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JUDICIAL REVIEW OF ARBITRATION PROCEEDINGS—A PRESENT NEED

FRED HERZOG

THE CASE of Riverdale Fabrics Corp. v. Tillinghast-Stiles Co. decided by the Court of Appeals of New York within the last year sheds an interesting light upon the tendency recently exhibited by several courts to restrict arbitration proceedings and to exercise extensive judicial control over them. The facts of the Riverdale case are rather simple. Two parties entered into a contract for the sale of yarn; the sales memorandum contained the following printed sentence: "This contract is also subject to the Cotton Yarn Rules of 1938 as amended." The rules referred to were regulatory measures adopted by certain well-known trade associations of cotton yarn dealers in the United States. One of these rules contained an elaborate exclusive arbitration clause. When a dispute arose between the parties, one of them proposed to institute arbitration proceedings; the other, thereupon, commenced proceedings to stay the arbitration of the controversy in accordance with the applicable provisions of the New York Arbitration Statute. The lower court denied the stay, but the Appellate Division reversed the ruling and granted the application of the stay, yet after reargument affirmed the lower court's decision by a divided court; in doing so, it relied upon the decision of the New York Court of Appeals in Level Export Corp. v. Wolz, Aiken & Co.

1 306 N.Y. 288, 118 N.E. 2d 104 (1954) (three judges dissenting, two of them, Desmond and Froessel, writing separate dissenting opinions).
2 Ibid., at 289 and 105.
5 281 App. Div. 983, 121 N.Y.S. 2d 262 (2d Dep't, 1953).
6 305 N.Y. 82, 111 N.E. 2d 218 (1953).

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which had been rendered in the meantime. The Court of Appeals reversed the Appelate Division and granted, by a divided court, the motion to stay the arbitration proceedings.

The majority based its decision upon the principle that a person will be compelled to surrender his right to resort to the courts only, if he has done so in writing by clear and unmistakable language. The clause in the sales memorandum making the contract subject to the Cotton Yarn Rules, which in turn contained an arbitration clause, was in the majority's opinion not sufficiently definite to demonstrate the parties' agreement to have controversies arising out of the sales contract settled by the process of arbitration. The majority pointed in this respect to the decision of the New York Appellate Division in the case of In re General Silk Importing Co. in which the sales memoranda stated that "sales are governed by raw silk rules adopted by the Silk Association of America." There, too, the rules referred to contained an exclusive arbitration provision, but it was held that the language employed demonstrated merely the intention of the parties to insure the performance of the contract in compliance with the adduced rules but did not evidence an agreement to have controversies arbitrated in accordance therewith, although both parties were members of the association which had promulgated the rules in question. The majority attempted to distinguish the case at hand from the recent decision rendered by the Court of Appeals in Level Export Corp. v. Wolz, Aiken & Co. relied upon by the Appellate Division in which the parties were held to have agreed upon arbitration upon the basis of the following clause contained in the sales memoranda: "This Salesnote is subject to the provisions of Standard Cotton Textile Salesnote which, by this reference, is incorporated as a part of this agreement and together herewith constitutes the entire contract between buyer and seller." There, the majority declared, the standard cotton textile salesnote which contained the arbitration clause was incorporated verbatim in the sales contract and thereby integrated and made part of the sales contract—a fact which was not present in the instant case.

8 305 N.Y. 82, 111 N.E. 2d 218 (1953).
9 Compare with the Riverdale Fabrics Corp. v. Tillinghast-Stiles Co., 306 N.Y. 288, 118 N.E. 2d 104 (1954), and Level Export Corp. v. Wolz, Aiken & Co. 305 N.Y. 82, 111 N.E. 2d 218 (1953) cases, the recent case of Madawick Contracting Co. v. Travelers Insurance Co., 307 N.Y. 111, 120 N.E. 2d 520 (1954), in which the New York Court of Appeals held that an insurance company which insured a subcontractor
The dissenting judges—seemingly correctly—emphasized that there was really no difference in law between provisions which read that "sales are governed by raw silk rules..." or are "subject to the Cotton Yarn Rules..." or "subject to the provisions of Standard Cotton Textile Salesnote which, by this reference, is incorporated as part of this agreement..." None of the contracts that served as a basis for the comparison which the majority made, contained an actual mention of the arbitration clause and all of them were made subject to outside rules which, on inspection, would have revealed the existence of an arbitration clause. Thus—the dissenting judges claimed—the legal significance was the same, although the phraseology varied; the result, therefore, should be the same too, in all the cases which were considered.

