CHAPTER 6

ARBITRATION IN GOVERNMENT

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I am reminded of a story told in my law school days of the teacher who sternly lectured one of her pupils. "Now, Johnny," she said, "there are two words you must never use. One of them is 'swell' and the other is 'lousy.'" Johnny spoke up brightly, "Sure, teacher, what are the two words?"

A discussion of the topic "Arbitration in Government" must cover a varied body of subtopics, for "government" itself includes political bodies functioning on various levels and "arbitration" is a process not readily reduced to one all-inclusive definition. It can be both swell and lousy.

A writer[1] has said recently that "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." He then adds: "It begins and depends upon the agreement of the parties to submit their claims to one or more persons chosen by them to serve as their arbitrators."

The problem of definition becomes significant, with its emphasis upon voluntary aspects of the parties' participation in the proceedings, when we consider whether it is arbitration when a government eliminates voluntary participation and provides that parties to a particular kind of dispute *will* submit that dispute to arbitration. Are we within the definition of arbitration when the government, instead of the parties to the dispute, selects the panel of arbiters? If arbitration begins with and depends upon the vol-

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1 Sturges, "Arbitration—What Is It?" 35 *N.Y.L.R.* 1031 (1960).

untary participation of the parties to the dispute, then a great part of a discussion on arbitration in government must deal with proceedings labeled arbitration but which actually are only arbitral-like proceedings.

Today, we shall use "arbitration" in the sense of a procedure whereby a dispute is submitted to one or more impartial persons for a final and binding determination.[2]

Governmental Use of Arbitration

Governmental bodies in the United States have made many uses of the arbitrational method of settling disputes, both direct and indirect.

There are instances where the governing authority has provided the arbitral method for use by private parties for the final determination of their private disputes. These are indirect uses, for the government is not a party to the dispute, but the government has acted to promote or to compel private disputants' use of the arbitral method of settling disputes.

A second class of the government's uses of arbitration might be termed the "direct uses." These are instances when government itself is a party to a dispute and as a party resorts to the arbitrational tribunal to obtain a binding and final decision upon the issues in the dispute. Where the indirect uses involve the government in its role, as the government, the direct uses involve the government, not as the government, but as an operating entity in a commercial or political setting.

Let's first look at some governmental indirect uses of arbitration.

Arbitration agreements were recognized at common law, but the common law gave it characteristics which would have stunted its growth to the useful device it is today in all commercial and industrial states if change by statute had not been effected. Among these characteristics were the inability to enforce agreements to arbitrate future disputes; the revocability of any arbitration agreement before an award was made; the award itself could only be enforced by bringing an action on the award in an

[2] Warns, "Arbitration and the Law," 15 *Arb. Jnl.* N.S. 3 (1960).

independent proceeding, and in such an independent proceeding the entire proceedings before the arbitrator became the subject of the litigation, for the function of the court was not limited to a review for specified errors in procedure.[3] A bargain to arbitrate was not a bar to an action on the original claim.[4]

The reluctance of courts to enforce arbitration contracts is said to date back to the dictum attributed to Lord Coke in 1609. The reasons given were both that an arbitration agreement tends to oust the courts of jurisdiction and that such an agreement is in its very nature unenforceable by a court of equity, because it called for personal service and for a series of acts.[5]

As you well know, the English cases were followed in the United States until the legislature of New York passed its arbitration act of 1927 which served as a pattern for the commercial arbitration statutes of New Jersey (1923), Massachusetts (1925), Hawaii (1925), Oregon (1925), Pennsylvania (1927) and California (1927). The federal arbitration act became effective in 1926.[6]

Today every state and the District of Columbia has some statute relating to arbitration.[7]

I shall not be so elementary as to discuss these trends and state acts with you today. You know them more intimately than I.

