard to arbitration differ in the various countries. Whether or not those advantages that have been mentioned can be had, depends upon the laws of the countries in question and often upon treaties which they have concluded, and must therefore be decided for each country separately.

In Germany judgments rendered by American courts are not enforced because of lack of reciprocity. In the case of foreign awards the question of reciprocity is not considered. Foreign awards will be enforced without a re-examination of the merits of the case. Only as to the form of the execution proceedings a debate has arisen whether the alleviated procedure, which the amendment to the Code of Civil Procedure introduced in 1925, can be applied also to foreign awards. But at the worst, execution on a foreign award could be had by what we may call an action on it without examination of its merits.⁴

Even in France, where arbitration has found recognition only very slowly and the arbitration clause in regard to future commercial disputes became valid generally only

⁴ See Nussbaum, *International Yearbook on Civil and Commercial Arbitration*, American Edition (published by the American Arbitration Association), pp. 24, 25, and for the latest developments also Vol. 2 of the Yearbook (German edition available only).

through a new law enacted in 1925, foreign awards will be enforced more easily than foreign judgments. Although various problems in regard to the international aspects of arbitration remain unsettled by the new law, the court decisions in the later years with negligible exceptions have made foreign awards enforceable in France without going into a re-examination of the merits of the case. It is interesting to note that very often the courts, in granting execution, have based their decision expressly on the distinction between an award as a private agreement and a foreign judgment as an act of sovereignty.⁵

In the Netherlands foreign awards, although no execution proceedings can be had on them, can be enforced through a contractual action without re-examination of the merits. Judgments, however, of foreign countries with which the Netherlands have no treaty in regard to their execution are treated much worse; neither by execution proceedings nor by a contractual action can they be enforced, because the theory of a judgment as a specialty is limited to the Anglo-American law systems and entirely unknown in the Netherlands.⁶

The situation is different in Austria. Here the foreign awards are treated like foreign judgments. A contractual action such as is admitted in Germany, Netherlands and various other countries cannot be had on a foreign award; and in order to obtain execution reciprocity must be guaranteed.⁷

Also in Italy foreign awards are treated like foreign judgments, but here reciprocity is not a requirement. However, various problems in connection with this subject are not yet settled in spite of the amendment of 1919 to Article 941 of the Code of Civil Procedure, which enumerated the requirements for foreign judgments and awards.

Those few examples will suffice to show that while the various countries differ considerably in the treatment of for-

⁵ Tribunal Civil Seine in *Journal de Droit International*, 1927, p. 436.

⁶ *Weekblad van het Recht*, No. 10,054 (1916) admitting an action on an award of the London Corn Trade Association, published in Nussbaum's *International Yearbook for Arbitration*, pp. 343-344.

⁷ Oberster Gerichtshof, Vienna, decision of December 16, 1908 (published in Nussbaum's *Yearbook*, pp. 353, 354) in which the Court refused the enforcement of an award of the London Corn Trade Association (see Note 6, Netherlands).

eign awards, in the majority of states awards will be enforced more easily than judgments. The Arbitration Protocol of the League of Nations of 1927 will tend to make this tendency still more pronounced.

There is another point to be considered. Courts are permanent institutions; they need not be formed for each particular case. This is of great importance. Not only would much time be lost if for each dispute special machinery would have to be set up; but it is hardly possible that such new organism could attain the efficiency of a permanent institution which has routinized part of its work and gained valuable experience.

An arbitration clause which leaves it to the parties to constitute an arbitral tribunal for the specific purpose of settling their dispute is therefore in most cases not advisable. If the defendant is recalcitrant the plaintiff must enlist in these cases the help of the courts, and then more time may be wasted through these preliminary court proceedings than if the whole dispute would have been referred to the courts for decision.

With the exception of cases of a special nature, it is impractical to agree to arbitration where no established machinery exists by which the arbitration proceedings can be handled.

Although the International Chamber of Commerce has established such an institution, it will be necessary in many cases to have arbitration machinery which is specially established for disputes between parties of two particular countries. The reason is that the different arbitration laws, in different countries, make different arbitration rules advisable. Often the specialization should go further, and arbitration machinery should be set up for disputes of parties between particular countries and of a particular trade.

There is an important field for Chambers of Commerce and Trade Associations. In England a number of Trade Associations and Exchanges have set up arbitration tribunals with detailed rules, to which disputes not only between English firms of the particular trade, or between an English and a foreign firm, but also disputes between foreign firms may be referred.

It is through these tribunals that the English viewpoint has to a great extent given its imprint on the forms of international trade.

In Germany another method is more widely used, that of making arbitration treaties between German Chambers of Commerce or Trade Associations and Chambers of Commerce or corresponding trade associations in another country. This method avoids giving one country the supremacy and, besides that, makes it possible to adapt its rules to the laws of the particular countries in question.