The restatement of the opinions of the majority and minority judges in a rather detailed manner serves as a good prelude to the problem to be considered in this article. If these opinions are carefully analyzed, it would appear that the view expressed by the dissenting judges is sounder than that stated by the majority which seemingly sacrifices substance to form and favors in such contracts, as were involved in the proceedings, verbosity over simplicity of expression. One has the feeling that a certain cult with magic words is practiced, reminiscent of the early days of the common law when the failure to use certain prescribed words was fatal to the effectiveness of the transaction or document.

Yet, there is a deep significance in the majority's opinion; this significance is not so much to be found in the reasoning as such but rather in the causes which have moved an outstanding court to engage in such hairsplitting nuances and to view commercial contracts and transactions with a formalistic rigor and harshness, hardly to be expected in the interpretation of commercial agreements. It, therefore, becomes important to analyze the frame of mind—the judicial mood, as it may be called—of the judges which has given rise to such opinions and distinguishes between fine shades and subtleties of language basing thereon diametrically opposed legal rulings. This frame of mind be-

against his contractual liability towards the general contractor would be bound by an arbitration award fixing the subcontractor's liability, although the insurance contract merely referred to the agreement between the subcontractor and general contractor. The court felt that the company's agent's reading of the subcontract, which contained the arbitration clause, was sufficient to inform the company of the existence of the arbitration clause and to establish the Company's eventual liability based upon an arbitration award.
trays the growing mistrust and apprehension with which judges have viewed arbitration proceedings—mistrust and apprehension which have manifested themselves in various forms and ways.

Broadened scope of judicial review of arbitrators' awards for the purpose of finding out whether the award was in contravention of established legal principles, determination by the courts whether an arbitrable issue was present and limitation of arbitration proceedings to those cases where parties have clearly and unequivocally agreed to submit their controversies to arbitration and have rigidly complied with the arbitration agreement—these are the most common instances of the ways and devices utilized by the courts in which their mistrust of arbitration proceedings finds expression. Although this phenomenon is not confined to one state or one part of the country, it is particularly noticeable in New York, and, therefore, eminently characteristic; for it is generally recognized that New York is an arbitration-conscious state, favoring arbitration, and the New York arbitration statute has been generally considered a model arbitration statute which provides for a very limited scope of review of arbitrators' awards and in this respect is declaratory of the common law. Thus the situation in New York serves as a good indicator and barometer of trend and outlook in the country.

AWARDS CONTRAVENTING ESTABLISHED LEGAL PRINCIPLES

As mentioned previously, recent decisions have manifested a strong tendency on the part of the courts to interfere in arbitration proceedings and to broaden the scope of judicial review of arbitration awards. Up till that time it was generally accepted with a few dissenting voices, that unless the submission agreement specifically required the arbitrator to decide the case in accordance with existing law, he could determine questions of law and fact as he saw fit and that a court had

12 Judicial control of the arbitration process has caused several comments in recent years, mostly critical of such "judicial interference." See, for example, Mayer, Judicial "Bulls" in the Delicate China Shop of Labor Arbitration, Labor Law Journal 502 (July 1951); Summers, Judicial Review of Labor Arbitration, 2 Buffalo L. Rev. 1 (1953); and Rosenfarb, The Courts and Arbitration, New York University Sixth Annual Conference on Labor, 161 (1953).
The award constituted a full and final adjustment of the controversy and mistakes of law and erroneous legal or factual findings of the arbitrator did not give the courts the power to vacate the award. The parties had selected their own tribunal and had chosen their own umpire; thus, they had submitted their controversy to the individual judgment of the arbitrator—a judgment which would not have to be fettered by the shackles of logic or law but was merely supposed to represent the best judgment and the honest opinion of the arbitrator. If the arbitrator rendered an incorrect judgment, a court should not annul the award because it thought it might have rendered a better one. "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."

Despite these repeated pronouncements on the part of various courts disclaiming any right to interfere in arbitration proceedings or to review even erroneous awards of arbitrators, courts in recent years have not shied away from doing so if they felt that arbitration was unwarranted, unjustified or undesirable or that an award rendered by an arbitrator was contrary to established legal principles. A few examples will illustrate this tendency exhibited by the courts, although even recent cases abound in statements in which lip service is given to the old declarations of principle and the courts' restrained power of review.