In addition to general arbitration statutes by which governmental bodies have sought to make arbitration an efficient means for the settlement of private disputes, some governments have enacted statutes which have compelled the private use of arbitration in cases of particular kinds of controversies. When legislative bodies have deemed the use of arbitration by private disputants of a particular class was essential to the public welfare, then they have dispensed with the voluntary aspects of a

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3 Feldman, "Arbitration Law in California," 30 *So. Cal. L. Rev.* 375 (1957).

4 *Restatement of the Law of Contracts,* Vol. 2, page 1055.

5 Mosk, "The Lawyer and Commercial Arbitration: The Modern Law," 39 *A.B.A. Jnl.* 193, 194 (1953).

6 43 Stats. 883 (1925), *U.S.C.A.* Title 9, sections 1-14 (1947).

7 Mosk, note 5, *supra* at page 195; Warns, "Arbitration and the Law," 15 *N.S. Arb. Jnl.* 3, 6 (1960); *South Dakota Code* § 37.4602, § 13.1201; *Cal. Code Civ. Proc.* §§ 1280-1293; *Kerr* v. *Nelson,* 7 Cal. 2d 85 (1936); *Levy* v. *Superior Court,* 15 Cal. 2d 692 (1940); *Universal Pictures Corp.* v. *Superior Court,* 9 Cal. App. 2d 490 (1935); 9 *U.S.C.A.* §§ 1, 2; Labor Management Relations Act, 1947, ch. 120, 61 Stat. 136, Title 29 *U.S.C.A.* § 185(a); *Lincoln Mills of Alabama* v. *Textile Workers Union,* CIO, 353 U.S. 446, 40 LRRM 2113 (1957).

submission to arbitration and have passed legislation compelling these parties to arbitrate.

An early example of such compulsory arbitration legislation was the Kansas statute [8] considered by the United States Supreme Court in the *Wolff Packing Co.* case.[9] Kansas compelled the management and employees in certain listed industries, which the Act characterized as essential industries, to submit any labor dispute to a Court of Industrial Relations. When the Court of Industrial Relations ruled on the dispute, both management and labor were ordered to comply until the order on application of either party might be changed. In review, the Supreme Court of the United States found this Court of Industrial Relations to be only an administrative agency and characterized the procedure involved as compulsory arbitration. The Supreme Court held that its orders violated the liberty of contract under the due process clause of the 14th Amendment, because both management and labor were by the order forced to perform contracts not of their own making. The food business involved in the *Wolff* case, indicated the court, was not affected with a sufficient degree of public interest to justify that invasion of constitutional right. Therefore, though the legislature can authorize and promote the voluntary use of arbitration, this case indicated that the legislature could not compel the submission of private disputes to a panel of arbiters appointed by the State unless the dispute was in some manner affected with a sufficient degree of public interest. Later decisions from the Supreme Court indicate that any compulsory arbitration act may be declared constitutional if existing economic and social conditions justify such a law.[10] Justice Douglas has said that "affected with a public interest" means no more than that an industry for adequate reason is subject to control for the public good.[11] It has been said that a review of the constitutional law decisions indicates that government, state or federal, might validly employ compulsory arbitration in public

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[8] Industrial Relations Act, c. 29, Laws 1920 Session.

[9] *Wolff Packing Co.* v. *Industrial Court,* 267 U.S. 552 (1924).

[10] *Highland* v. *Russell Car & Snow Co.,* 279 U.S. 253, 261 (1929). See further discussion of cases in Stanford, "Compulsory Arbitration—A Solution for Industrial Decay?" 13 *U. Pittsburgh L. Rev.* 462, 464 (1952).

[11] *Olson* v. *Nebraska,* 313 U.S. 236, 245, 246 (1941).

utilities and in those industries where the public health, safety, and welfare are said to be endangered.[12]

During the Second World War, Congress passed the War Labor Disputes Act [13] giving the War Labor Board the power to decide disputes, and to provide by order the wages and hours and all other terms and conditions customarily included in collective bargaining agreements.[14] Under this grant of power, the War Labor Board issued orders for compulsory arbitration. Although the constitutionality of these orders of compulsory arbitration was never challenged, it was generally conceded that if challenged the court would uphold them on the ground that in wartime the industry-labor relationship should be subject to control for the public good.[15] This was indirect use of arbitration by government in its effort to win the war.

