dence and dragging proceedings out virtually until the strike is settled.

I should finally record my pleasure at meeting a group of a dozen or so members of the NAA, led by Arnold Zack, who visited Australia in May 1981 for a week. It was a pleasure also to have enjoyed the company of Ben Aaron on his rather longer stay in Australia. I hope they found the highly concentrated experience of comparative labor relations rewarding.

Arbitration—The Changing Scene in Great Britain

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Those unfamiliar with the structure of industrial relations in Great Britain, or merely familiar with some of its idiosyncracies, must find it difficult to understand the apparently unstructured and haphazard use of arbitration. Even those working within the system find it difficult to say why arbitration still lacks a clearly established role.

Two general characteristics of the system add to the complexity. It is well known that no clear distinction is made between disputes of right and disputes of interest. This lack of clarity will remain so long as collective agreements are not regarded as legally binding. Each dispute about the interpretation of an existing agreement takes on the character of a fresh negotiation. This is felt by some to be a foolish, indeed amateurish, lack of formality and precision. To others, and they appear to be in the majority, the system is beneficially flexible and stresses "mutuality"—that is to say, the joint regulation of problems. Whatever the merits of that majority view, and it appears to be receiving increased criticism, it means that the arbitrator has failed to secure a regular place in the system as interpreter of disputed collective agreements. That is to be regretted.

More confusing still is the other important characteristic—the existence of a somewhat distinct type of arbitration, usually referred to as unilateral arbitration. In classical voluntary arbitration, the two parties agree to submit their difference to an arbitrator, usually promising to accept his award. Unilateral arbitration allows one party to insist upon arbitration. This form

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is usually found in legislation where not only is one side able to force arbitration, but the award is also legally binding. It is very occasionally to be found in collective agreements, usually in the public sector where the pressure of striking was rarely resorted to (times have indeed changed). For example, the Railway Staff National Tribunal has an interesting provision by which a joint submission to the tribunal leads to a binding award, a unilateral submission to an advisory award.

These two characteristics—the use of arbitration in interest disputes and the existence of unilateral arbitration—have inevitably made the process of arbitration itself the subject of warm political debate. It is arguable that arbitration flourishes best quietly and unsung, though this may be a somewhat British reaction. Certainly the opposite is true. Where arbitration is used to settle major pay disputes or to resolve a collective-bargaining dispute which had led to disruptive strike action, then the full glare of publicity is inevitable and can so easily give a false impression of the whole process. Opinions are formed from one well-publicized, but badly understood, instance. Hostility to the process can easily take root.

Like so much else in democratic politics, these attitudes seem to swing violently from time to time. Just now arbitration is definitely out of general favor. The U.K. government has adopted a philosophy based on the market economy, not unknown, we are given to understand, in universities on the shores of Lake Michigan. Intervention, especially enforced intervention by a third party into wage determination, is regarded now with some hostility, especially by the government as employer itself.

The recession has added greater weight to this criticism. Several of the usual devices of the interest-dispute arbitrator—comparability is the strongest example—have been fiercely criticized. The process is said to have ignored important factors, of which "ability to pay" is the most frequently mentioned. An argument such as that is difficult to refute, in part because in the public sector the wage fund drawn from rates and taxes can never be as finite as that available to the commercial employer. He has always used the inability-to-pay argument, and it is easier —though by no means easy—to test his sincerity. Since, in the mixed economy, the government is a major employer either directly (the civil service) or indirectly as contributor to the wage fund in areas ranging from local government and hospital ser-

vices to subsidized nationalized industries, and even grant-aided private industry, its attitude is crucial. Since the government has as one of its primary functions the overall regulation of the economy, it is inevitable that its political stance in that field will be strongly reflected in its role as employer. Thus the boundary between the economic arguments (can't afford) and the political (the government has willed the end, so must provide the means) is never clear and, in this context, is virtually nonexistent.

So, since the election of the Conservative Government in 1979, the criticisms of arbitration have grown. The government has made public its adverse view of unilateral arbitration machinery in the public sector and has started to dismantle it. Pay-fixing generally is regarded as primarily to be based upon market forces, and arbitration is obviously in that context an irritant. It follows that while there is an increasing growth of third-party resolvement of rights disputes, arbitration generally is in decline. It is possible to illustrate this by looking briefly, but in more detail, at the changing pattern.