The devices of interference utilized by the courts may take on different forms, depending upon the statute under which the particular court operates. In the State of New York where the tendency to interfere with arbitration proceedings is most noticeable—not because of a peculiar hostility against arbitration evinced by the New York judges...
but because of the sheer number of arbitration proceedings which the New York Statute\textsuperscript{19} encourages—the courts either have used their power to stay arbitration proceedings to accomplish their aim or have simply broadened their scope of review.\textsuperscript{20} This is particularly significant, since the right to stay or to compel arbitration proceedings and to vacate or modify arbitration awards is rather limited under the New York statute. Thus, a court may stay or compel arbitration only upon determination of substantial issues pertaining “to the making of the contract or submission or the failure to comply therewith.”\textsuperscript{21} As far as the review of an arbitrator’s award is concerned, it may be vacated, in general, only when the arbitrator was guilty of evident partiality, misconduct or corruption, or exceeded his powers or rendered an award which was not definite and final.\textsuperscript{22} The courts may modify an award where there was a miscalculation of figures or a misdescription of a person or property referred to in the award or “where the award is imperfect in a matter of form” or was made on a matter not submitted but not affecting the merits of the decision.\textsuperscript{23}

Despite these limited powers with which the arbitration statute invested the courts, the judges have ingeniously found ways and means within the narrow confines of the law to exercise proper control over arbitration proceedings. Thus, in the case of \textit{Riverdale Fabrics Corp. v. Tillinghast-Stiles Co.},\textsuperscript{24} discussed previously, they have insisted that submission of a matter to arbitration will be enforced only if the parties have made a clear and unequivocal agreement to that effect.\textsuperscript{25} This has almost led to the requirement that the settling of a dispute by the method of arbitration must be spelled out \textit{expressis verbis} in the contract in order to give it effectiveness. Closely connected therewith is the requirement insisted upon by the courts that arbitration will be permitted only if the issue is an arbitrable one; this issue will be determined by the court and not by the arbitrator,\textsuperscript{26} which means that

\begin{itemize}
  \item \textsuperscript{19} New York Civil Practice Act (Thompson’s Laws of New York, 1939) §§ 1448–69.
  \item \textsuperscript{21} New York Civil Practice Act (Thompson’s Laws of New York, 1939) § 1450.
  \item \textsuperscript{22} Ibid. § 1462.
  \item \textsuperscript{23} Ibid. § 1462a.
  \item \textsuperscript{24} 306 N.Y. 288, 118 N.E. 2d 104 (1954).
  \item \textsuperscript{25} See also Lehman v. Ostrovsky, 264 N.Y. 130, 190 N.E. 208 (1934).
  \item \textsuperscript{26} Application of Graphite Metallizing Corporation, 271 App. Div. 839, 66 N.Y.S. 2d 53 (2d Dep’t, 1946).
\end{itemize}
it is the court who decides whether the arbitrator has jurisdiction and not the arbitrator himself. In *Towns & James v. Barasch*,\(^2\) for instance, a collective bargaining agreement provided that if any claim, dispute or controversy should arise between the parties concerning any condition, provision or term contained in any article of the agreement, which could not be adjusted by negotiation, the matter should be submitted to arbitration. The agreement also contained a clause stating that either party could upon notice during the term of the agreement request the other party to negotiate for a revision of the employees' wages or working hours. The union in accordance with the agreement requested a revision of the wages; negotiations ensued which ended in a deadlock. The union thereupon demanded arbitration, but the court upon petition of the employer stayed the arbitration proceedings, simply stating that the arbitration clause was not explicit enough to cover the wage revision controversy. It might be argued\(^2\) that the court, in interpreting the arbitration clause and thereby the contract, transgressed upon the territory reserved exclusively to the arbitrator by legislative mandate. But it may be asked in this connection: Is it not wise for the courts to exercise such powers which will check carefully upon the assumption of jurisdiction on the part of arbitrators? Is not the unbridled exercise of jurisdiction and thereby of power fraught with great danger to the body politic which, therefore, should be a point of grave concern to the courts? Have not the courts the ultimate right to investigate and to determine the jurisdiction of all other agencies or persons exercising judicial or quasi-judicial functions and is it not desirable, nay imperative, that one authority only—the courts—exercise this control which is vested in them by the constitutional scheme of division of powers?