It has been said that it was the War Labor Board which gave labor arbitration its great impetus.[16] John Steelman, a director of the United States Conciliation Service, reported that in 1940 the commissioners of the Federal Conciliation service were urged to peddle arbitration clauses as Fuller brushes or industrial insurance might be sold and that later the efforts of the Conciliation Service were supplemented by those of the National War Labor Board which in its directive orders required arbitration clauses to be included in the contracts of disputants before it. Today with 90% of labor-management contracts including arbitration clauses, it must be concluded that government's indirect use of arbitration has been a substantial factor in bringing about this high percentage.

Other instances where Federal and State governments have provided for the use of arbitration are many. Compulsory arbitration of the disputed amount of fire loss in policies issued by Minnesota fire insurance companies was upheld by the United States Supreme Court.[17] The United States Railway Labor Act contains provisions

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12 Stanford, note *supra* 10, 474.
13 War Labor Disputes Act, ch. 144, 57 Stat. 163 (1943).
14 *Ibid.*, section 7 (a) (2).
15 Seitz, "Validity of War Labor Board Orders of Union Security and Compulsory Arbitration Under War Labor Disputes Act," 32 *Kentucky L. J.* 262, 278 (1944).
16 Warns, "Arbitration and the Law," 15 *Arb. Jnl.* N.S. 3 (1960).
17 *Mason's Minnesota Stat.* 1927, section 3512. *Insurance Co.* v. *Glidden Co.*, 284 U.S. 151 (1931).

relating to the voluntary submission of disputes to arbitration.[18] But the instances in the statutes of all the governments throughout the United States where the legislature has urged or directed the use of arbitration are too numerous to list here. And here we are still considering only those uses where the government itself is not directly a party to the dispute, the indirect uses. Nor can we mention all the instances where a governmental body has, in establishing the procedures for the operation of its agencies, directed that arbitral concepts be employed, such as those found in the procedures of the Selective Service Agencies of the United States.[19]

Brief mention should be made of the State of Pennsylvania. In 1955, Pennsylvania began what has been termed an experiment in compulsory arbitration.[20] To reduce the long wait before an action could be brought to trail in Pennsylvania, a so-called "Compulsory Arbitration" Act was passed.[21] The Act, generally speaking, allows the court of Common Pleas in any county by rules of court to decree that all civil cases, where the amount in controversy is $2000 or less, shall first be submitted to and heard by a board of arbitrators who are members of the Bar of that county. The statute was upheld as constitutional before the Supreme Court of Pennsylvania.[22] In those parts of Pennsylvania where it has been put into use there have been favorable reports.[23] When the court has issued a decree pursuant to the statute, those cases coming within the scope of the statute must first be submitted to a panel of arbitrators chosen from a list of members of the Bar of the county; but if either party is dissatisfied with the award, that party is entitled to a trial *de novo* on the same issues that were submitted to the panel of arbitrators. While it may technically not be called compulsory arbitration, since the award rendered by the arbiters has no more finality than that which the parties to the dispute choose to give it, it probably would seem generally advis-

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18 *U.S.C.A.*, Title 45, sections 155-159.

19 Kupfer, "Arbital Concepts in Selective Service," 5 *Arb. Jnl.* 61 (1941).

20 Swartz, "Compulsory Arbitration, An Experiment in Pennsylvania," 42 *A.B.A. Jnl.* 513 (1956).

21 Pa. Stat. Ann. Title 5, Sections 30, 31, 71, 77, 121, 129.

22 Application of Smith, 112 A. 2d 655, appeal dismissed *sub nom Smith* v. *Wisler*, 350 U.S. 858 (1955).

23 Swartz, note 20 *supra;* "Compulsory Arbitration to Relieve Trial Calendar Congestion," 8 *Stanford Law Review* 410 (1956).

able for parties to abide by the award, and each award which is respected by the parties means that to that extent the courts of Pennsylvania are less congested.

