1-1-1960

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Wesley A. Sturges
Yale Law School

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ARBITRATION — WHAT IS IT?

WESLEY A. STURGES

The identification of arbitration as it is constituted in legal lore is not very difficult. There is a near consensus of judicial utterance and statutory provision posing it as a process for hearing and deciding controversies of economic consequence arising between parties. It begins with and depends upon an agreement of the parties to submit their claims to one or more persons chosen by them to serve as their arbitrator.

Certain significant legal requirements governing the hearing and decision of the claims submitted attach unless the parties stipulate against them or otherwise waive them; they attach without any necessity of their stipulation. These minimum legal requirements assure:

(1) Mutual rights of hearing. Each party is entitled to reasonable notice of time and place of hearing to be had before the arbitrators sitting in due quorum, an opportunity to present evidence in his own behalf relating to the matter in issue and an opportunity to cross-examine opposing evidence.

(2) Mutual rights that, after hearing, the arbitrators shall render such award on the issues submitted to them as they deem fair and just—whether or not according to law. To the award attach legal finality, conclusiveness and enforceability subject only to limited causes to defeat or vacate the award.¹

This generic identification of arbitration does not, of course, reckon with the details of distinctions between common law and statutory arbitration, nor with the declared distinctions between arbitration of commercial and labor-management causes. It does not take account of any precise similarities to or differences from processes of settling controversies frequently cited as “appraisals,” “valuations”

or miscellaneous methods of compromise or settlement. Nor does this identification comprehend so-called "compulsory arbitration."

In defining arbitration, it has been common in the law reports for judges to expand upon its general outline as set out above and to refer to it as a substitute for litigation in the courts. Thus: "Arbitration is the submission of some disputed matter to selected persons, and the substitution of their decision or award for the judgment of the established tribunals of justice." Again: "Broadly speaking, arbitration is a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in place of the tribunals provided by the ordinary processes of law." Similarly, "an arbitration is a substitute for proceedings in court"; also, "An agreement to arbitrate is really an agreement between parties who are in controversy, or look forward to the possibility of being in one, to substitute a tribunal other than the courts of the land to determine their rights."

The New York Court of Appeals has carried the idea that arbitration is a substitute for litigation to the point of ruling that arbitration under the arbitration statute should be limited to "justiciable" controversies. It has been ruled from time to time that the parties' controversy must qualify more or less for litigation in the courts or it cannot be arbitrated under the statute. Said the court on one of

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2 Reckoning with details of distinction and of similarity assigned in judges' opinions comparing arbitration and nonarbitral (but nonlitigious) processes of resolving parties' controversies leaves intact the foregoing general identification of arbitration. It is the standard of reference for arrangement of the similarities and such distinctions as have been determined. See, e.g., California Annual Conference of the Methodist Episcopal Church v. Seitz, supra note 1. Compare Dworkin v. Caledonian Ins. Co., 285 Mo. 342, 226 S.W. 846 (1920), with Citizens Bldg. of W. Palm Beach, Inc. v. Western Union Tel. Co., 120 F.2d 982 (5th Cir. 1941); American Cent. Ins. Co. v. District Court, 125 Minn. 374, 147 N.W. 242 (1914); Gord v. F. S. Harmon & Co., 188 Wash. 134, 61 P.2d 1294 (1936).

3 Concerning the coinage of "compulsory arbitration" for legal circles, see Chas. Wolff Packing Co. v. Court of Industrial Relations, 267 U.S. 552, 564 (1924); State v. Howat, 116 Kan. 412, 415, 227 Pac. 752, 754 (1924), aff'd sub nom. Dorchy v. Kansas, 272 U.S. 306 (1926).

4 Deal v. Thompson, 51 Okla. 256, 258-59, 151 Pac. 856, 857 (1915).


6 California Annual Conference of the Methodist Episcopal Church v. Seitz, 74 Cal. 287, 291, 14 Pac. 839, 841 (1887).

these occasions: "Arbitrators under the Arbitration Law deal with the same kinds of controversies that are dealt with by the courts. . . . The arbitration statute now in force is confined to controversies that are justiciable under the law as it exists today."8

It seems that these decisions have been influenced more or less by the section of the New York statute providing for submission thereunder of existing disputes "which may be the subject of an action." The may has been resolved into must; the controversy must be "justiciable" or it cannot be arbitrated under a statutory submission.9 This stricture upon arbitrability under the New York statute has not been imposed on common law arbitration.10

It should be noted, if not emphasized, that in the foregoing identification of arbitration as a substitute for litigation, the substitute (arbitration) bears little resemblance to the litigation process. This is true, because the arbitral proceeding can be initiated and carried out without traditional pleadings. Accordingly, the validity and effect of such pleadings do not become of concern.11 Moreover, it is generally for the arbitrator to determine finally whether to receive or reject testimony or other evidence—subject to required deference for the parties' right of hearing.12 Traditional presumptions and burdens of