While it might be contended that in *Towns & James v. Barasch*,\(^2\) the court interpreted mainly the arbitration clause, in order to decide the arbitrability of the dispute, the courts clearly engaged in the interpretation of the substantive provisions of the contract in *International Ass'n. of Machinists v. Cutler-Hammer*\(^3\) to effectuate the same purpose. In that case a collective bargaining agreement provided that the

\(^{27}\) 197 Misc. 1022, 96 N.Y.S. 2d 32 (S. Ct., 1950).


\(^{29}\) 197 N.Y. Misc. 1022, 96 N.Y.S. 2d 32 (S. Ct., 1950).

employer would meet with the union "to discuss payment of a bonus." The agreement also provided for arbitration of disputes concerning the "... meaning, performance, non-performance or application" of its provisions. The parties met and discussed the bonus but were unable to reach an agreement. The union moved for arbitration but the court held that the dispute was not arbitrable. It took the view that the agreement required the employer to "discuss" the bonus but not to pay it. In doing so, the court made the following characteristic statement:

While the contract provides for arbitration of disputes as to the "meaning, performance, non-performance or application" of its provisions, the mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words, cannot make an arbitrable issue. It is for the court to determine whether the contract contains a provision for arbitration of the dispute tendered, and in the exercise of that jurisdiction the court must determine whether there is such a dispute. If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.

The phraseology used in the quotation just stated which acknowledges the courts' power to interpret the provisions of a contract in order to determine the existence of an arbitrable issue forms a bridge over to the exercise of a broadened review power on the part of the courts. For if the courts may delve into and interpret a contract for the purpose of finding out the existence of an arbitrable controversy they also must have the power to examine whether an arbitrator in his award has correctly interpreted the contract, since it might appear that by his eventual misinterpretation of the contractual provisions he has assumed the existence of an arbitrable dispute where none was present and has exercised powers which, in reality, he did not possess. Thus, the foundation is laid for the assumption of a large review power by the courts—larger than the statute seemingly intended them to have.

The case of Western Union Tel. Co. v. American Comm. Ass'n affords a good example of the exercise of this extended review power by the courts. In this case, a collective bargaining agreement provided that the union should not engage in strikes or other stoppages of work

32 Ibid.
33 Ibid.
34 299 N.Y. 177, 86 N.E. 2d 162 (1949) (4-3 decision), noted in 63 Harv. L. Rev. 347 (1949).
during the life of the contract, and that disputes as to the application or interpretation of the contract should be submitted to an arbitrator who, however, should have no authority to alter or modify the provisions of the agreement. A controversy arose between union and company when the union, in support of a strike called by affiliated unions against other cablegram companies, refused to handle cablegrams which during their transmission had been handled by any one of the strike-bound companies. The issue submitted to arbitration was whether the union by engaging in such refusal had breached its collective bargaining agreement. The arbitrator found that there was a trade custom in existence in the industry not to handle so-called “hot traffic” and consequently that the union’s refusal to work, when read in the light of that custom, did not amount to a breach of the collective bargaining agreement. The award was upheld by the lower court, but vacated by the Appellate Division, whose action, in turn, was affirmed by the Court of Appeals. In doing so, the high court declared that the arbitrator had no right to resort to customs of trade in interpreting the contract since the language was unambiguous, plain and clear and did not admit of resort to extrinsic circumstances. The arbitrator, therefore, had exceeded his powers.

It is quite obvious that the courts, under the claim of reviewing the arbitrator’s authority, actually determined the merits of the controversy by supplying their own interpretation to the contract and by setting aside the contrary interpretation of the arbitrator which, as the courts claimed, amounted to an unauthorized exercise of power. It needs not much imagination to visualize the extension of the scope of the courts’ review power when the line of reasoning in the *Western Union* case is carefully considered.

Closely related to the line of cases exemplified by the *Western Union* case in which the courts have broadened their review power by scrutinizing the contractual interpretation indulged in by the arbitrator are those in which the courts have found that the arbitrator has exceeded his authority by failing to use the remedy expressly specified by the parties in their contract, but instead has devised a remedy of his own.