Reference to such permanent arbitral tribunals not only simplifies the procedure considerably, but it guarantees a high standard of jurisdiction.

It is easier for the parties to find capable arbitrators. The associations which have established arbitration machinery have lists of available arbitrators. These lists contain usually the names of men whose integrity is beyond question, and whose experience in arbitrating disputes is considerable. Usually each of the corresponding associations has two lists, one containing the names of merchants of the particular trade, the other containing names of jurists who are specially qualified to act as arbitrators on account of their knowledge of the laws and customs of both countries. From the first list each party selects as a rule one arbitrator and these two arbitrators or the association itself selects as third arbitrator one of the second list. In those cases where all three arbitrators are merchants it is at least provided that a jurist be present and available for consultation with the arbitrators, and, if possible, a jurist who is fully conversant with the different law systems involved.

I consider the participation of jurists in arbitral proceedings a *conditio sine qua non*. It is true that especially in commercial disputes the merchant's inherent feeling for justice and his practical grasp of business may often produce better results than great legal learning. But before either the knowledge of law or the feeling for justice can be applied, the case has to be analyzed, the evidence weighed and the main issues crystallized out of the mass of facts submitted. This is the domain of the lawyer. For this he is trained. The good business man wins success through his "business in-

stinct"—he works intuitively. This method does not help him in analyzing a complicated case. One knows how difficult it is for the lawyer to elicit the proper information from the layman, who has lived through the case. To do this is considered one of the lawyer's most important tasks. Is it believable that the merchant who is not able to present his own case to his lawyer in a clear and complete form, will suddenly be imbued with this faculty, necessary to decide a case justly, when he becomes an arbitrator? The value of the merchant as arbitrator lies in his knowledge and understanding of trade conditions; the value of the lawyer in his analytical ability. Only co-operation of both is a guaranty of permanently satisfactory work by the arbitral tribunal.

The co-operation of lawyers has furthermore the advantage of stabilizing the jurisdiction of the arbitral tribunal. There is nothing more detrimental than a continually changing attitude of courts or arbitral tribunals. As it cannot be expected that a merchant follows the jurisdiction of the arbitral tribunals and courts, how can it be expected that a tribunal without lawyers will consider precedents? That does not mean that arbitral tribunals should be bound by precedents in the way English and American courts are; it means only that, for example, one tribunal should not decide today that it is sufficient to deliver one copy of a bill of lading, while the same tribunal consisting of different arbitrators takes the next day the stand that a full set must be delivered without giving good reasons for the deviation from the previous decision. It is clear that only co-operation of lawyers will make a stabilization of jurisdiction possible.⁸

For the same reason it should be demanded that arbitrators give their reasons for the decision in writing. A number of arbitration laws make a written opinion a requirement for a valid award;⁹ others allow its omission only where the parties have expressly waived it.¹⁰

⁸ It is interesting to note that most codes based on the Spanish law demand that arbitrators always be lawyers. (Spain: Ley de Enjuiciamiento Civil Art. 790; also Cuba Art. 789; and others.)

⁹ Italy: Codice di Procedura Civile Art. 21; Netherland: Wetboek Van Burgerlijke Regtvoording Art. 637; Bulgary: ZPO. Sec. 1241; and others.

¹⁰ Germany: ZPO. Par. 1041 I No. 5 and II, but it is interesting to note that the Deutsche Juristentag 1925 suggested a change in the law making a

Besides, the duty of the arbitrators to give reasons for the decision in writing will do more than to stabilize jurisdiction. It will raise the standard of the decisions and it will give the public confidence in the tribunal. Everybody who has acted in a judicial capacity will confirm that many a decision was changed after the grounds were brought to paper and that by reducing his reasons to writing even the most conscientious will attain greater thoroughness. Lord Gottenham, the eminent English judge who, although working under a system which does not require written decisions, used to bring his decisions to paper, is said to have given the following explanation for his policy: "You cannot be sure that you understand your subject until you have written upon it."¹¹

In conclusion I may say: Arbitration is preferable to court proceedings in foreign trade disputes where countries are concerned in which the legal regulation of arbitration is favorable to the method of settling disputes. In any event, it must be possible to refer this arbitration to arbitration machineries established by chambers of commerce or corresponding trade associations in the different countries and organized under rules especially adapted to the conditions of the particular trade and the laws of the countries concerned.

FRTZ MOSES.

New York City.

written opinion obligatory. (Still different, Norway, in its new code of civil procedure, in force since July 1, 1927, which makes a written opinion necessary only when one of the parties has demanded it. Sec. 464.)

¹¹ See *Law Quarterly Review*, April, 1927, p. 183.

It is interesting to note that the "Law Society," the association of English solicitors, at its "Provincial Meeting" in Birmingham, 1926 advocated written opinions in order to improve the diligence of the arbitrators. *Solicitors Journal*, Vol. 70, p. 1003.