ARBITRATION AND GOVERNMENT CONTRACTS

ARBITRATION has with the aid of legislation[1] developed from an improvised and misunderstood technique into an effective method for settling disputes. Although the Federal Government has, as lawmaker, facilitated the use of arbitration and arbitration agreements by private parties,[2] it has so far denied itself the benefits of the device with respect to its own contracts. The current expansion of public spending for defense, multiplying the Government's contractual relations with private business,[3] emphasizes this defect in the procedure of federal procurement. It is the purpose of this Comment to discover whether or not the Government is denied the use of arbitration under existing law, and if so, to consider the problems which must be met before arbitration can be made available. This inquiry will be made with a view to recommending the legislative authorization that may seem necessary.

I.

An arbitration agreement is an agreement to submit an existing or future controversy to a non-judicial tribunal chosen by the parties. The advantage of arbitration lies mainly in the flexibility which it provides in the adjustment of disputes typically arising under contracts for sale or construction.[4] Few public or private contracts present novel or subtle issues of law requiring judicial interpretation. Few contracting parties, on the other hand, can escape disagreement, more or less serious, over questions of the quantity and quality of materials used or sold, elements of cost in cost-plus-a-fixed-fee contracts, or the allocation of liability for delays in performance. When such disputes arise, litigation is often costly and dilatory. Arbitration refers them to a body familiar with the practices and language of the trade, ready to proceed to hearing promptly, and able to investigate the merits of a controversy without

1. While every state except Oklahoma and South Dakota has enacted general statutes governing arbitration of existing controversies, the movement to provide statutory sanctions for agreements to arbitrate future disputes began with the enactment of the New York Arbitration Law in 1920. Statutes similar to that of New York have been enacted in Arizona, California, Connecticut, Louisiana, Massachusetts, New Hampshire, Ohio, Oregon, Pennsylvania, Rhode Island, Wisconsin, Hawaii, and the United States. A Uniform Arbitration Act, which does not cover future disputes agreements, has been enacted in Nevada, North Carolina, Utah, and Wyoming.

2. 43 STAT. 883 (1925), 9 U. S. C. § 1 *et seq.* (Supp. 1939), hereinafter referred to as ARBITRATION ACT.

3. In December, 1940, it was estimated that 30% of the plants in the United States capable of manufacturing goods for the national defense program were working on Government contracts. Statement of Philip Murray in N. Y. Times, Dec. 18, 1940, p. 1, col. 1. See Comment (1940) 50 YALE L. J. 250, 266-285.

4. See Sturges, *Commercial Arbitration or Court Application of Common Law Rules of Marketing* (1925) 34 YALE L. J. 480.

tripping over the more restrictive rules of evidence and civil procedure.[5] Involuntary delays do not appear because *ad hoc* arbitral tribunals never have crowded dockets,[6] and dilatory tactics are minimized. Moreover, if court action is necessary to enforce any phase of the arbitration procedure, it can be quickly secured, since statutory arbitration agreements are enforced, and awards confirmed, vacated, or corrected, under simplified motion procedure.[7] These advantages have been widely recognized by legal and commercial groups, which have urged the passage of statutes designed to remove the common law limitations on arbitration agreements and arbitral proceedings and awards,[8] and have encouraged or compelled arbitration of disputes arising among their own members.[9] In England, where statutory arbitration has a longer history,[10] it has been estimated that less than 3% of the disputes over commercial contracts are settled by litigation.[11]

When disputes arise under Government contracts, however, both the Government and the contractor are at present limited to procedures which in

5. Although generalizations are difficult because of the varying standards for arbitration proceedings applied by courts in reviewing awards, the proposition that arbitrators are not obliged to follow common law rules of evidence is generally accepted. See the discussion in Sturges, *supra* note 4, at 485.

6. During the last fiscal year reported on by the Attorney General, the Court of Claims had 1,156 cases pending at the beginning of the year, docketed 769 cases, disposed of 331, and had 1,594 pending at the close of the year. In the district courts, 65.3% of civil cases in the same period had been pending six months or over, and 17.3% three years or over. REP. ATT'Y GEN. (1939) 192.