Typical of this group of cases are those in which, for instance, the arbitrator was called upon to decide whether an employee had violated a company rule and, therefore, was properly discharged in accordance

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36 299 N.Y. 177, 86 N.E. 2d 162 (1949).
with the collective bargaining agreement which provided discharge as punishment for such violation; in a goodly number of such instances the arbitrator took it upon himself to mitigate the punishment meted out to the employee by the employer and to convert the discharge into a temporary suspension, although he had found that the employee had actually broken the plant rule and, therefore, could be properly discharged under the terms of the contract. The courts have held in such situations that the arbitrator had exceeded his authority, since he modified the contract existing between the parties. One should assume that arbitrators would recognize the limitation of their power and like the courts abide by the terms of the contract, which means, impose the penalty which the contract prescribes; yet, some of them have seriously argued that, barring a contract expressly prohibiting the arbitrator from modifying a penalty, they have the right to change the penalty if they find it too severe, thereby substituting their judgment for that of the employer, one of the parties to the dispute.

The courts, lastly, will interfere in arbitration proceedings and vacate an award, which, in their opinion, is contrary to public policy. Since the term "public policy" is rather loose and may cover a wide and varying territory, it can easily be seen that the courts by conjuring the magic notion of public policy may assume broad review powers which are otherwise denied to them. Until now the cases have been comparatively rare in which the courts have found it necessary to vacate awards which have been contrary to public policy. But it must be realized that this tendency for broader review and closer check of arbitration proceedings on the part of the courts is only in its infant stage and represents only the beginning of a move which may gain vigor and definite contours as time progresses.

The outstanding case in which the court held that an award violated public policy is Publishers' Ass'n v. Newspaper & Mail Del. Union. See, for example, American Safety Razor Corp. v. Amalgamated Machine, Instrument & Metal Local 475, 280 App. Div. 800, 113 N.Y.S. 2d 232 (2d Dep't, 1952).


The policy of the courts to formulate and to enunciate "the public policy" of a state is of particular importance in view of the United States Supreme Court's pronouncement that the public policy of a state may be expressed by its courts even though the legislature has not chosen to legislate on the particular subject matter involved. Hughes v. Superior Court of California, 339 U.S. 460 (1950).

280 App. Div. 500, 114 N.Y.S. 2d 401 (1st Dep't, 1952) (3-2 decision), noted in 22 Fordham L. Rev. 202 (1953); 66 Harv. L. Rev. 525 (1953); 27 St. John's L. Rev. 346 (1953); 2 Buffalo L. Rev. 157 (1952); 52 Col. L. Rev. 943 (1952); 4 Syracuse L. Rev. 140 (1952).
In that case the majority of the court refused to confirm an award in which the arbitrator, in accordance with the express power granted to him by the contract, had assessed punitive damages against a union which had violated a no-strike clause, the main reason being that punitive damages were in contravention of the public policy of the state. The majority’s opinion contains the following characteristic statement:

The court will not lend its power to the enforcement of the kind of a decision in arbitration which it would neither allow nor enforce as the subject of an action maintained before it directly.\(^4\)

Another case enunciating the same principle is *Western Union Tel. Co. v. American Comm. Ass’n*,\(^4\) previously referred to. The court stated there, among other reasons, that an award which sanctioned the refusal of a telegraphers’ union to handle messages emanating from certain strike-bound companies was invalid since a penal law of the State of New York\(^4\) made it a criminal offense for telegraph company employees to wilfully refuse to transmit messages.

The decisions cited above were set forth as illustrative examples of the various ways which the courts utilized to interfere in arbitration proceedings. Some of these decisions might be viewed by an unbiased examiner as ill-considered, some again as proper and in the best interest of justice. But through all of them goes a common streak of distrust and apprehension which the courts have exhibited toward arbitration proceedings—distrust and apprehension that has prompted them to step over the boundaries of review drawn by the statute and to tread upon territory from which they are supposedly excluded.

### THE NEW EQUITY OF LAWLESSNESS

In view of the apprehension with which courts have apparently begun to view the arbitration process and the resulting increasing interference by the courts in that process, the question arises by necessity whether that apprehension is justified and based upon some real, rational foundation or whether it represents merely an emotional outgrowth of frustration, brought about by a feeling of professional jealousy which senses with growing concern the progressive inroads made by arbitrators upon the courts’ jurisdiction. It might be true that


\(^{42}\) 299 N.Y. 117, 86 N.E. 2d 162 (1949).

