The Voluntaryist

Whole Number 84 *"If one takes care of the means, the end will take care of itself."* **February 1997**

"Stateless, Not Lawless": Voluntaryism and Arbitration

By Carl Watner

Introduction

Arbitration is a consensual process whereby two parties to a dispute agree to accept as final the judgment of a third person or persons in settling the matter in question. Arbitration depends upon the consent and voluntary agreement of the disputants, and the willingness of the arbitrator(s) to serve. What distinguishes arbitration from all forms of State judicial settlement of disputes is its totally voluntary nature. Arbitrators are not licensed by the State (at least not yet). The disputing parties select the arbitrators and determine the procedure and rules by which their disagreement will be settled. They may agree in advance of any actual dispute to submit their differences to arbitration or they may simply agree to arbitrate an existing problem. The arbitral award or settlement decided upon by the arbitrator obtains its binding force from the contract or agreement of the parties to arbitrate, and does not require the coercive legal apparatus of the State to be respected or enforced. Nonviolent, non-State punishments may be brought to bear against those who, having promised to arbitrate or honor an arbitral award, refuse to do so. Ostracism, excommunication, and the boycott are arbitral sanctions that function in the spirit of true voluntaryism.

Arbitration is undoubtedly as old as mankind, and is certainly older, as an institution, than the near-monopoly court systems we find in use in the contemporary nation-state. Arbitration has been favored in all the ancient legal systems (Jewish, Roman, Greek, Byzantine, Islamic, and Christian), except that of the Chinese, who believed that "going to law" or court was an evil. (The Chinese, while using mediation and conciliation, have always been reluctant to give third parties the right to make a judgement.) It is probably not an exaggeration, as Jerzy Jakubowski has written, to say that arbitration "is a universal human institution. It is [the] product of a universal human need and desire for the equitable solution of differences inevitably arising from time to time between people by an impartial person having the confidence of and authority from" the disputants themselves.

Wherever arbitration has existed, it has posed a threat to the supremacy of the State judicial system. Consequently, it has been co-opted, regulated, and controlled by the State, making its legal history a complex, and sometimes confusing, tangle. The purpose of this article is to offer an overview of arbitration, both past and current, interpreted from a voluntaryist point of view. Voluntaryists advocate an all voluntary society, where all the affairs of people are undertaken by mutual consent or not at all. In the absence of coercive, tax-supported governments which tend to monopolize the judicial settlement of disputes, arbitration and other voluntary dispute settlement practices would flourish and constitute an integral part of civilized life. The old Law Merchant, which was "voluntarily produced, voluntarily adjudicated, and voluntarily enforced," and the international commercial arbitration practices of today prove that arbitration is a moral and practical alternative to compulsory dispute settlement by the State.

Most people assume that nation-states are prerequisites for producing "law and order", and find it difficult to envision a competitive market in the judicial arena. As voluntaryists already realize, such is not the case. If the truth be known, the compulsory nation-state is destructive, rather than supportive, of property rights and the voluntary social order. Bruce Benson, whose scholarly work in this area I wish to acknowledge, once characterized the American Wild West of the mid-1800s (where coercive government was either absent or extremely weak) as "stateless, but not lawless." Benson would have us focus on the fact that liberty is the mother, not the daughter, of civilized living. Property, contracts, and customary law existed before State-made law tried to supercede them. As Benson and others have noted, private property is a key characteristic of all societies where custom is the primary source of law, and where reciprocity is the primary impetus for meeting one's obligations.

What does this have to do with arbitration? Arbitration is one of the key sources of voluntary law and order in a society without the State. Every contract or voluntary agreement between two or more people contains within itself the essence of the rules governing the transaction(s) between them. These "homemade" laws or rules derive their power from the consent of the parties, and usually differ markedly from statutory or third-party law (often arbitrarily) imposed upon them by the State with its power of legislative law-making. The essence of this idea can be seen in a conflict between International Business Machines Corp. and Fujitsu Ltd., that occurred during the late 1980s, which included an arbitral award of $833.3 million to IBM. IBM claimed that Fujitsu was copying its software, which then enabled Fujitsu to market computers that were compatible with IBM's. Government-made copyright law did not clearly address the issue of such a complex software-hardware dispute, because technology had forged ahead into areas never before addressed by State-made law. Shedding the courts, their own legal staffs and lawyers, and four years of wrangling over the issue, the two companies decided to appoint two arbitrators to settle the issue. The two arbitrators were given "sweeping powers to shape future software relations between IBM and Fujitsu. The two men, in their own words, will 'constitute the intellectual property law between the two companies'." (WALL ST. JOURNAL, Sept. 18, 1987, A1)

The History of Arbitration

While much of this article will focus on the various aspects and significance of domestic and international com-

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The Voluntaryist

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Subscription Information

Published bi-monthly by The Voluntaryists, P.O. Box 1275, Gramling, SC 29348. Yearly subscriptions (six issues) are $18 or .045 ounce or 1.400 grams of fine gold. For overseas postage, please add $5 or 1/3 of the regular subscription price. Single back issues are $4 each or 1/5 of the regular subscription price. Please check the number on your mailing label to see when you should renew.