7. ARBITRATION ACT §§ 6, 12, 13; Cohen and Dayton, *The New Federal Arbitration Law* (1926) 12 VA. L. REV. 265.

8. At common law courts refused to stay suits brought in violation of arbitration agreements. The doctrine that future disputes clauses are contracts void as attempts to "oust the courts of their jurisdiction" is usually traced to Vynior's Case, decided by Lord Coke in 1609, 8 Coke 80 (K. B. 1609). The language first appeared in Kill v. Hollister, 1 Wilson 129 (K. B. 1746). See Sayre, *Development of Commercial Arbitration Law* (1928) 37 YALE L. J. 595. Specific performance of agreements to arbitrate was denied on the ground that there is no lack of equity in confining parties to the courts. Kaufmann v. Liggett, 209 Pa. 87, 58 Atl. 129 (1904); Greason v. Keteltas, 17 N. Y. 491 (1858). And the award could not be reduced to judgment without suit on the award, on a penal bond given to insure performance, or on a promissory note. See STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 674. Parties may arbitrate under common law rules despite the existence of arbitration statutes, which are regarded as merely cumulative. For discussion of the relation between common law and statutory arbitrations, consult STURGES, *op. cit. supra*. The doctrine that the statutes are remedial in character has created some confusion in the application of conflicts of laws principles to arbitration agreements. See Lorenzen, *Commercial Arbitration—International and Interstate Aspects* (1934) 43 YALE L. J. 716.

9. See Cohen and Dayton, *The New Federal Arbitration Law* (1926) 12 VA. L. REV. 265; Sayre, *Development of Commercial Arbitration Law* (1928) 37 YALE L. J. 595.

10. 52 & 53 VICT., c. 49 (1889); 10 & 11 GEO. V., c. 81 (1920).

11. Rosenbaum, *A Report on Commercial Arbitration in England* (1916), Bulletin XII of the American Judicature Society; see BACON, COMMERCIAL ARBITRATION AS GOVERNED BY THE LAW OF ENGLAND (1925).

private dealings would be regarded as cumbersome and unsatisfactory. The standard forms for Government contracts and sub-contracts now attempt to discourage litigation by including varying provisions designed to refer all disputes over questions of fact to determination by a Government representative, with a right of appeal to a designated superior official or officials.[12] Only if the specified officials fail or refuse to decide the facts, or use their powers fraudulently, has the contractor an opportunity to secure an independent examination of the controversy. Otherwise their decision binds both parties.[13] If delays are caused by the Government, the contractor must submit written notice of the facts to the contracting officer to secure remission of the liquidated damages stipulated in the contract.[14] He must sue for his own damages, however, unless an appropriation is specially provided.[15]

The desirability of referring these disputes to arbitration seems clear. It would of course reduce demands on the time of policy-forming officials now constrained to hear or otherwise dispose of appeals. But the essential fact is that an adjudication by arbitration would be more in keeping with notions of fairness than any decision by an individual official. Such unilateral determinations involve many of the issues which, under private contracts, are decided by impartial bodies through litigation or arbitration. Entrusting to a contracting officer the primary decision as to whether or not that officer was responsible for delay in the performance of a contract, for instance, seems an even less desirable method for settling disputes than litigation.[16] Appeal

12. A typical clause is Article XV in the War Department's Cost-Plus-A-Fixed-Fee Construction Contract, approved by the Assistant Secretary of War on July 12, 1940. It provides that all disputes concerning questions of fact shall be decided by the contracting officer, subject to written appeal by the contractor within 30 days to the Chief of Branch or his duly authorized representative, whose decision shall be final and conclusive upon both parties when the amount involved is $15,000 or less. When a larger amount is involved, the decision of the Chief of Branch can be appealed by the contractor to the Secretary of War. In the meantime the contractor must "diligently proceed with the work as directed."

13. United States v. Gleason, 175 U. S. 588 (1900) (engineer's finding on length of "just and reasonable" delay in performance); Kihlberg v. United States, 97 U. S. 398 (1878) (distance under contract for transportation fixed by chief quartermaster); Yale & Towne Mfg. Co. v. United States, 58 Ct. Cl. 633 (1923) (proper extension of time); Brinck, Receiver v. United States, 53 Ct. Cl. 170 (1918) (quality of material).

14. McGuire, Matters of Procedure Under Government Contracts (1935).

15. The Court of Claims is not, like the General Accounting Office, limited to existing appropriations. See Mansfield, The Comptroller General (1939) 109. The Court has, on the other hand, declined jurisdiction of claims which could be settled by the Comptroller General. See *In re* Proposed Reference, 53 Ct. Cl. 370 (1918); *In re* Departmental Reference, 59 Ct. Cl. 813 (1924).