Some (a minority) of the older arbitration statutes have provided for arbitration thereunder of controversies "which might be the subject of a suit or action," or which "may be the subject of a civil action." Sturges, supra at 199-210. No statute reads—nor does the New York statute say—"which must be the subject of a civil action." These clauses are of doubtful significance at best. See Matter of Arbitration between Transpacific Transp. Corp. and Sirena Shipping Co., 9 App. Div. 2d 316, 193 N.Y.S.2d 277 (1st Dep't 1959). They might well be counted as directory, designed only to limit arbitration thereunder to civil causes as contrasted with claims resting upon criminal offenses. It would be adequate if these clauses were construed to recognize that a claim that cannot be made the basis of suit because of illegality cannot be submitted to arbitration. See, e.g., Richards v. Holt, 61 Iowa 529, 16 N.W. 595 (1883); Tomlinson v. Hammond, 8 Iowa 40 (1859). See also Loving & Evans v. Blick, 33 Cal. 2d 603, 204 P.2d 23 (1949); Western Union Tel. Co. v. American Communications Ass'n, 299 N.Y. 177, 86 N.E.2d 162 (1949); Smith v. Gladney, 128 Tex. 354, 98 S.W.2d 351 (1936). In the few cases litigated under these provisions outside New York, the foregoing restriction does not appear to have been imposed.

11 See, e.g., Tuskaloosa Bridge Co. v. Jemison, 33 Ala. 476 (1859).
12 This right of hearing is expressly assured in many of the arbitration statutes, as at common law, by making it cause to vacate an award when "the arbitrators were
proof of the law of pleading and of the law of evidence do not govern. Unless the parties require otherwise, the arbitrator generally may disregard (or estimate and follow) what might be the law of the case were it to be established in litigation;\textsuperscript{13} and distinctions between “issues of fact” and “issues of law” as conceived in the law of civil procedure have no comparable role in arbitration.\textsuperscript{14} In short, unless the parties require otherwise in the given case, arbitration displaces all significant aspects of civil litigation except the right of hearing as indicated above. To restrict it to “justiciable” controversies, as if in deference to the scope of civil litigation, can claim little validity in the prevailing conception of arbitration.

In contrast to the foregoing identification of arbitration as a substitute for litigation is a less prevalent identification whereby arbitration is advanced as a part of litigation. This has not proved reliable or helpful. A group of cases in the federal courts, involving the guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy.” N.Y. Civ. Prac. Act § 1462(3).

\textsuperscript{13} A very few of the arbitration statutes (mostly older ones) prescribe more or less explicitly (in disregard of common law) that the arbitrator must “follow the law” in an arbitration thereunder. The more recent arbitration statute of Pennsylvania (1927) prescribes that the court shall make “an order modifying or correcting the award ... where the award is against the law, and is such that had it been a verdict of the jury the court would have entered different or other judgment notwithstanding the verdict.” Pa. Stat. Ann. tit. 5, § 171(d) (1930). See Pennsylvania Elec. Co. v. Shannon, 377 Pa. 352, 105 A.2d 55 (1954). “Some statutes may be found to command the arbitration or to defeat entirely the parties’ agreement for arbitration. See Wilko v. Swan, 346 U.S. 427 (1944).”

\textsuperscript{14} Arbitration has been referred to as a “legitimate and conclusive method of determining facts and issues of law as between the parties to the contract of submission.” Note, 27 St. John’s L. Rev. 350, 351 (1953). (Emphasis added.) To like effect, see the opinion in Fudickar v. Guardian Mut. Life Ins. Co., 62 N.Y. 392 (1875). Unless the parties require otherwise, the agenda of the arbitrator embraces no division of “facts” and “law” as conceived in civil litigation; the arbitrator is no compound of judge and jury as established in civil procedure; the arbitrator is to hear the parties and decide as he deems fair and just on the total showing as made by the parties.

A few of the arbitration statutes have prescribed more or less precisely, in accord with requirements prescribed for referees, that an award thereunder shall “state the facts found and the conclusions of law separately.” The Iowa Supreme Court held such a provision ineffective. “The law requires the arbitrators,” said the court, “to make an award—not facts found and legal conclusions.” McKnight v. McCullough, 21 Iowa 111, 114 (1866).

The provision has given rise to considerable litigation in Nebraska. The vagaries of judicial application of the provision are best indicated by the following Nebraska decisions: In re Johnson, 87 Neb. 375, 127 N.W. 133 (1910); City of O’Neill v. Clark, 87 Neb. 760, 78 N.W. 256 (1899); Burksland v. Johnson, 50 Neb. 858, 70 N.W. 388 (1897); Westover v. Armstrong, 24 Neb. 391, 35 N.W. 843 (1888); Graves v. Scoville, 17 Neb. 593, 24 N.W. 222 (1885); Sides v. Brendlinger, 14 Neb. 491, 17 N.W. 113 (1883); Murry v. Mills, 1 Neb. 456 (1871).
appealability to the court of appeals of orders by the district court under the United States Arbitration Act, should be noted in this connection. Whether or not the actual decisions on appealability might plausibly be sustained on another rationale is not considered here. The identification of arbitration as an accessory to litigation is the point of present concern.