Before concluding the discussion of government's indirect uses of arbitration, United States treaties must be mentioned. In a treaty between the United States and Madagascar in 1881, it was provided that "it shall be the duty of the court to encourage the settlement of controversies of a civil character by mutual agreement, or to submit the same to the decision of referees agreed upon by the parties." [24] This was the first example of a United States Treaty provision according formal recognition to the arbitral method of settling disputes. [25]

The first general treaty commitment of a reciprocal character entered into by the United States concerning commercial arbitration appeared in the Treaty of Commerce and Navigation with the Republic of China, signed in 1946.[26] Since then it has been standard practice for the United States to seek the inclusion of a commercial arbitration provision in appropriate treaties negotiated with all countries. Such provisions have occurred in at least 14 treaties signed since 1945, all of them of the general type known as Friendship, Commerce and Navigation.[27] A treaty of Friendship, Commerce, and Navigation is a broad general purpose instrument which deals in a comprehensive way, on a bilateral and reciprocal basis, with the rights of American citizens, trade, business and shipping abroad.[28] This is one more way in which the government is indirectly using arbitration—for the protection of the interest of its citizens as they deal in foreign commerce.

The enforcement of foreign awards will be facilitated by the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, which came into force

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24 Treaty of Friendship and Commerce, Art. VI, para. 20 (I Mallory 1061).

25 Walker, "Commercial Arbitration in United States Treaties," 11 *Arb. Jnl.* N.S. 68 (1956).

26 *Ibid.*

27 Pisar, "UN Convention on Foreign Arbitral Awards," 30 *So. Cal. L. Rev.* 14, 30 (1959).

28 "Commercial Treaties of the United States and Private Foreign Investment, 19 *Fed. Bar Jnl.* 367 (1959).

on July 9, 1959, but the United States has not yet acceded to the convention.[29]

Turning now to the second class of governmental uses of arbitration, the direct uses in which the government is a party to a dispute, international relations again must be considered.

Modern international arbitration, conceived as a procedure based on the application of rules of law, may be said to have begun with the Jay Treaty of November 19, 1794, between Great Britain and the United States. In that treaty the parties submitted to adjudication by mixed commissions such matters as the determination of boundary disputes, controversies bearing upon the exercise of belligerent rights at sea by Great Britain during its war with France and the fulfillment by the United States, in the same war, of its obligations of neutrality. While in the 19th century a number of arbitrations between other states took place, the bulk of arbitral practice in that century was based on agreements between the United States and Great Britain. These proceedings effectively revealed the political and legal potentialities of international arbitration by submitting successfully to legal determination complex and delicate political issues. In 1870, the two nations ended a bitter controversy by agreement to arbitrate the claims of the United States for alleged violations of neutral obligations by Great Britain in the American Civil War, in the matter of the "Alabama" and other vessels. The British Guiana arbitration of 1897 between Great Britain and Venezuela in which the United States Consul and United States' arbitrators played prominent parts was brought about largely as the result of political pressure exerted by the United States under the Monroe Doctrine. An acute question concerning the freedom of the sea was involved in the Bering Sea arbitration of 1893. The awards in all these arbitrations were preceded by elaborate written and oral arguments, which, more than any other factor, was responsible for raising the prestige and revealing the possibilities of international arbitration.