\(^{43}\) New York Penal Law (Thompson’s Laws of New York, 1939) § 1423 (6).
courts are anxious and prone to protect their jurisdiction and power, for that is only human; nobody who administers an office wants to see his official functions diminished and infringed upon. That is probably the psychological reason for those decisions rendered in certain jurisdictions, which hold that agreements to arbitrate future disputes are invalid because they would oust the courts of jurisdiction. But petty professional jealousy is too simple an explanation for the phenomenon of growing control of the arbitration process. If, for example, the case of Publishers' Ass'n v. Newspaper & Mail Del. Union is recalled to mind, in which the court refused to uphold an award for punitive damages since it ran counter to the public policy of the state, it becomes apparent that there were deeper and weightier reasons present than a feeling of jealousy which prompted the court to act. There must have been present deep concern and growing apprehension of the judges over the pronouncements of arbitrators who not only exercised far-reaching judicial powers but whose decisions affected a multitude of citizens. These arbitrators disregarded well-recognized principles of law, scoffed surreptitiously at them, proclaimed their independence from the public policy of the state and substituted for the legal thoughts of the community, as formulated and expressed by the courts, their own ideologies and ideas of justice. They displayed the attitude of judicial demi-gods who stood above the law of the community, were not bound by it, and, therefore, could create and invoke their own law and determine each case before them according to their own concepts of justice and economic philosophy.

Thus, the courts were faced with instances where arbitrators, without hesitation, changed the contract entered into by the parties, or, under the guise of interpretation, modified it in spite of the age-old principle that anyone deciding a contractual dispute between two parties must determine it under the terms of the contract as written and interpreted by the contracting parties and may not supply his own interpretation. There were cases where arbitrators altered the con-

44 See, for instance, White Eagle Laundry Co. v. Slawek, 296 Ill. 240, 129 N.E. 753 (1921).


46 See, for instance, the following statement by the Illinois Supreme Court in Englestein v. Mintz, 345 Ill. 48, 60, 177 N.E. 746, 751 (1931): "Courts of equity may not, under the guise of construction make a new or different contract for the parties. Gibbs v. People's Nat'l Bank, 198 Ill. 307, 64 N.E. 1060; Clark v. Mallory, 185 Ill. 227, 56 N.E. 1099."
tract and interfered with well-established legal principles by changing
the remedy which the parties to the contract had provided for the in-
fract of certain provisions.\textsuperscript{48} There were instances where arbitrators
invented new legal doctrines which contravened those of the com-
community enunciated by the courts and where they ruled in violation
of the public policy of the state.\textsuperscript{49} Were the judges idly to sit by, particu-
larly when appealed to by the harmed party to right the wrong? Were
the judges to refuse relief to the wronged party and to acknowledge
two rules of law, one for the community at large and the other for
those whose disputes were settled by arbitration? For it should be
noted that contrary to the wails of anguish emitted by some writers
that the judges have attempted to destroy the autonomy of the arbi-
trators against the wishes of all the parties concerned,\textsuperscript{50} it is only
through the appeal to the courts by at least one of the parties affected
that the judges obtain jurisdiction and thereby the power to "meddle"
in arbitration proceedings.

If the courts had encountered only occasional slip-ups by arbitrators
in which they had turned away from the well-recognized principles of
law, the courts might have shrugged off the matter and might not have
scrutinized arbitration matters with the meticulous care which they
seem to be exercising now. But these objectionable judicial pronounce-
ments of arbitrators did not constitute isolated instances and did not
slacken; they began to form part and parcel of an ever growing body
of law which increased daily and proceeded to engulf large segments
of the law. Proof of that can be found in the fields of commercial and
labor arbitration. Thus, the adjudging of labor disputes arising under
collective bargaining agreements falls practically exclusively in the
domain of arbitrators. If the vast amount of collective bargaining
agreements in force in the United States is realized, if it is kept in
mind that these agreements cover thousands of businesses and indus-
tries throughout the country and regulate the conduct of millions of
persons and the economic conditions of numerous enterprises\textsuperscript{51} upon

\textsuperscript{48} See, for instance, American Safety Razor Corp. v. Amalgamated Machine,

\textsuperscript{49} See, for instance, Western Union Tel. Co. v. American Comm. Ass'n, 299 N.Y.
117, 86 N.E. 2d 162 (1949).