In Schoenamsgruber v. Hamburg-American Line, the Supreme Court, in an action in admiralty, ruled out the appealability of orders to proceed with arbitration and to stay trial pending arbitration entered by a district court under the United States Arbitration Act. The Court held that these orders of a district court were not "final"; nor were they "interlocutory injunctions" so as to qualify for appeal under pertinent statutes. In the course of its opinion the Supreme Court took the position that: "The orders appealed from merely stay action in the court pending arbitration and filing of the award. . . . And plainly, so far as concerns appealability, they are not to be distinguished from an order postponing trial of an action at law to await the report of an auditor." There is, however, no such reporting back by the arbitrator to the court as in the case of an auditor; and the course of the proceedings and the making of the award of the arbitrator are free from legal prescriptions governing reference to an auditor. Indeed any similarity of the situations seems to lie at best in the formal structure of the order of stay.

In Murray Oil Products Co. v. Mitsui & Co., Judge Learned Hand, dealing with a stay of trial pending arbitration under Section 3 of the United States Arbitration Act (on matters other than appealability of the order of stay of trial), went the foregoing opinion of the Supreme Court one better in making arbitration a function of the pending litigation. "Arbitration," he said, "is merely a form of trial, to be adopted in the action itself, in place of the trial at common law: it is like a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure, Rule 39(c), 28 U.S.C.A. following section 723c. That is the whole effect of § 3." This view was subsequently

17 294 U.S. at 457. (Emphasis added.) As appears earlier in the opinion of the Court in this case and in the report of the case in the court of appeals, The Oakland, 70 F.2d 234 (9th Cir. 1934), the district court had granted not only an order for stay of trial pending arbitration, but also a general order to proceed with arbitration—all as contemplated in § 8 of the United States Arbitration Act, 9 U.S.C. § 8 (1958). Id. at 456.
18 146 F.2d 381, 383 (2d Cir. 1944). (Emphasis added.)
endorsed by the same court in 1953 in Stathatos v. Arnold Bernstein S.S. Corp.\(^{10}\)

In 1956 we appear to have come to an end of this analogizing based on such remote resemblances—at least for the courts of the United States. In that year in Bernhardt v. Polygraphic Co. of America,\(^{20}\) Justice Douglas, speaking for the Court, expressly disagreed with the foregoing rationale as set out in the Murray Oil Products case. And in the following year, in Goodall-Sanford, Inc. v. United Textile Workers,\(^{21}\) Justice Douglas, for the majority of the Court, took occasion, after expressly passing over the Schoenamsgruber case,\(^{22}\) to make the point that:

Arbitration is not merely a step in judicial enforcement of a claim nor auxiliary to a main proceeding, but the full relief sought. A decree . . . ordering enforcement of an arbitration provision in a collective bargaining agreement is, therefore, a “final decision” [thereby qualifying for appeal] within the meaning of 28 U.S.C. § 1291.\(^{23}\)

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\(^{10}\) 202 F.2d 525 (2d Cir. 1953). See also Bernhardt v. Polygraphic Co. of America, 218 F.2d 948 (2d Cir. 1955), rev’d, 350 U.S. 198 (1956). Similarly, in an earlier case, Hyman v. Pottheg’s Exrs, 101 F.2d 262 (2d Cir. 1939), Judge Learned Hand had generalized that “however informal, an arbitration is a kind of trial, and the arbitrators do not ordinarily take sides.” Id. at 265. (Emphasis added.) Again, Nolan, P.J., dissenting in Madawick Contracting Co. v. Travelers Ins. Co., 281 App. Div. 754, 118 N.Y.S.2d 115 (2d Dep’t 1953) (mem.), rev’d, 307 N.Y. 111, 120 N.E.2d 520 (1954), urged that “A hearing before arbitrators, although informal, is nevertheless a trial.” Id. at 756, 118 N.Y.S.2d at 118.

On the other hand, in Wilko v. Swan, 346 U.S. 427, reversing 201 F.2d 439 (2d Cir. 1953), respondent’s argument that arbitration “is merely a form of trial to be used in lieu of a trial of law” failed him on the issues resolved by the majority in that case. Compare Frankfurter, J., dissenting, 346 U.S. at 439.

No authorities have been observed translating “a trial” into “an arbitration.”


\(^{21}\) 353 U.S. 550 (1957).

\(^{22}\) Id. at 551. See also Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955); In re Pahlberg, 131 F.2d 968 (2d Cir. 1942).

\(^{23}\) 353 U.S. at 551-52. The Supreme Court of Louisiana voiced like views in Housing Authority v. Henry Ericson Co., 197 La. 732, 2 So. 2d 195 (1941), with respect to arbitration under the Louisiana arbitration statute, even though the given arbitration agreement provided that “The procedure and rules of evidence applicable to proceedings in the courts of the State of Louisiana shall apply to the proceedings of arbitration.” Id. at 743, 2 So. 2d at 198. See also Snyder v. Superior Court, 24 Cal. App. 2d 263, 74 F.2d 782 (1937); In re Curtis and Castle Arbitration, 64 Conn. 301, 30 Atl. 769 (1894); Alderman v. Alderman, 296 S.W.2d 312 (Tex. Civ. App. 1956).