16. Objection has also been made that under the present system departmental decisions may involve questions of law. The theory remains that it is "the province of the courts to declare the law of the contract." Davis v. United States, 82 Ct. Cl. 334 (1936). In this case the Court of Claims held that decisions as to the meaning of the words "wiring" and "subcontractor" were questions of law. Whether the work met

through the hierarchy of the department to officials who know progressively less about the precise matters at issue seems an illusory safeguard,[17] as does the contractor's opportunity to persuade a court that the initial determination was fraudulent. From the Government's point of view, the experience of other public bodies which have tried arbitration suggests that, once the sovereign has shed its immunity, it need have no more to fear from independent arbiters than from an equally independent judiciary.[18]

Once accepted by the Government, arbitration can perform functions broader than the adjustment of disputes under procurement contracts. Upon the cessation of hostilities in 1918, the Government needed both to dispose of surplus supplies on hand and to stop work on thousands of contracts with manufacturers. Local sales control boards headed by Army officers were set up by the War Department with broad powers to settle disputes arising over sale of supplies at auction, even to the extent of ordering refundment to purchasers where funds had not been covered into the Treasury.[19] Adequate arbitration clauses in the sales contracts would presumably have assured a more impartial and complete hearing of these controversies. In terminating contracts, the Secretary of War offered his own settlements to contractors in lieu of the remedies provided by contract, or suit for breach of contract in the Court of Claims.[20] Such settlements, involving determination of the

contract requirements, and who was liable for delay in performance, were classified as questions of "fact." The futility of such distinctions is apparent.

17. *Cf.* Bray v. United States, 46 Ct. Cl. 132 (1911); Fitzgibbon v. United States, 52 Ct. Cl. 164 (1917).

18. The Pennsylvania Arbitration Act is specifically made applicable to any written contract executed by the state, any of its agencies or subdivisions, or any municipal corporations. PA. STAT. (Purdon, 1936) tit. 5, §§ 176, 181; Commonwealth v. Union Paving Co., 288 Pa. 577, 136 Atl. 856 (1927). Compulsory arbitration of controversies arising from contracts of the state highway commission is provided by statute in North Dakota and in Minnesota. MINN. STAT. (1927) § 2554(17); N. D. LAWS, 1927, c. 160. Municipal corporations are generally stated to have an inherent power, incident to their power to contract, to submit to arbitration. DILLON, MUNICIPAL CORPORATIONS (4th ed. 1890) § 478; Shawneetown v. Baker, 85 Ill. 563 (1877); District Twp. of Walnut v. Rankin, 70 Iowa 65, 29 N. W. 806 (1886); Maroulas v. State Industrial Accident Comm., 117 Ore. 406, 244 Pac. 317 (1926). Iowa has carried an arbitration provision in its specifications for highway work for 25 years, under which some 40 arbitrations have been held. The Port of New York Authority and the Department of Water Supply of the City of Detroit have occasionally resorted to arbitration. The recent contract for construction of the Lake Champlain Bridge, between Crown Point, New York, and Chimney Point, Vermont, included a clause making the findings of the bridge commission's engineer on questions of time and financial consideration reviewable by arbitration pursuant to the New York Act. White, *Arbitration Under Public Construction Contracts* (1937) 1 ARBIT. J. 149.

19. For a description of the boards, see United States v. Koplin, 24 F. (2d) 840 (N. D. Ga. 1928).

20. The legislation and procedure is described in *Notes on Jurisdiction of the Secretary of War to Settle Contracts and Usual Basis Used in Doing So.* (U. S. War Dep't 1920).

contractors' net expenditures under the terminated contracts,[21] would also have been given fuller and more impartial consideration by arbitrators. At present, arbitration would permit decentralized and efficient determinations of similar issues under contracts to construct emergency facilities for defense production.

II.

Despite the policy expressed by Congress in the United States Arbitration Act, it has been said that Government contracting officers are powerless to agree to arbitrate without express statutory authority. Because this opinion rests in part on grounds other than specific lack of statutory authorization, its foundations are worth investigating with some particularity.