The multilateral convention for the Pacific Settlement of International Disputes concluded at the First Peace Conference held at The Hague in the Netherlands, in 1899, contained elaborate pro-

[29] Domke, "Arbitration," 35 *N.Y.U.L.R.* 600 (1959).

visions for arbitration, including the establishment by the signatories of a panel of jurists called the Permanent Court of Arbitration, to which each nation was to appoint four members, and from which nations desiring to go to arbitration might choose competent arbitrators. When the Second Hague Peace Conference was called in 1907, United States Secretary of State, Elihu Root, opposed arbitration, not because of unwillingness to submit controversies to impartial arbitration, but because of apprehensions that the arbitrators would not be impartial. The American delegates tried to have the Permanent Court of Arbitration developed into a permanent tribunal composed of full-time judges, adequately paid, with no outside interests, and devoting their entire time to the trial and decision of international causes by judicial methods under a sense of judicial responsibility. The 1899 convention for the Pacific Settlement of International Disputes was revised, but as revised it fell short of the pattern outlined by Root. The Permanent Court of Arbitration handled no cases after 1932, but was formally still in existence when it was assigned the somewhat nominal function of nominating judges for election to the International Court of Justice which now functions under the auspices of the United Nations.[30]

Turning away from international relations to the power of an officer of the federal government to submit a claim held by or against the federal government to the decision of an arbitrator, we come to an area in which there still exists considerable uncertainty. The 1845 case of *Ames* v. *United States* [31] held that no officer of the United States has authority to enter into a submission to arbitration of a dispute which would bind the United States, unless the power was given to the officer by special act of Congress. Subsequently the Federal Attorney General,[32] the Comptroller General,[33] and the Judge Advocate General of the Army [34] rendered opinions in which they each reached the con-

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[30] See Vol. 2 *Ency. Britannica* 513, "International Court of Justice" (1957); Vol. 2 *Ency. Brittanica* 222, "International Arbitration" (1957).

[31] 24 Fed. Cases 784 (No. 14,441).

[32] 33 *Ops. Atty Gen.* 160, 165 (1922); 17 *Ops. Atty. Gen.* 486 (1882).

[33] 19 *Dec. Comp. Gen.* 700 (1940); 8 *Dec. Comp. Gen.* 96 (1928); 7 *Dec. Comp. Gen.* 541 (1928); 6 *Dec. Comp. Gen.* 140 (1926); 5 *Dec. Comp. Gen.* 417 (1925).

[34] *Judge Advocate General of the Army Opinions* No. 545.02 (May 5, 1914); No. 104 (April 14, 1924); *Dig. Ops. Jag* 1912-1930 410 (1932); See note, 53 *Col. Law Rev.* 879 (1953).

clusion that a federal officer did not have the power to submit a claim to arbitration.

To the contrary, however, it was argued that inasmuch as the purpose of forming governmental corporations is to enable these agencies to function with the power and in the manner of private corporations, the denial to officials in such corporate agencies of the power to use the method of arbitration for the settlement of disputes contradicts the reason for the establishment of such governmental agencies, since private corporations do submit disputes to arbitration.

In 1881, a Court of Claims decision, while recognizing the rule of the *Ames* case, held that if the federal officer possessed the power in relation to the subject matter of the submission to carry into effect the decree which the award might direct, he had the power to consent to the submission.[35]

The United States Arbitration Act was passed long after the rule denying this power to federal officers had been stated. Since the Act contained no express inclusion of federal officers, under ordinary rules of construction it is to be presumed that the legislature did not mean to grant to federal officers the power to submit disputes to arbitration.

In 1953, however, the Court of Claims [36] again considered the issue of the power of federal officers to arbitrate disputes without express authority for such from the federal legislature. In this case a government contract for the construction of hemp mills in Minnesota had been executed through the Commodity Credit Corporation, acting on behalf of the Defense Plant Corporation, both agencies of the United States Government. The contract provided that in the event of any disagreement arising under the contract it should be submitted for determination to arbitrators selected by the parties. The Court of Claims held that the arbitration clause was valid and a bar to the construction firm's action for damages under the contract. The Court drew analogy between the arbitration provision in the disputed contract and the provision of Article 15 in standard form government contracts for submission of disputes to the contracting officer. The Court stated that

[35] *United States* v. *Great Fall Mfg. Co.*, 16 Ct. Claims 160 (1881), affirmed on other grounds, 112 U.S. 645 (1884).