Holding that an order under the United States Arbitration Act appointing arbitrators was “final” and appealable, Judge Learned Hand had declared in Krauss Bros. Lumber Co. v. Louis Bossert & Sons, 62 F.2d 1004, 1005 (2d Cir. 1933), that: “The purpose of arbitration is essentially an escape from judicial trial . . . . So far as the arbitration proceeding itself is concerned, the last deliberative action of the court is the appointment of the arbitrators, who thereupon take over the controversy and dispose of it.” And in American Almond Prods. Co. v. Consolidated Pecan Sales Co., 144 F.2d 448, 451 (2d Cir. 1944), he generalized that “Arbitration may or may not be a desirable substitute for trials in court; as to that the parties must decide in each
The differentiation of submissions to arbitration from submissions to "auditors," "masters," "referees" or the like long predated the novel analogies indulged in in the foregoing opinions in the Schoenamsgruber and Murray Oil Products cases. The distinction generally had come about in situations wherein the parties had started out in litigation but had come to agree upon the submission of their controversy to arbitration before the action or suit was concluded. Such submission of pending actions or suits to arbitration was generally recognized for its difference from reference of such causes to "auditors," "masters" or "referees." Thus, the Court of Appeals of Maryland commented upon such submissions to arbitration as follows:

We think further, that the arbitrators were not bound to have stated in detail the grounds upon which they came to the conclusion, that nothing was due to the appellant. It was not their duty to perform the office of auditor or master in Chancery, and report facts for the decision of the Court; but to state the result of their examination, which according to the express terms of the submission, was to be final. Kyd on Awards, 345; where the distinction is taken between the duty of a master and that of an arbitrator, the latter is instituted judge of the facts without appeal; the former is only a minister to prepare something for the Court, which is really the judge; and when by agreement of the parties, the award of the referees is to be final, their power seems to be more of a judicial than a ministerial character.24

In line with the foregoing view disassociating arbitration from litigation, arbitration has generally been set apart from an "action," "suit" or "other proceeding" as well.25 To identify arbitration as an "action," "suit" or "other proceeding" seems as unreliable as to identify it as any part of a litigation for any purpose. There being no

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25 N.Y. Civ. Prac. Act § 1459 declares that the "arbitration of a controversy" under the statute "shall be deemed a special proceeding." This identification does not seem to pose arbitration as being more closely akin to litigation than otherwise. The utility or function of the provision is not clear; it is sometimes cited to court proceedings relating to the award—not to the arbitration. See Matter of Arbitration between Morris White Fashions, Inc. and Susquehanna Mills, Inc., 295 N.Y. 450, 68 N.E.2d 437 (1946) (special proceeding determined by court review of award). See also Accito v. Matmor Canning Co., 128 Cal. App. 2d 631, 276 P.2d 34 (1954).
court, pleadings or rules of civil procedure to govern and there being little constraint by the law of evidence or by what might be the substantive law of the cause were it in litigation, unless the parties agree otherwise, it is difficult to catch any substantial resemblance between arbitration and an "action," "suit" or "other proceeding."

Judicial refusal to include arbitration within these categories of litigation appears in various contexts in most of the American cases.\textsuperscript{26} Thus, an arbitration under the Alabama statute and proceedings thereunder to obtain entry of judgment on the award did not constitute a suit subject to an "act to regulate judicial proceedings." Arbitration, said the Alabama Supreme Court, "is a proceeding before triers chosen by the parties themselves. It is not an action commenced in any court, in which there may be an appearance term, a pleading term and a judgment term."\textsuperscript{27} Similar ruling was made with respect to an arbitration and award under an arbitration statute which fashioned the arbitration after an amicable action. This statute was like some others of the older type under which the parties filed their submission agreement in a court and thereby invoked its jurisdiction to facilitate the arbitration, confirm the award and enter judgment or to vacate, modify or correct the award. The court held that neither a foreign corporation's participation in bringing on the arbitration nor its initiation of the proceedings in court to confirm the award and have judgment entered offended a statute providing that a foreign corporation without a license to do business in the state could not "maintain any suit or action, either legal or equitable, in any of the courts of this state, upon any demand." Said the Texas court:

It is our view that the court referred to in the statute from which foreign corporations were excluded is a court exercising judicial powers through officials selected to preside over established tribunals of justice,

\textsuperscript{26} No instance has been observed of judicial or legislative identification of an "action" or "suit" as arbitration.


In Weston v. City Council, 27 U.S. (2 Pet.) 448 (1829), Chief Justice Marshall voiced a definition of a civil "suit" which frequently has been quoted or paraphrased in whole or in part with approval. (The case involved an inquiry whether or not a writ of prohibition constituted a "suit" for the purpose at hand.) "The term," said the Chief Justice, "is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit." Id. at 464.
and before a court which can force a litigant to come for the adjudication of his rights. It does not mean a board or [sic] arbitration, created by agreement of the parties. . . . If the parties make an agreement to settle their dispute out of court, arising out of a legal contract, courts of this state will not interfere, especially when they follow a method conferred on them by the Legislature. We do not think a trial before arbitrators is a "suit or action" within the meaning of article 1318.28

It remains to take account of Madawick Contracting Co. v. Travelers Insurance Co., as decided by the New York Court of Appeals in 1954.29 It involved an action for a declaratory judgment to determine whether or not the defendant insurer was required, under the terms of its policy, to defend the insured-plaintiff in an arbitration and pay any award that might be rendered against plaintiff. The plaintiff, a subcontractor, undertook in the subcontract to indemnify the general contractor against loss and expense incurred by reason of liability imposed on him by law for damages caused by or arising out of plaintiff's work in carrying out the subcontract, and further to provide various forms of liability insurance. The subcontract also included a general arbitration provision.