The question was judicially considered on one occasion, in the case of *United States v. Ames*,[22] decided by the Circuit Court of Massachusetts in 1845. The Secretary of War had authorized the district attorney for Massachusetts to refer to arbitration a controversy between Ames and the Government over a dam erected by Ames which caused water to flow on Government land. An arbitration was held and an award, in part favorable to Ames, was rendered; but the then prevailing procedure for entering the award as a rule of court was not followed.[23] Later the Government sued Ames for trespass, and he pleaded the award. The precise issue was whether or not the award constituted an adequate plea in bar. In ruling the plea invalid, the court held that the Secretary's authorization to arbitrate was beyond constitutional power, since no department or officer of the Government may vest judicial power anywhere except in a court created under Article 3 of the Constitution.[24] The holding seems puzzling and inconclusive. If it was meant that only constitutional courts can judicially determine the Government's rights, the argument is no longer valid. The Court of Claims, established and judicially sustained after the *Ames* case,[25] is a legislative court exercising judicial power.[26] Nevertheless, the *Ames* case is still cited

21. In eight months, the Secretary settled 21,800 contracts for an aggregate sum of $272,786,000, an average of 13% of the contract price. Settlements were based on cost, not on the contract price, and excluded compensation for anticipated profit. Although contractors who refused to accept the settlement offered by the War Department could sue for breach, the Department pointedly suggested that settlement was "much more favorable than litigation of so great a number of claims against the United States would be with the consequent delays, both in reaching judgments and in obtaining from Congress the appropriations to pay the same." U. S. War Dep't, *op. cit. supra* note 20, at 16.

22. 24 Fed. Cas. 784 (C. C. Mass. 1845).

23. *Id.* at 789.

24. *Ibid.*

25. Act Feb. 24, 1855, c. 122, 10 STAT. 612; Act March 3, 1863, c. 92, 12 STAT. 765; as incorporated in 36 STAT. 1135 (1911), 28 U. S. C. § 250 (Supp. 1939). A concise history of the Court may be found in Pocono Pines Assembly Hotels Co. v. United States, 73 Ct. Cl. 447 (1932).

26. Williams v. United States, 289 U. S. 553 (1933).

to support the proposition that the rights and liabilities of the United States may not be submitted to the adjudication of arbitrators.[27]

A second line of argument, adopted by the Judge Advocate General of the Army, is that agreements to settle by arbitration all disputes arising under a contract are void as attempts to "oust the jurisdiction" of the courts,[28] and that a Government contracting officer cannot "waive the illegality" of such a clause by inserting it in a contract.[29] The basic assumption of this argument, that arbitration clauses are against public policy, was superseded by the United States Arbitration Act, which expressly declares against their invalidity and makes them irrevocable and specifically enforceable. Though this legislation may have limited application in some instances, as when parties agree to submit future disputes to a tribunal in a foreign jurisdiction,[30] no special limitations apply to the use of arbitration agreements by the United States.

The most stubborn opposition to proposals for arbitration by the United States has appeared in the deliberations of the Comptroller General.[31] More precisely, that officer has ruled that the Government cannot be charged with the expenses of an arbitration for which there has been no appropriation by Congress.[32] Reliance was had upon a 1909 statute[33] prohibiting the use of Treasury funds for the expenses of unauthorized boards and commissions.[34] The legal effect of his decision might be technically avoided by an agreement which would charge the contractor with the expenses of the arbitration. But the Comptroller General's strategic power over disbursements, enhanced by the circumstance that they are imperfectly defined, has given at least an *in terrorem* persuasiveness to his broader statements that agreements to arbitrate would be invalid unless authorized by statute.[35] The

27. 8 DEC. COMP. GEN. 96 (1928).

28. See note 8 *supra.*

29. Digest of Opinions of the Judge Advocate General, 1912-30, 410 (May 5, 1919), 164 (Apr. 14, 1920). The Attorney General, in disapproving a contract giving a power company an unlimited option to purchase a government plant and containing other clauses unfavorable to the government, expressed his opinion that a provision for the "arbitration" (*i.e.*, appraisal) of the price to be paid was unenforceable. 33 OPS. ATT'Y GEN. 160 (Daugherty, 1922).

30. The Edam, 27 F. Supp. 8 (S. D. N. Y. 1939) ("all disputes to be submitted to the determination of the competent court at Rotterdam" held not an arbitration clause).

31. 8 DEC. COMP. GEN. 96 (1928); 7 DEC. COMP. GEN. 541 (1928); 6 DEC. COMP. GEN. 140 (1926); 5 DEC. COMP. GEN. 417 (1925).

32. See decisions cited *supra* note 31.

33. 35 STAT. 1027 (1909), 31 U. S. C. § 673 (Supp. 1939).

34. 43 CONG. REC. 3118, 3119 (1909). Its sponsor complained of the "great number of commissions that are now in existence (that) have been working under authority from the executive department alone." The measure was modified to substitute the words "authorized by law" for "authorized by Congress." The statute also forbids the detailing of regular government employes to unauthorized commissions.