\textsuperscript{50} See Rosenfarb, The Courts and Arbitration, New York University Sixth Annual

\textsuperscript{51} "An arbitration clause has been included in more than 91% of the 75,000 or more
collective contracts essentially in operation in this country and affecting more than
five and a half million employees," Lenhoff, The Effect of Labor Arbitration Clauses
which, in turn, the well-being of the nation depends, then the rulings of arbitrators and the development of a new body of law distinct and differing from that found in the courts of the country is no small matter; then these arbitration decisions cannot be ignored and dismissed as the occasional outbursts of individuals who in their exuberance over the—maybe once in a lifetime—acquired power to exercise judicial prerogatives have overstepped the bounds of judicial discretion. It might be that this emotional factor coupled with the often misunderstood principle that the arbitrator may proceed free from the fetters of legal rules has produced these awards which reflect the arbitrator’s independence from current legal thought. It might also be that the arbitrator’s knowledge that, barring any fraud or corruptness on his part, his determination of the issues is final and cannot be reviewed, has given rise to the awards questioned by the courts. Yet, be that as it may, the stark fact remains that the courts began to sense the emergence of some new kind of legal ideology which commenced to take definite contours, encompassing the most important areas of the country’s economic life and large segments of the nation’s citizens. It can safely be assumed that the motives prompting the courts to interfere with arbitration proceedings have been at this early stage of development “acted on rather as inarticulate instincts than as definite ideas, for which a rational defense is ready.”52 In other words, the courts have intuitively grasped the danger, without having had the time and without having been afforded the benefit of historical perspective to formulate precisely the legal and logical basis for the necessity and desirability of their interference.

This new ideology evinced in arbitration awards with its attendant body of law, regulating the jural relations of great numbers of the population, can best be described as some sort of folksy jurisprudence, characterized not so much by the emergence of a new set of guiding rules but rather by the negation of basic legal principles heretofore commonly accepted in the community and by making expediency the basic idea to be followed in the determination of controversies. Thus, this new jurisprudence is based, in general, upon emotion rather than legal principle, upon economic policy considerations rather than the achievement of equal justice. Pity for the plight of the economically weaker, or supposedly weaker, or the desire to preserve industrial

peace are frequently found examples in which the emotional basis or the basis of economic policy, respectively, manifest themselves.

Compromise—the brain-child of expediency—and not to each his due, has become the desired end, elevating it to the pedestal otherwise occupied by equal justice. Typical of that idea of compromise are the many instances, mentioned already previously, where a collective bargaining agreement provides for the discharge of a worker in case he violates a certain plant rule and where the arbitrator converts the discharge ordered by the employer after the worker's violation of the rule, into a temporary suspension, although he has found that the worker has been actually guilty of an infraction of the plant rule. It might immediately be interjected that there is nothing wrong with such decisions and, on the contrary, that they are desirable since they introduce merely an element of equity into the relationship involved. Yet, such an argument loses sight of the fact that the arbitrator by rendering such a decision has overstepped his bounds, that he has arrogated functions which were not allotted to him by the parties and that he thereby has entered upon territory from which he was excluded by the will of the parties. Above all, once having acted without proper authority, where is that path of lawlessness going to lead? Soon he will change, by more or less subtle interpretation, the substantive terms of the contract and mold the jural relations of the parties according to his own economic conception. Once the individual's economic philosophy has become the determinative yardstick, injustice will be a certain consequence.

It is this new body of lawlessness against which the courts have taken a stand and which breeds the suspicion with which courts have begun to view arbitration proceedings whenever called upon to do so.

The emergence of this new body of law is strongly reminiscent of the development of equity jurisprudence in England. There, too, the chancellors, at the outset, did not intend and did not visualize the creation of a new legal system. But with the progress of time and the continuing rigidity of the common law, granting redress only in the form of damages and excluding specific relief, apart from actions for the recovery of land, equity began to emerge as a new legal system. The sad spectacle of two competing and conflicting systems existing side by side within the same state unfolded itself before the eyes of the stunned citizens trying to find redress for the wrongs suffered by

53 Walsh, A Treatise on Equity 2-11 (1930).
them. Had the common law judges not persisted in the denial of specific relief and had the historical constellation in England been different, at the critical time, equity would never have developed as a distinct and separate system, sparing thereby the citizenry the unnecessary expense and dilemma of two feuding systems.

The present day judges, unlike their brethren in the middle ages, have instinctively reacted to this new equity of compromise and opportunism. They have stood up and have attempted to nip the nascent system in the bud. Time will tell whether they succeeded.