Pursuant to the subcontract, plaintiff procured the required indemnity insurance from defendant, Travelers Insurance Company. The insurer was advised of the foregoing provisions of the subcontract when it issued its policy to plaintiff. Furthermore, the insurer's representatives had read the contract before issuing the policy, under which the insurer undertook "to pay on behalf of the insured all sums which the insured shall become obligated to pay" under the subcontract, and also to "defend . . . any suit against the insured" seeking damages under the subcontract; but "no action shall lie against the company [insurer] . . . until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant, and the company."30

The general contractor made claim for property damages against


30 281 App. Div. at 754, 118 N.Y.S.2d at 115-16.
the plaintiff, subcontractor under the subcontract, and demanded arbitration. Plaintiff called upon the insurer to defend in the arbitration; insurer refused, replying that it could not consent to the proposed arbitration, nor defend the insured in the arbitration proceeding nor be bound by the result of the arbitration, as it did not regard an arbitration proceeding as a suit against the insured within the meaning of the policy or an adverse finding as liability imposed by law. The New York Court of Appeals held that the insurer was obligated to defend plaintiff in the arbitration and to pay the amount of any award against plaintiff.

The court of appeals gave its attention chiefly to the point whether or not an arbitration should be held to constitute, under the terms of the policy, "any suit" which insurer had agreed to defend in the insured's name and behalf on the condition that no action should be brought on the policy until the amount of the insured's obligation to pay had been finally determined "by judgment against the insured after actual trial" or by compromise settlement.\(^3\)

The court translated the arbitration into "trial" and "judgment" as follows:

Here, by issuing an insurance policy to implement a construction contract which shows on its face that liability under the policy may result only through an award in arbitration proceedings, unless the adverse party elects to waive arbitration, the carrier is deemed to have meant the word "trial" as used in this policy to include arbitration proceedings, and to have intended that "judgment" shall include such judgments as are entered upon confirmation of arbitration awards pursuant to section 1464 of the Civil Practice Act, which by section 1466 are given the same force and effect after entry as a "judgment in an action".\(^2\)

The court came to this conclusion relying chiefly, it seems, upon the fundamental rule in the construction of all agreements, namely, ascertaining that mythical abstraction (used even when the parties are in dispute over the matter), "the substantial intent of the parties."

It is thought that a more plausible rationale for the result reached would involve (1) discarding translation of the arbitration into "any suit," "trial" and "judgment" as used in the policy, and (2) recognizing the insurer's policy as having been issued to cover the insured's stated obligations arising under the subcontract—including the arbitration provision therein—thereby making the insurer a party to the arbitration provision and subject to the rights and obligations relating thereto as provided in the arbitration statute.

The court of appeals was convinced that the insurer became a

\(^3\) 307 N.Y. at 116, 120 N.E.2d at 522.
\(^2\) Id. at 119, 120 N.E.2d at 523-24.
party to the arbitration provision in the subcontract, for "when an insurance company contracts to indemnify under such circumstances as to protect the insured against a particular liability imposed upon it by a construction contract, the insurer should be construed to have promised to do so in accordance with the requirements, terms and conditions of the agreement." Accordingly, the proper and adequate remedy of the insured in this case would have been, it seems, to have made application under the arbitration statute against the insurer for an order to proceed with arbitration. Fit accompaniment would be a reading of the arbitration and award out of "any suit," "trial" and "judgment" as written in the policy.

In several cases the judiciary has considered whether or not the holding of arbitral hearings and the making of awards, or either, constitutes the carrying on of "judicial business" or "judicial proceedings" or the doing of "judicial acts" in violation of the Sunday laws. Here again the "judicializing" of arbitration has not been very persuasive in resolving the issue at hand. The general question has not been extensively litigated in recent times.

New York courts have manifested more readiness than others to invalidate both Sunday arbitral hearings and arbitral awards published to the parties on Sunday by identifying them as "judicial proceedings," "judicial acts" or the like. In the early case of Matter of Arbitration between Picker and Marcus, the losing party had objected to a Sunday arbitration proceeding and requested the arbitrators to adjourn to a weekday. The arbitration was held to have offended the New York Sunday statute providing that "A court shall not be opened, or transact any business on Sunday, except to receive a verdict or discharge a jury." (The award was signed by the arbitrators and delivered to the parties on a weekday.) Said the court: "A statutory arbitration, such as this was, is a judicial proceeding provided for and regulated by the Code of Civil Procedure. The arbitrators sit as a court, or at least perform a statutory judicial function."