35. For criticism of the Comptroller General's powers, see MANSFIELD, THE COMPTROLLER GENERAL (1939) *passim.*

Comptroller General has expressed this view in disapproving contracts containing limited future disputes clauses which were submitted to him by the Secretary of War[36] and the Secretary of Commerce.[37] He rejected the argument that the general authorization of the Secretary of Commerce to acquire leases "under terms customary in the oil and gas industry" included power to agree to arbitration of disputes over the value of gas rights and the cost of drilling wells.[38]

Although it would seem that none of these arguments conclusively establishes the necessity for statutory authorization to arbitrate, in practical effect they have proved a formidable deterrent to experiment. Understandable inhibitions have stood in the way of bringing the question to a court test. If the contract is awarded by bid, the bidder may have little opportunity to shape the terms of the bargain. Even if it is awarded by negotiation,[39] private contractors and Government contracting officers are inclined to accede to opinions held by Government legal or accounting departments. On the assumption, therefore, that specific statutory authorization is desirable as a practical matter if not as a legal necessity, it is proposed to discuss the problems such authorization may raise.

III.

Since Congress may provide for the adjustment of claims by[40] and against[41] the Government and regulate the manner of their determination, it may unquestionably authorize the adjustment of both classes of claims by arbitration. The power of Congress to provide for the enforcement of

36. 7 DEC. COMP. GEN. 541 (1928). In this opinion the Comptroller General advised the Secretary of War that a clause in a lease by the War Department of power generating facilities, providing for arbitration of disputes by three arbitrators, one to be chosen by the War Department, one by the power company, and the third by the two so designated, was not within the Secretary's authority.

37. 8 DEC. COMP. GEN. 96 (1928).

38. The *Ames* case was cited to sustain his position. 8 DEC. COMP. GEN. 96 (1928).

39. Permitted by certain recent appropriation measures. Pub. L. No. 781, 76th Cong., 3d Sess. (Sept. 9, 1940); Pub. L. No. 667, 76th Cong., 3d Sess. (June 26, 1940); Pub. L. No. 671, 76th Cong., 3d Sess. (June 28, 1940) § 2(a); Pub. L. No. 703, 76th Cong., 3d Sess. (July 2, 1940) §§ 1(a), 1(b) 5; Pub. L. No. 588, 76th Cong., 3d Sess. (June 11, 1940).

40. Power to compromise unliquidated claims is exercised by the Attorney General, the Secretary of the Treasury, and the Commissioner of Internal Revenue. REV. STAT. § 3469 (1875), 31 U. S. C. § 194 (Supp. 1939); 53 STAT. 508 (1939), 15 U. S. C. § 728 (Supp. 1939); Executive Order No. 6166, June 10, 1933. The Attorney General possesses the general power of an attorney conducting a suit to dismiss, discontinue, or compromise government suits. See 38 OPS. ATT'Y GEN. 125 (1934).

41. See note 25 *supra*. On claims up to $10,000, the district courts exercise jurisdiction concurrently with the Court of Claims. 36 STAT. 1093 (1911), 28 U. S. C. § 41 (20) (Supp. 1939). The General Accounting Office has limited powers of settlement. 42 STAT. 24 (1921), 31 U. S. C. § 71 (Supp. 1939).

claims by or against the Government in regulating the jurisdiction of the federal courts is also clear.[42] The form of statutory authorization for arbitration presents, therefore, not problems of power, but problems of policy.

The first problem seems to be whether authority to arbitrate should be conferred specially or generally. Special authorizations could be included in the individual statutes creating each of the Government agencies, or in particular appropriation measures.[43] Congress would thus have to consider separately each agency and department and any possible reasons peculiar to it for avoiding, or limiting, resort to arbitration.[44] The alternative is a general authorization by amendment to the United States Arbitration Act which would make its provisions available to Government contracting officers. This method would seem to be far more expedient.

It seems desirable, if a general authorization is conferred, that contracting officers be left to determine the extent to which they will employ arbitration, both as to the type of contracts affected and as to the scope of the arbitration agreements. The authorization proposed is therefore permissive rather than mandatory. While this vesting of discretion might enable administrative standpatters to deny arbitration to contractors who would have no legal standing to compel it, the disadvantages of discretion seem to be outweighed by those which would attend a blanket Congressional order to arbitrate. Such an order might well discredit the remedy by exposing to mandamus proceedings[45] officers who had good reason to avoid arbitration in a particular case. And once the existing obstacles to arbitration had been removed, administrative responsibility would be better served by allowing officers a freedom of experiment and adaptation in discovering feasible uses and desirable limitations.