[36] *George J. Grant Const. Co.* v. *United States*, 109 F. Supp. 245 (1953).

Supreme Court decisions [37] approving the standard form contract provision for submission of a dispute proved that the construction firm was wrong in asserting that Congress intended claims to be presented against the government only in the Court of Claims. There seems to be no final word from the Supreme Court on the precise issue as yet.

The standard form clause referred to in the *Grant Construction Co.* case provided substantially that all disputes concerning questions of fact arising under the contract should be decided by the contracting officer of the governmental agency, subject to written appeal by the contractor within 30 days to the head of the department or his duly authorized representative, whose decision was to be final and conclusive upon the parties to the dispute.[38] In practical effect, the parties to the contract agreed to appoint the contracting officer as arbitrator on disputed questions of fact arising under the contract. The Supreme Court of the United States in the *Wunderlich* case [39] held that the determination reached by this procedure was final and conclusive, except where a contractor could prove that the decision was based upon fraud. The mere findings by the Court of Claims that the award was arbitrary, capricious, grossly erroneous and not supported by sufficient evidence were not grounds for setting aside an award rendered pursuant to the dispute clause in the contract.[40]

Much sentiment against the Supreme Court's construction of the clause arose. It was said that the contracting officer of an agency only with great difficulty could be expected to take the role of an impartial arbiter where disputes arose between the governmental agency and the private contractor, and that under the circumstances an appeal to the contracting officer's superior was futile. The contractor's chances of establishing fraud in the award were negligible. Furthermore, the inclusion of the clause in the contract was mandatory whenever a contractor did business with the government, so that it could not really be said that by his voluntary agreement he had consented to the procedure.[41]

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[37] Citing *United States* v. *Moorman*, 338 U.S. 457; *United States* v. *Wunderlich*, 342 U.S. 98.

[38] *U.S.C.A.* Tit. 41 § 54.13 (Repealed Mar 16, 1959, 24 F.R. 1907, page 220).

[39] *United States* v. *Wunderlich*, 342 U.S. 98 (1951).

[40] *Ibid.*

[41] "The Disputes Clause of the Government Construction Contract; Its Misconstruction," 27 *Notre Dame Lawyer* 167 (1952).

Subsequently Congress attempted to correct some of the objectionable features in the standard form government contracts dispute clause.[42] The contracting officer now must reduce his decision to writing and furnish the contractor with a copy of it. After an appeal from the award of the contracting officer to the Secretary, the decision of the Secretary is final and conclusive; but it is now final and conclusive only if it is determined by a court of competent jurisdiction not to have been fraudulent, or capricious, or arbitrary, or unsupported by substantial evidence.

Another noteworthy direct use of arbitration by the Federal Government appeared in the Contract Settlement Act of 1944,[43] passed by Congress during the war. A contemporary writer commented that the use of arbitration in the manner provided in the Act was essential to an orderly demobilization upon the cessation of the war. Section 13 (c) of the Act provided that the contracting agency responsible for settling any claim and the war contractor asserting the claim could by agreement submit all or any part of the termination claim to arbitration without regard to the amount in dispute. It provided that such arbitration was to be governed by the provisions of the United States Arbitration Act to the same extent as if authorized by an effective agreement in writing between the government and the War Contractor. Any such arbitration award was to be final and conclusive upon the United States. Under the Contract Settlement Act of 1944, therefore, an officer of the federal government could no longer refuse to arbitrate a dispute upon the ground that he lacked authority to bind the government to the award of an arbitrator.[44]

On the level of state governments and their direct use of arbitration, a recent development has been the passage of legislation providing for the use of arbitration in the inheritance tax field for the solution of the problem of the multiple state determination of domicile. In 1949, California adopted the Uniform Act on Interstate Arbitration of Death Taxes [45] which authorizes but does not require the taxing officials of the state to enter into a stipulation

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[42] See *U.S.C.A.*, Title 41, Appendix section 1-7.101-12.