The court also took account of the action of the arbitrators in going forward with the hearing over defendant's objection and in denial of his request for adjournment and found this sufficient misconduct to vitiate the award. Said the court in this connection:

In our opinion, to proceed with the hearing of the arbitration on Sunday, in the face of the objections and protest of one of the parties to it, was illegal, and constituted misconduct on the part of the arbitra-

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33 Id. at 118, 120 N.E.2d at 523.
36 Id. at 91, 114 N.Y. Supp. at 292.
tors which vitiated their award. The cases cited to the contrary are not in point. In neither of them did any party object at the time to going on upon Sunday. In one case (Isaacs v. Beth Hamedash Society, 1 Hilt. 469) all the parties were Hebrews, who observed their Sabbath on Saturday, and the parties and witnesses attended voluntarily without objection. In the other (Ehrlich v. Pike, 53 Misc. Rep. 333) there were a number of meetings of the arbitrators, and there was no meeting held on Sunday at which the parties and witnesses were required to attend. It merely appeared that "the award was discussed and practically agreed upon" on that day.

Quite clearly the Picker decision was adequately justified, without more, by the manifest arbitrariness of the arbitrators in refusing the given request for adjournment by the defendant.

In an earlier New York case, Story v. Elliott, it was held that an award made and published to the parties on Sunday was void under common law rules invalidating a "judicial proceeding" held on Sunday. In Matter of Arbitration between Brody and Owen, decided in 1940, the appellate division reaffirmed the views of both Story v. Elliott and Picker. The hearing was held (over the radio) on Sunday and the award was rendered and published to the parties on the same day. In invalidating the award, the court found that the submission was fraudulently induced, that the hearing was arbitrarily conducted, and also that the hearing was conducted primarily for public entertainment thereby constituting a fraud on the determination of justice.

37 The court observed in the Isaacs case that "the arbitrators sat, heard the parties and witnesses, and signed the award on Sunday, but it was dated as of the next day and was delivered to the parties on Monday." This, said the court, meant that the award was made and published on Monday, and, therefore, did not offend the Sunday law. Isaacs v. Beth Hamedrash Soc'y, 1 Hilt. 469, 474 (N.Y. City Ct. of C.P. 1857). "Our statute prohibits servile labor or working on Sunday, but the prohibition is declared not to be applicable to those who uniformly keep the last day of the week, called Saturday, as holy time, and do not labor or work on that day, provided their labor shall not disturb other persons in their observance of the first day of the week, as holy time. 1 Rev. Stat. 675, § 70. It was not unlawful, therefore, for the parties and witnesses here, being all Israelites, to assemble together on Sunday, and investigate, deliberate upon, and arbitrate the matter in controversy." Id. at 473.

The court also indicated that it very much doubted that the proceedings on Sunday partook of the nature of a "judicial proceeding," but if they were to be so regarded "still it would not render their subsequent award void." Said the court in this connection "Sunday is not dies juridicus for the giving of judgment, or the awarding of judicial process, but it may be for other matters connected with judicial proceedings." Id. at 474.

The court concluded "that the proceedings before the arbitrators, under the circumstances, would not in validate [sic] their award, which purported upon upon [sic] its face to have been made, and was actually delivered and published on Monday." Id. at 475-76.

39 8 Cow. 27 (N.Y. Sup. Ct. 1827).
40 259 App. Div. 720, 18 N.Y.S.2d 28 (2d Dep't 1940) (mem.).
But the court also saw fit to add that the hearing and award were void under the Sunday law. The court said on this point:

Arbitration is a judicial proceeding and arbitrators perform a judicial function. . . . The proceedings were, therefore, in violation of section 5 of the Judiciary Law, which prohibits judicial proceedings on Sunday, with certain exceptions not pertinent here. . . . The statute expresses the public policy of the State, and cannot be waived.41

A Missouri court42 declined to apply that state's Sunday laws in the following case. The arbitral hearing in a statutory arbitration was held on Sunday. The parties and arbitrators were Jews; the hearing was had in a synagogue. The arbitrators agreed upon their award on that day (Sunday), but the award was not signed or published to the parties until Monday. The arbitral hearing consisted of hearing the parties' unsworn statements; there were no other witnesses. The court took the view that the hearing of the unsworn statements of the parties did not constitute a judicial hearing such as is prohibited at common law, nor did it transgress the Missouri Sunday statute which was similar to the New York law.

To issue subpoenas, to swear witnesses and to hear the testimony of such witnesses would be judicial acts that could not be lawfully done on Sunday but none of these things was done in this case, and we perceive no ground on which it may be said that the arbitrators were performing a judicial act when they met informally, listened—not to evidence as that term is understood in law, but to the unsworn assertions and harangues of the parties and, by their consent, considered and determined the controversy between them on those forensic efforts alone and without resort to legal evidence.

The so-called hearing of the case was not a judicial act and since the formal award was not made and published on Sunday but on the following Monday, it is not void though it formally expressed a conclusion the arbitrators reached at the end of a debate heard on Sunday. . . .