In leaving to contracting officers the definition of the scope of the agreement, the proposed general authorization would permit them to include

42. See notes 25 and 41 *supra*.

43. The United States Shipping Board and any other government agency operating a merchant vessel may "arbitrate, compromise, or settle" a libel *in personam* or a suit for salvage services rendered by the vessel. 41 STAT. 527 (1920), 46 U. S. C. § 749 (Supp. 1939). The word "arbitrate" in this statute has not been judicially defined. The criminal code contains a provision that any disputes as to the "price, quality, suitability or character" of products manufactured in a prison industry for a Government department shall be arbitrated by a board consisting of the Comptroller General of the United States, the Superintendent of Supplies of the General Supply Committee, and the Chief of the United States Bureau of Efficiency, or their representatives. 46 STAT. 392 (1930), 18 U. S. C. § 744(g) (Supp. 1939). The General Supply Committee was abolished by Executive Order of June 10, 1933, No. 6166, § 1. The Bureau of Efficiency has been abolished by Congress. 47 STAT. 1519 (1933).

44. Officials may prefer to reserve for litigation contracts involving very large sums, feeling that the publicity that would be attracted by a large award adverse to the Government might expose them to criticism. See White, *Arbitration Under Public Construction Contracts* (1937) 1 ARBIT. J. 149, 151.

45. Miguel v. McCarl, 291 U. S. 442 (1934); see note 75 *infra*.

within it any matters which could be included in such an agreement between private parties.[46] There should be no difficulty in defining the scope of an existing controversy submitted to arbitration.[47] Courts have sometimes interpreted future disputes agreements liberally,[48] however, and officers desiring to limit their scope should do so with nicety. What exceptions are desirable, and how completely arbitrators should displace courts and other agencies in adjudicating public rights, are questions depending on general considerations of policy and convenience.[49] Since the Government in its commercial dealings is considered a ward of the court,[50] its officers might be protected from the consequences of defective draftsmanship; but contractors would not enjoy any such protection. Fairness suggests the desirability of drawing on the many expert sources available[51] to aid in the drafting of suitable standard forms for arbitration agreements, similar to those now in use for other Government contracts.[52]

No doubt of the individual agent's authority to arbitrate should exist when a future disputes clause appears in a contract, if it is countersigned by a superior officer. This is a usual requirement to prevent execution by agents without actual authority.[53] An agreement attempted by parol would be

46. The United States Arbitration Act excludes from its scope "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." ARBITRATION ACT § 1.

47. This would be the case where disagreement arose over a contract not containing a future disputes clause, and it were desired to submit the controversy to arbitration. Under statutes prescribing separate formalities for future disputes clauses and agreements to submit existing controversies, the argument may be made that submission agreements must be executed for each dispute arising under a future disputes clause. The United States Act, however, does not prescribe separate formalities. See STURGES, COMMERCIAL ARBITRATION AND AWARDS (1930) 324-328.

48. Connor v. Simpson, 104 Pa. 440 (1883); Clark & Sons v. Pittsburgh, 217 Pa. 46, 66 Atl. 154 (1907). But *cf.* Young v. Crescent Dev. Co., 240 N. Y. 244, 148 N. E. 510 (1925); Smith Fireproof Const. Co. v. Thompson-Starrett Co., 247 N. Y. 277, 160 N. E. 369 (1928).

49. See note 44 *supra.*

50. Wilber Nat. Bank v. United States, 294 U. S. 120, 123 (1935); United States v. Verdier, 164 U. S. 213 (1896). Justice Holmes' statement of the policy underlying the doctrine is characteristic: "Men must turn square corners when they deal with the government." Rock Island, A. & L. R. R. v. United States, 254 U. S. 141, 143 (1920).

51. The American Arbitration Association, notably, has developed advisory facilities for arbitrations. See Parker, *Arbitration Under the Standard Documents of the American Institute of Architects* (1937) 1 ARBIT. J. 134.

52. "As the situation is today, there is very little dispute under the standard forms of contracts except as to the facts . . ." MCGUIRE, MATTERS OF PROCEDURE UNDER GOVERNMENT CONTRACTS (1935) 22.