[43] Public Law 399-78th Congress, Chapter 358, 2d session (Senate Bill 1718).

[44] Domke, "Arbitration of War Contracts Termination Claims," 11 *Jnl. D of C Bar Association* 435 (1944).

[45] "Uniform Act on Interstate Arbitration of Death Taxes," *Revenue and Taxation Code*, sections 14197-14197.13.

for such arbitration. This act has been passed in eight other states.[46] In 1957, California, in addition, passed the interstate arbitration statute inspired by the National Tax Association,[47] under which the state is required to submit the question of domicile to arbitration if the procedure is invoked by the executor of an estate. As of 1960, 10 states have adopted the compulsory Interstate Arbitration of Death Taxes Statute.[48]

Whether the compulsory arbitration statute of 1957 will be effective depends upon whether all the states involved in the taxing of a particular estate have an arbitration statute. If any have only the Uniform Act, successful arbitration between the states will depend upon whether the taxing officials will consent to submit the particular matter to arbitration. The only reported arbitration under these statutes has been one between Massachusetts and New Hampshire, both of which have the compulsory statute.[49]

In the California Education Code [50] it is provided that a dispute between the governing board of two school districts on what constitutes a fixture, when one district is taking over a school from another district, "shall" be submitted to a board of arbitrators appointed to determine the issue.

The California Water Code [51] authorizes every municipal corporation and every person, firm or corporation causing any damage from acts done by them in furtherance of supplying water for domestic uses, to enter into an agreement for the arbitration of such claims.

Over all, it is well established as the general rule throughout the United States, that in the absence of statutory prohibition a municipal corporation has the power to submit to arbitration any claim asserted by or against it, whether the claim is based on contract or tort.[52] The power is said to be inherent in the right

46 See Marsh, "Multiple Death Taxation in the United States," 8 *U.C.L.A.L.R.* 69, 86 (1960).
47 *Revenue and Taxation Code,* sections 14199-14199.13.
48 See Marsh, note 46, *supra,* at 86.
49 See Marsh, note 46 *supra,* at 86.
50 Cal. Ed. Code section 16303.
51 Cal. Water Code section 1246.
52 *District of Columbia* v. *Bailey,* 171 U.S. 161 (1898); *Boston* v. *Brazer,* 11 Mass. 447 (1814); *North Braddock* v. *Corey,* 205 Pa. 35; Annotation in 40 *A.L.R.* 1370 (1926).

to contract and the right to maintain and defend suits, and a city has the power when making a contract to include a provision for arbitration of future disputes or claims which may arise under it. Such a clause is valid and of the same effect as a similar provision between private parties.[53]

Also, a county has the power to submit a claim asserted by it or against it to arbitration.[54] When this is done, the proceeding of the arbitrators and the effect of the award are governed by the same rules that relate to arbitrators generally.[55] It has been held that a school district,[56] an incorporated road district,[57] and the overseers of the poor who were made a quasi-corporation in a county [58] all have the power to submit disputes to the binding decision of an arbiter.

Government has sought to promote the use of arbitration by private disputants and has passed laws to make these private tribunals more effective than they were under the common law. Some authorities have commented [59] that it should not be immediately concluded that legislation putting legal sanctions behind arbitration clauses is desirable, for "whenever there is a statutory provision for the enforcement of arbitration agreements and arbitration awards the courts are called upon to put the sanction of law behind the decision of the arbitrator." Some have raised the question: "Would it have been better if governments had not, as many have, made arbitration agreements irrevocable, so that it would have been, as it originally began, 'a voluntary process?' "

In answer to this query, it can be said that under general arbitration statutes, which make an agreement to arbitrate irrevocable, the parties do enter the contract voluntarily. Bargaining strength may be a factor in the inclusion of the clause, but it is also a factor involved when at common law a party refuses to

53 *City Street Improvement Co.* v. *Marysville,* 155 Cal. 419 (1909).