Unlike, however, the circumstances prevailing in the middle ages, there is nowadays no necessity for the development of a new legal system; there is no rigidity of rules, practices and procedures prevailing in the courts, and, above all, there is no inclination on the part of the courts to interfere with the arbitration process as such. Contemporary courts possess the necessary mental and procedural flexibility to deal with all problems thrown up by modern society, particularly if it is kept in mind that the power exercised by the courts in this type of cases is merely a review power which concerns itself not with the application of the arbitrator's expertness to the issues at hand but rather with the preservation and the safeguarding of basic legal principles recognized in the community at large. That the courts are perfectly well capable of fulfilling this function is proven by the fact that they have exercised and continue to exercise far-reaching review powers over the rulings of administrative agencies carrying out quasi-judicial functions. Yet, despite this review power exercised by the courts, administrative agencies have continued to function efficiently within their allotted field and their effectiveness has not been impaired. At the present time nobody would seriously argue that the courts should be severely restrained or barred from the exercise of review powers over the judicial rulings of administrative agencies. However, with respect to arbitration proceedings it is contended that the courts should engage in a hands-off policy. It is argued that such conduct on the part of the courts is regrettable, since it destroys and nullifies the autonomy and thereby the usefulness of arbitration, because the courts supposedly do not possess the necessary expertness to deal effec-

54 Ibid., at 7, 8.
tively and efficiently with arbitration problems. But this argument misses the point. The question is not whether the courts should take over the settling of disputes which are peculiarly suited for arbitration and are traditionally determined by such means, but rather whether the courts, as guardians of the law of the land, should tolerate the emergence of a new set of legal principles which are opposed to those promulgated by them and which apply to certain groups of the population a yardstick different from that by which the conduct of other citizens is gauged. The courts have shown that they will not abdicate their functions and will not be blocked in the exercise of these functions by even narrowly drawn statutory provisions, if a literal interpretation of these provisions would tend to emasculate the primary power of the courts—to preserve and safeguard justice by seeing to it that basic and well-recognized legal principles are observed and applied.

It must be said in all fairness that eminent arbitrators have always been aware of the limitations which are imposed upon them by existing legal principles; they have recognized that they must determine disputes before them within the framework of these principles and not by disregarding them and deciding the matter according to their own ideas of law. But unfortunately a goodly number of arbitrators have not followed this noteworthy prescript, although they might have given lip-service to it.

CONCLUSION

In the preceding pages it has been attempted to set forth the reasons which apparently have motivated the courts to tighten the judicial control over arbitration proceedings.

The danger of the emergence of a new legal system covering the disputes of large groups of the population engendered the instinctive


67 See, for example, the following statement by Prof. Clarence M. Updegraft, chairman of the arbitration board, in Kansas City Public Service Co., 8 L.A. 149, 159 (1947): "No award of this board can give validity to any contract which contravenes the law of any state. If it is indeed true that the Kansas law is ineffective because unconstitutional, that result has not yet been authoritatively declared by a court of last resort. The act must be assumed effective until otherwise determined." See also the excellent treatment given in Elkouri, How Arbitration Works, 169-85 (1952); and Platt, The Arbitration Process in the Settlement of Labor Disputes, 31 J. Am. Jud. Soc. 54 (1947).
reaction of the courts to prevent the growth of such a system, so that it may eventually die of a natural death.

It is believed that this reaction on the part of the courts is desirable and laudable, for it would be unfortunate and unwarranted to have within the same community, after law and equity, a third system arise, which eventually will compete and feud with the existing system or systems. In these days of merger and simplification of procedure it would be a luxury which would be in the last resort detrimental to all the parties concerned. For it should be once more emphasized that this new system, unlike equity, was not brought about by the shortcomings of the existing and available means to right a wrong, but rather by the refusal of some arbitrators to abide by and to apply basic legal principles recognized in the community. What the courts did was merely to bring back to the path of law and order those who had strayed away from it. The value of the arbitration process as a means of settling disputes is thereby in no way impaired or diminished. On the contrary, it is believed that parties who have heretofore been hesitant to enter into arbitration agreements for fear that the arbitrator might settle the controversy according to his own conception of law might now be more amenable to having their dispute determined by arbitration, since they might anticipate the likelihood of court interference if the award should violate established legal principles. It would be desirable if statutes were enacted to this effect in every state that does not already have such a provision, which would be applicable to all arbitration proceedings, whether instituted under the common law or under a particular arbitration statute. The advantages of arbitration such as expeditiousness, saving of costs and expertness of the arbitrator would in no way be diminished or impaired.