53. For a discussion of the departmental procedures involving approval by superior officers, see SHEALEY, GOVERNMENT CONTRACTS (1938) 311-315. Government agents have no apparent authority. Utah Power & Light Co. v. United States, 243 U. S. 389, 409 (1917); Sutton v. United States, 256 U. S. 575 (1921); Filor v. United States, 9 Wall. 45 (U. S. 1869). An exception to the rule is allowed when the United States be-

nugatory under the Arbitration Act, since only written agreements are enforceable under its provisions.[54]

A workable method of meeting the expenses of an arbitration to which the Government is a party should not be difficult to find. In general, the authority of arbitrators is derived from and limited by the arbitration agreement.[55] Incident to their authority to make an award, however, they may have the power to provide compensation for themselves,[56] retaining the award as security,[57] and to divide the expenses of the arbitration between the parties.[58] Analogizing the expenses of the arbitration to court costs, it would seem that a Government agency established with a "sue and be sued" clause,[59] which might therefore be held liable for costs,[60] would be taxable for its proper share of the arbitration expenses.[61] The principle that the United States as sovereign never pays costs has been modified by the Tucker Act, which provides that a prevailing claimant in the Court of Claims may have his costs.[62] Assuming that a uniform rule for costs and arbitration expenses is desirable, its application may be left to the court confirming the award.

The simplest solution for the payment of arbitrators might be to stipulate in all cases that their compensation be paid by the private contractor, since this method would require neither specific appropriation for arbitrators nor authorization to pay them from general funds. An equitable compromise would be to require each party to pay the fee of the arbitrator it selected. The arbitrator chosen by the Government could then be drawn from persons

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comes a party to commercial paper; it then stands in the shoes of a private person. United States v. Guaranty Trust Co., 293 U. S. 340 (1934).

54. ARBITRATION ACT, § 1. In general, a contract required to be in writing by REV. STAT. § 3744 (1875), 41 U. S. C. § 16 (Supp. 1939), if not performed, cannot be sued upon by the contractor. Gruber v. United States, 60 Ct. Cl. 222 (1925); Rome Brass & Copper Co. v. United States, 60 Ct. Cl. 280 (1925). The government may waive the informality and sue. United States v. New York & P. R. S. S. Co., 239 U. S. 88 (1915). If, after performance, the government refuses to perfect the contract, the contractor may sue for the value of his goods or services. Clark v. United States, 95 U. S. 539 (1877); Moran Bros. v. United States, 39 Ct. Cl. 486 (1904).

55. See STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 144.

56. Alling v. Munson, 2 Conn. 691 (1818); Strang v. Ferguson, 14 Johns. 161 (N. Y. 1817); Tri-State Transp. Co. v. Stearns Bros., 195 N. C. 720, 143 S. E. 473 (1928).

57. Withholding the award beyond the date required for delivery has been held not to affect its validity. Willard v. Bickford, 39 N. H. 536 (1859); New York Lumber & Wood Working Co. v. Schneider, 119 N. Y. 475, 24 N. E. 4 (1890); STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 612.

58. See note 56 *supra;* STURGES, *op. cit. supra* note 57, at 611.

59. Forty government-owned corporations have the clause. See Keifer & Keifer v. RFC, 306 U. S. 381, 390 (1939).

60. RFC v. J. G. Menihan Corp., 111 F. (2d) 940 (C. C. A. 2d, 1940), *cert. granted,* 61 S. Ct. 126 (1940), 8 U. OF CHI. L. REV. 154.

61. *Cf.* United States v. Shaw, 309 U. S. 495 (1940); United States v. Verdier, 164 U. S. 213, 219 (1896).

62. 24 STAT. 508 (1887), 36 STAT. 1138 (1911), 28 U. S. C. § 258 (Supp. 1939).

already on its payroll. If the arbitrators failed to agree, and appointed a third arbitrator or umpire, his fee could be paid by the contractor, unless he, too, were drawn from regular Government personnel.[63] Such an arrangement would eliminate the necessity for further action by Congress, and would dissuade contractors from invoking arbitration over minor disputes. Departments contemplating other methods of payment could avoid possible difficulty with the General Accounting Office[64] by including in their budgetary requisitions a fund for the compensation of arbitrators.

IV.

Arbitration agreements in Government contracts would be irrevocable and enforceable in federal courts under the United States Arbitration Act.[65] They would, however, be subject to the normal requirements of federal jurisdiction.