54 *Benedict* v. *Oneida County,* 24 Hun (N.Y.) 413; *County* v. *Townbridge,* 25 Wash. 140; *McGillivray Constr. Co.* v. *Hoskins,* 54 Cal. App. 636.

55 See *Carter* v. *Krueger,* 175 Ky. 399.

56 *Walnut* v. *Rankin,* 70 Iowa 65; *Burham* v. *Union Free School Dist.,* 48 N.Y. Supp. 702, aff'd. 165 N.Y. 661.

57 *Lewelling Co.* v. *St. Francis County Road Improv. Dist.,* 158 Ark. 91, 250 S.W. 1.

58 *Chapline* v. *Ohio County,* 7 Leigh (Va.) 231.

59 Cox, "Legal Aspects of Labor Arbitration in New England," 8 *Arb. Jnl.* N.S. 5 (1953); Domke, "Arbitration," 35 *N.Y.U.L.R.* 600 (1959).

abide by his agreement to submit a controversy to arbitration. More importantly, since the remainder of the contract may be specifically enforceable, there is little reason for not specifically enforcing the agreement to arbitrate. And since arbitration has proven to be a successful means for resolving the typical commercial dispute or labor dispute, government has ample cause for saying that it is in the public interest that those who have agreed to arbitrate must perform their agreements. Thus the dispute may be resolved without disruption in the social functions of the disputants and without adding to the congestion of modern day courts.

Governments have, in general, promoted the use of arbitration as a different means of resolving disputes than is available in the courts or than was available by common law arbitration. For the most part the choice of whether to arbitrate or to use the courts in cases of disputes has been left to the parties. But by law, recognition has been accorded to the private tribunal of arbitration, and by law that tribunal's status has been enhanced, greatly defined, and protected.

Whenever the government or one of its agencies becomes a party to a dispute submitted to arbitration, many factors enter which need not be considered in the ordinary case. Private parties, unlike government officials, do not have their powers, duties and discretion rigidly stated and legally limited.

An instance of these extra considerations which interfere with the fuller use of arbitration directly by governmental agencies arose in a New York [60] case in 1953 involving a dispute between the New York Board of Education and the High School Teachers Association. The dispute concerned extra compensation for extra-curricular activities. The Board of Education refused to go to arbitration. The court upheld the board's refusal upon the ground that the dispute involved an administrative policy matter of which the Board by law could not divest itself of responsibility, the Board alone having the right and responsibility to fix its own administrative policy, subject only to the review of the Commissioner of Education.

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[60] Matter of High School Teachers Ass'n. of N.Y. City, *N.Y.L.* Sept. 17, 1953, p. 444 D. Falco J.

Unionism in government employment is in its infancy as yet,[61] but even where such unions exist there are complex problems. Whereas government has promoted collective bargaining in private industry, and although it must accord a just grievance procedure for its own employees, it has jealously guarded its sovereignty and frowned upon union activity for its employees, generally speaking.[62] I cite this as a fact, not as being justified.

In conclusion, it must be noted that the indirect governmental uses of arbitration have been many and of great political and economic consequence. Where the government is engaged in political disputes with foreign nations and where the government is engaged in ordinary commercial dealings, the direct uses of arbitration have been resorted to in much the same manner as by any private disputant. However, difficulties in governmental participation in arbitration do arise when an officer or agency of government by law is responsible for exercising its own discretion in the furtherance of governmental policy. With the development of further guiding principles in distinguishing between a policy decision and a dispute under existing policy, greater direct use of arbitration by government can be foreseen.

With the growing delays, costs and uncertainties of modern day litigation, with the growth in size and multiplied activity of both big business and big government, with the increased number of disputes in this complicated society of ours, there would seem to be only three courses open—a psychiatrist's couch, an improved Miltown, or arbitration.

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61 Segal, "Grievance Procedures for Public Employees," *Labor Law Journal,* 921 (1958).

62 Brady, "Government Policy Regarding the Public and Its Servants." 3 *Labor Law Journal,* 555, 557 (1952).