Under our statutes . . . [referring to the arbitration statute] the award is not a judgment, but conceding, as we do, that its making and publishing constitute a judicial act, the time of the performance of such act is deemed in law to be coincident with the publication.43

The Supreme Court of Vermont has taken arbitrations and awards out of the Sunday laws by reasoning quite at variance with the New York views and without regard for the limitation of situation relied upon in the Missouri case. In Blood v. Bates,44 decided in 1858, the court was presented with a record showing that the arbitral hearing,

42 Karapschinsky v. Rothbaum, 177 Mo. App. 91, 163 S.W. 290 (1914).
43 Id. at 94-95, 163 S.W. at 291.
44 31 Vt. 147 (1858).
held on Friday and Saturday, was closed shortly before midnight on Saturday, the arbitrators publishing their award to the parties about 3 a.m. on Sunday. The court sustained the award and, in explaining its position, noted that defendant claimed that an arbitration award was a judgment and therefore void at common law if rendered on the Sabbath. The court conceded that a judgment rendered on the Sabbath was void at common law, the Sabbath being regarded as a day on which no judicial act can be done, and that, should an award of arbitrators be a judgment, it of course could not be legally rendered on the Sabbath. But the court did not think an award was a judgment within the legal meaning of the term. As a board of arbitrators is created by contract between the parties, such board can exist only by the mutual assent of both parties. Since a board of arbitrators is not a court or a judicial tribunal in any proper sense of these terms, it has none of the powers that appertain to courts to regulate their proceedings, or to enforce their decisions.

An award, when made, is more in the nature of a contract than of a judgment; it is but the consummation of the contract of submission, its appropriate and legitimate result.\(^\text{45}\)

\[\ldots\]

The case was in the hands of the arbitrators, and the parties had no control over them in regard to the time when they would consider it and publish their award.\(^\text{46}\) There was nothing in the submission that required the arbitrators to publish their award at the time when they did, and there is nothing in the case to show that the parties knew that they were about to publish their award until it was done. \[\ldots\] But if the publication of the award was a violation of the statute, and subjected the arbitrators to the penalty imposed, did that make the award void as between the parties, they in no manner participating in the act, and having no control over the arbitrators in this respect?\(^\text{47}\)

The court answered its own question in the negative.

In an earlier Vermont case, *Sargeant v. Butts*,\(^\text{48}\) the arbitral hear-

\[\text{\textsuperscript{45} See similarly Cardozo, J., in Finsilver, Still & Moss, Inc. v. Goldberg, Maas & Co., 253 N.Y. 382, 392, 171 N.E. 579, 582 (1930), where, referring to the motion to confirm an award and enter judgment under the arbitration statute, he said: "The motion to confirm is equivalent to a suit in equity to carry into effect the terms of the agreement and the arbitration had thereunder."}

\[\text{\textsuperscript{46} Arbitrators are sometimes referred to as agents of the parties, but, as it has been written with more care: "Arbitrators are, in no proper sense of the term, agents. \[\ldots\] To call an arbitrator an agent is an egregious misnomer, and any attempt to apply to arbitration the rules pertaining to agency is far fetched and impractical." Martin v. Vansant, 99 Wash. 106, 117, 168 Pac. 990, 994 (1917). See also Cohen, Commercial Arbitration and the Law 92-95 (1918). Compare Hays v. Hays, 23 Wend. 363, 367 (N.Y. Sup. Ct. 1840), with Collins v. Oliver, 23 Tenn. (4 Humph.) 439, 440 (1844).}

\[\text{\textsuperscript{47} Blood v. Bates, 31 Vt. 147, 150-51 (1858).}

\[\text{\textsuperscript{48} 21 Vt. 99 (1849).}
ing started on Saturday and was concluded early Sunday morning, at which time the arbitrators then began deliberations as to their award. Subsequently (on Sunday morning) they reported their award to the parties. The court sustained the enforceability of the award. Redfield, J., explained the views of the court as follows:

In order to render a contract void, for the reason that it was closed on Sunday, it must appear, that the party seeking to enforce it had some voluntary agency in consummating the contract on that day. But here the agency of the plaintiff closed upon Saturday. The arbitrators might retain the case under consideration during Sunday, and make their award upon another day, or close it at the earliest possible moment, and then set themselves to the appropriate celebration of the Lord's day, freed from the care of this and other worldly anxieties, of a secular character. The latter course to us seems the more consistent with that unostentatious humble-mindedness, which is so befitting the Christian profession. Some would doubtless prefer a more decided declaration of their conscientious feelings upon the subject, that they could feel the more assured, that they had performed the important duty of maintaining Christian warfare! But the course pursued by these arbitrators will be satisfactory to most minds. It is not very different from a court receiving a verdict upon Sunday,—which, for special reasons, they no doubt might do. No one would question the regularity of a judgment for that reason alone, I think.40

Absent considerations of overhead costs and further economic and practical problems involved in keeping the courts open for judicial business on Sundays as in the case of arbitrations and awards, it is not very clear why they should be translated into "judicial business" or "judicial proceedings" to be voided under the Sunday laws. As indicated in the Sargeant case, it seems reasonable to doubt that assurances of maintenance of Christian warfare alone require the judiciary to strike down Sunday arbitrations or Sunday awards.