No difficulty should appear in staying suits brought in violation of an agreement to arbitrate. The United States would bring such a suit in a federal district court with jurisdiction over the defendant's person.[66] The contractor could sue the United States on a contract claim only in the Court of Claims, or, if the matter in controversy were less than $10,000, in the federal district court.[67] Suit in either case could be stayed on application to the court under Section 3 of the Arbitration Act.[68]

If, however, either the contractor or the Government, without bringing suit, refused to proceed to arbitration, a different problem would arise. A party aggrieved by the other's failure to arbitrate may, under Section 4 of the Arbitration Act, seek specific performance in any court of the United States which would have jurisdiction under the Judicial Code of a suit arising between the parties.[69] The suits that might arise between the Government and a private contractor fall into three jurisdictional categories. The Court of Claims and the district courts have concurrent jurisdiction of contract suits against the Government where the matter in controversy is less than $10,000.[70] Where it exceeds that figure, the Court of Claims has ex-

63. That one, or even two, of the arbitrators would thus be Government officials would not appear sufficient to vitiate the arbitration. *Cf.* Commonwealth v. Union Paving Co., 288 Pa. 577, 136 Atl. 856 (1927), and cases there cited. This fact might, however, affect the arbitration's impartiality, unless the second Government arbitrator were drawn from another department.

64. See notes 15 and 35 *supra.*

65. Government agreements would qualify under the Act as agreements in contracts covering commerce between a state and the District of Columbia, or under the provision extending the benefits of the Act to commerce within the District. ARBITRATION ACT, § 1.

66. 36 STAT. 1091 (1911), 28 U. S. C. § 41(1) (Supp. 1939).

67. 36 STAT. 1093 (1911), 28 U. S. C. § 41(20) (Supp. 1939).

68. ARBITRATION ACT, § 3.

69. ARBITRATION ACT, § 4.

70. 36 STAT. 1093 (1911), 28 U. S. C. § 41(20) (Supp. 1939).

clusive jurisdiction.[71] Finally, the district courts have jurisdiction of any suit brought by the Government.[72] Two interpretations of Section 4 would be possible. If the Court of Claims is not considered a court of the United States exercising jurisdiction under the Judicial Code, specific performance of the agreement to arbitrate could be sought only in the district courts.[73] Presumably they would not be subject to the maximum jurisdictional amount of $10,000, since the suit would not be one for a money judgment against the Government. If the Court of Claims is considered a court of the United States within the meaning of Section 4, it, too, could grant specific performance. As a practical matter, there would seem to be no necessity to adopt this interpretation. Its only purpose would be to make available a court which could exercise jurisdiction over Government officers in the District of Columbia.[74] For this purpose, the District Court of the District of Columbia would be as satisfactory as the Court of Claims. If the Government official failed to appoint an arbitrator, without denying the existence or applicability of the arbitration agreement, this court under Section 5 of the Act could itself appoint an arbitrator or arbitrators.[75] Proceedings under either section against a recalcitrant contractor could be had in his own district.

The Act provides that parties to an agreement may stipulate that judgment be entered on the award and may specify the court to which application may be made for such judgment.[76] Instead of specifying a court in the agreement, the simpler practice would be to apply to the Court of Claims to confirm awards of more than $10,000 against the government, to the district courts or the Court of Claims for smaller awards, and to the district courts for all awards in favor of the Government. Courts would be required to confirm the award on application unless it were vacated, modified, or corrected as the Act prescribes.[77]

The Government's rights would be amply protected under the existing provisions of the Arbitration Act. Motion to vacate would enable the court to set aside an award if it had been procured by corruption or fraud, if the arbitrators were guilty of misconduct, exceeded their powers, or failed to

71. 36 STAT. 1093 (1911), 28 U. S. C. § 41(20) (Supp. 1939).

72. 36 STAT. 1091 (1911), 28 U. S. C. § 41(1) (Supp. 1939).

73. For a discussion of jurisdictional requirements under Section 4, see STURGES, COMMERCIAL ARBITRATIONS AND AWARDS (1930) 950.

74. In general, it is unwise to proceed against government officers on the assumption that their superiors are not necessary parties. Litigants making the assumption in suits for injunctions, in order to avoid suing in the District of Columbia, may be met by a holding that the superior is a necessary party and that the Court has no jurisdiction over his person, resulting in dismissal of the suit. Gnerich v. Rutter, 265 U. S. 388 (1924); Eastman v. United States, 28 F. Supp. 807 (W. D. Wash. 1939).

75. ARBITRATION ACT, § 5.

76. ARBITRATION ACT, § 9.

77. ARBITRATION ACT, § 9.