I. Individual Rights and Industrial Tribunals

The growth of individual rights has depended largely upon a steady legislative program, begun in 1963. It started with the establishment of minimum periods of notice for all employees, gained a great boost with the regulation of dismissal by the Industrial Relations Act of 1971 (now repealed, but these provisions were reenacted in the new legislation), and by 1976 had covered a wide area including points such as time-off for trade-union activity and maternity leave. These statutory rules supplemented collective agreements, which had never been able to establish such an advantageous position overall. It was welcomed by the trade unions; indeed, they persuaded the Labor Government to make the advances of 1974–1975. The obvious disadvantage appears to have been overlooked. The existence of the statutory provisions lessened the need to press for strengthened collective agreements. The gains still appear to many to outweigh the loss. Yet many would argue that the easy option of legislation has provided yet another excuse to the trade unions who lack real professionalism.

The real interest to arbitrators is the emphasis now placed on dispute resolution outside the collective agreement. The statutory rules are enforced by the industrial tribunals—a system

outlined in the 1980 report by my colleague, Professor Johnston. The growth in the number of complaints made to the tribunals was remarkable, and there has been little sign of a diminution. The annual figure of about 40,000 is a surprise, but there is a conciliation step, so the majority of cases never reach a hearing.

The reasons for surprise are twofold. The acceptance of a legalized tribunal system firmly linked, through the Employment Appeals Tribunal, to the ordinary courts is such a marked change from the staunch independence of those in industrial relations. It may well be that the indirect impact of tribunal decisions on the concept of a fair-employment contract was not fully appreciated. So far little has been written, other than by academic lawyers, about the creation of a plethora of rules which amount to a "standard form" of contract. The second ground for surprise is the apparently acceptable loss of control, and even power, by the trade unions as the legal rules come to regulate more and more. Obviously, in an area as untilled and unstructured as the law of employment was until the 1960s, any development of rules is likely to be an improvement of rights—certainly for those working in areas without a history of collective bargaining. This perhaps obscured the previously clear disadvantages of legal regulation—a loss of flexibility and an artificiality as abstract rules replace individual settlement of difficulties. Again, some academic voices are being raised on this point, too. But the system flourishes.

The current development will be of real danger only if there is a move towards legally binding collective agreements. This is still stoutly resisted by both sides of industry. However, as so often happens, pressure for reform comes on a different wind. The current political cry is for a reassessment of the power and position of our trade unions, secured under the common law by means of statutory immunities. Already in the Employment Act of 1980 and the current proposals (Employment Bill of 1982), the process is in train. One major step would be to make immunities depend upon "failure of due process" under the collective agreement. This proposal, in line with the present government's political views, has not found favor, largely perhaps because of practical difficulties. For it to be workable, the status of the collective agreement would have to be more firmly established—the very groundwork that would be needed before, and therefore might lead naturally to, the status of being legally binding.

Were that to occur without deliberate thought, the likelihood would be that supervision of legally binding agreements would become the responsibility of the tribunals. Although at first sight this is logical, it has one very important drawback. The close integration via the Employment Appeals Tribunal would tend to bring to bear on the handling of a collective-agreement dispute the methods of documentary interpretation developed by the courts. This has a very legalistic flavor, very foreign to usual industrial relations practice. It is to be hoped that this development does not occur unnoticed. Attention at some stage will need to be given specifically to whether arbitration along the U.S. lines would not provide a more fruitful advance.

II. Unilateral Arbitration in Pay

The period 1974–1979 was notable for its use of unilateral arbitration, by which is meant provisions enabling one party to insist that the other submits an issue to binding arbitration. It is secured by statute. The use of the device has its roots in attempts to prevent industrial strife during the Second World War. It allowed the employee who felt he was being paid less than the established rate—that is, the rate fixed by a national or local collective agreement—to claim an increase.