Sometimes arbitration is cited as being a "quasi-judicial tribunal" and arbitrators as being "judges" of the parties' choosing, "judicial officers" or officers exercising "judicial functions." Here, again, the presentation of arbitration or arbitrators in the role of courts or judiciary is necessarily based upon remote resemblances. "Quasi-judicial tribunal" and the other foregoing terms are not very meaning-

40 Id. at 101-02. In a like case the Supreme Court of Indiana declared its acceptance and approval. Kiger v. Coats, 18 Ind. 153 (1862). Said the Indiana court: "The giving of notice of the award, then, not being an act of common labor; not being a judicial act, and not being specially prohibited by any statute; but being simply a ministerial act, in connection with a judicial proceeding, would seem to be valid, especially as the notice seems to have been received without objection. And the case of Sargeant v. Butts . . . is directly in point, that an award might be signed, and notice of it given, to the parties on Sunday, where the arbitrators had entered upon and failed to complete the duty on Saturday." Id. at 155.
ful. Opinions designating the courts or the judiciary as "quasi-arbitral tribunals" or the judiciary or jury as "arbitrators," or the like, have not been observed. It is true that as judges and juries hear and decide litigated matters, so do arbitrators hear and decide matters submitted to them by parties. But here the resemblance ends. Arbitrators, as distinguished from judges, are not appointed by the sovereign, are not paid by it, nor are they sworn to any allegiance. Arbitrators exercise no constitutional jurisdiction or like role in the judicial systems—state or national. As already indicated, they are generally not bound to follow the law unless the parties so prescribe and, as likely as not, they are laymen technically unqualified (and not disposed) to exercise the office of the professional judge.

As pointed out above, the Supreme Court of Alabama excluded arbitration from an "act to regulate judicial proceedings." That court also has ruled that arbitrators were not subject to a statute disqualifying "judge, chancellor, county commissioner or justice of the peace" from sitting in any cause or proceeding in which he was "related to either party within the fourth degree of consanguinity or affinity." Said the court in this connection:

Parties may be drawn against their consent before judges, chancellors, county commissioners and justices of the peace; and usually they have little or no choice in the matter. These are officers appointed by the law, and suitors must submit to their orders. Arbitration, in this State, is never compulsory. Parties voluntarily elect this mode of adjustment, and appoint their own arbitrators. We know no reason why persons related to suitors within the fourth degree, may not, if chosen, act as arbitrators, and make a binding award. *Volenti non fit injuria.*

In 1931, the New York Appellate Division summarized the disassociation of arbitrations, awards and arbitrators from judicial proceedings, judgments and the judiciary in refusing to grant an order of prohibition against a common law arbitration. Without reference to the earlier New York opinions on the applicability of the Sunday laws, as reviewed above, to arbitrations and awards, the court observed:

This was an attempted common-law arbitration which is a contractual, not a judicial proceeding, and, if properly conducted, results, not in a judgment, but in a cause of action against the party who does not obey

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51 Crooks v. Chambers, 40 Ala. 239 (1866). See text accompanying note 27 supra.
the award. The arbitrators do not constitute a judicial or quasi-judicial body whose proceedings are the subject of an order of prohibition.\textsuperscript{53}

The process of making judges of arbitrators and judicial proceedings of arbitrations seems to be at its best, when used \textit{arguendo} to reaffirm the parties' right of hearing in arbitrations,\textsuperscript{54} to raise the finality and conclusiveness of awards to those of "a judgment"\textsuperscript{55} or to lend stature to some set of facts being made up in a given case as cause for disqualification of the arbitrator, as for insufficient "honesty" or "impartiality," undue "bias" or "misconduct."\textsuperscript{56}

As further litigation centers upon arbitrations and awards, so may the usages of analogy, metaphor and the making of classifications\textsuperscript{57} in the course of the judicial process confound and complicate the role of the arbitral process as presently conceived in legal tradition. The recent discard by the Supreme Court of the earlier identifications as voiced in the \textit{Schoenamsgruber} and \textit{Murray Oil Products} cases, as reviewed above, should, on the other hand, serve as a useful deterrent in state as well as federal courts.

\begin{footnotes}
\item[53] Fidelity & Deposit Co. v. Woltz, 234 App. Div. 823, 253 N.Y. Supp. 583 (4th Dep't 1931) (per curiam).
\item[54] See Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards, 1 Wash. 2d 401, 96 P.2d 257 (1939).
\item[57] "Arbitration," like other terms and concepts in legal lore, is, of course, ever subject to judicial revision to make the term mean what the judge may think he should make it mean for the given case. For the recent vintage of the process as related to "arbitration," see, e.g., Boston Printing Pressmen's Union v. Potter Press, 141 F. Supp. 553 (D. Mass. 1956), aff'd, 241 F.2d 787 (1st Cir.), cert. denied, 355 U.S. 817 (1957); Gord v. F. S. Harmon & Co., 188 Wash. 134, 61 P.2d 1294 (1936).
\end{footnotes}