In the Employment Protection Act of 1975, the trade unions persuaded the government to extend this process to a worker who could show that his rate fell below the "district level." The law was, surprisingly, put into operation at the beginning of 1976, a moment when the government was establishing a pay policy that year-by-year attempted to reduce the permitted wage increases. The juxtaposition of the pay policy and the procedure —usually referred to as Schedule 11, where the rules were to be found in the 1975 Act—meant an inevitable use of the machinery.

Thus the body to which the machinery was entrusted, the Central Arbitration Committee (once known as the Industrial Court), found itself inundated with cases. The figures speak for themselves: 1976, 54; 1977, 742; 1978, 529; 1979, 346. It was not merely the low-paid who used the system. Since it was based on comparative levels, highly paid workers who felt they had fallen behind those of similar skill in the same industry and district were able to bring a case. Employers who found that they were unable to attract labor because their wage rates were out of line encouraged their trade unions to bring such a case.

Indeed, on occasion the government as employer or, through public ownership, the paymaster encouraged raises to be sought by this route so that the annual increase would remain within pay-policy limits.

The result of this phenomenon was that the process of arbitration boomed as it never previously had done. Techniques had to be developed and members of the panels had to gain experience. For four years the amount of work was unprecedented.

The Conservative Government, elected in 1979, had policies strongly opposed to the social-democratic approach. The concept of solidarity of wages—that is, the rate for the job—were replaced by a faith in competition. The whole system was swept away, leaving wage-fixing as far as possible to market forces and to collective bargaining. No doubt if the pendulum swings back again to where comparability and solidarity predominate, a very uneven wage pattern will be found giving scope, under a political philosophy so minded, to another bout of consolidation of rates.

It is interesting to note, too, that when the Labor Government found itself under pressure from public employees for "catching-up" raises, it set up a standing committee on pay (called the Clegg Committee after its chairman). It was not, of course, in form an arbitration body, yet in reality it had many of the same features. It received written evidence from the parties, held discussions with them, and produced a report which had much the same effect as an arbitration award. Obviously it differed from arbitration chiefly in that the committee itself did a great deal of research in comparative levels of pay, either itself or by means of commissioning consultants. This body, too, fell under the axe of the market-oriented Conservative Government.

This relatively brief period of pay-determination by unilateral arbitration, or the Clegg Commission, is typical of the U.K. scene. A process or a new body is launched, and before its techniques can be properly refined or its longer-term impact evaluated, it falls to a political change of wind. This not only changes the principles, but does considerable institutional damage.

III. Voluntary Arbitration

The failure to regard the collective agreement as even a quasi-legal document means that voluntary arbitration remains a fitfully used instrument in industrial relations. Its use is not

monitored, so it is impossible to give adequate statistics. Arbitration services are offered free by the public, but independent, Advisory Conciliation and Arbitration Service (ACAS). Its establishment, with a tripartite council—employer, trade union, and independent members—led to a marked increase in the use of its services. A complete guess will be that it arranges at least half and probably three-quarters of the arbitration work. The statistics are:

	1975	1976	. . .	1979	1980
Boards (three-member arbitration)	32	31		44	34
Single arbitrators	260	265		304	237

The pattern is relatively steady with a workload in the 375–475 range. It seems clear that there is a need for arbitration under the present arrangements, but the need, like so much else in the system, is not institutionalized; it is an ad hoc reaction to current problems.

To summarize: There are two areas of tension which will determine future development. The first is political. Both the Labor Party and the new, and as yet not provenly established third force, the Social Democratic Party, will undoubtedly turn to more institutional and formalized procedures. It is inevitable that the pendulum would then swing back towards the concept of unilateral arbitration in one form or another. The current Conservative Party, although itself containing differing attitudes, is at present firmly wedded to laissez-faire views which do not regard arbitration as other than an emergency escape, to be used sparingly. The political battle is likely to be resolved next at a general election in 1984 or thereabouts. Arbitration will not be an issue! But its short-term future will be at stake.

The second is more subtle and would need expanded consideration to be fully explained. There is, however, a relatively unnoticed conflict between the legal approach, epitomized by the industrial tribunals, and the more traditional informal approach. Arbitration is flexible enough to live in either camp, but its real role should be as the formalism of the informal system. Yet there are signs that, despite a great deal of opposition, the legalization of industrial relations is gathering momentum. The result should make an interesting report in two to three years' time.