Back issues of this publication are available on microfiche from John Zube, Box 52, Berrima, NSW 2577, Australia.

"Stateless, Not Lawless": Voluntaryism and Arbitration

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mercial arbitration, such as the IBM-Fujitsu case, there are important reasons for considering the use of arbitration in other areas of life. Arbitration can be, and has been resorted to, in many other types of situations involving community, club, or congregational disputes, patient complaints against hospitals or doctors, in divorce proceedings, and in attorney-client disputes. Arbitration has been widely used in resolving labor disputes, as well as in settling consumer complaints against retail businesses. Currently in Japan, arbitration is sometimes used to determine the amount of restitution a criminal owes to his or her victim. With a little imagination arbitration can be applied to almost any facet of life. Two examples will suffice to demonstrate.

The first is found in Jerold Auerbach's book, JUSTICE WITHOUT LAW?, and describes the effects of an arbitral case in Puritan New England in the early 1640s. The dispute involved the amount to be paid by a Mrs. Hibbens, "wife of a prominent Boston resident," and Mr. Crabtree, who provided carpentry services in her house. When neither of the two could agree on how much Crabtree was due, Mr. Hibbens suggested arbitration. He "chose one carpenter and Crabtree another. The arbitrators set a revised fee, but Mrs. Hibbens remained obdurate." She not only found Crabtree's work unsatisfactory, but cast aspersions on the skills of the two arbitrators, "which diminished their reputation in the community. Church elders approached Mrs. Hibbens, but she remained unmollified. After another arbitration attempt failed, the dispute moved into the First Church of Boston, where Reverend Cotton presided."

The focus of the dispute now shifted "from a disagreement over wages to the stubborn recalcitrance of a church member who did not respect communal fellowship." Not only did Mrs. Hibbens gossip behind the backs of the carpenter-arbitrators, she refused to confront them face-to-face, in a "church way," as required by congregational rules. Ultimately, Mrs. Hibbens' behavior was judged by the entire church membership, "in a process designed to reassert harmony and consensus." As Auerbach pointed out:

> Congregants were free to offer information, opinion, and admonition, but the purpose of individual participation was to encourage a collective congregational judgment, which would isolate offenders, restore them to congregational fellowship, and thereby strengthen communal values. The sanctions of admonition and excommunication were sufficient for this purpose. The church could neither arrest a wrongdoer nor seize his property, but the danger of expulsion, where church and community were virtually co-extensive, loomed ominously. [p. 24]

This was Mrs. Hibbens' fate. She was excommunicated by a vote of the church membership, pronounced "a leprous and unclean person," and deprived of "the enjoyment of all those blessed privileges and ordinances which God hath entrusted his Church withal, which [she had] so long abused."

How many Americans know that George Washington placed an arbitration clause in his Last Will and Testament in 1799? Washington hoped that no conflicts would arise concerning the testamentary disposition of his property. However, he provided that "all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; two to be chosen by the disputants—each having the choice of one—and the third by the two of those. Which three men thus chosen, shall, unfettered by Law, or legal constructions, declare their intent of the Testators intention; and such decision is to all intents and purposes to be as binding on the Parties as if it had been given in the Supreme Court of the United States." So far as is known the provisions of this clause went unexercised.

Business arbitration in this country and Europe certainly pre-dated Washington's will. Americans used arbitration during the Stamp Act crisis of 1765-66 when their refusal to pay British taxes blocked their access to colonial courts. In May 1768, the New York Chamber of Commerce appointed an arbitration committee "for the settlement of commercial disputes outside of the courts." Referred to as "the oldest American tribunal," the New York Chamber of Commerce "has continuously, except for a short time at the beginning of [the 20th] century, maintained some form of arbitration procedure." The New York Stock Exchange, founded in 1792, provided for arbitration in its Constitution of 1817. The oldest arbitral institution in the cotton trade is to be found in Liverpool, England, where the first rules of cotton trading, which included rules governing arbitration, were published in 1863 by the Liverpool Cotton Exchange. Likewise, the first rules of the New York Cotton Exchange, founded in 1870 provided for a court of arbitration. The Dried Fruit Association of New York (now the Association of Food Distributors, Inc.) still maintains an arbitration tribunal which has been in continuous existence since the time of the group's founding in 1906. One of the Association's officials, writing in 1958, pointed out that it was not unusual for a request for arbitration to be received in the morning, and the arbitral award be issued the same afternoon. This was most desirable where the commodity in question was perishable and where it needed to be moved before the free time on the dock expired.

As William Wooldridge has pointed out in his chapter on "Voluntary Justice," arbitration has always played an essential part in the workings of the Law Merchant. For several hundred years, arbitral tribunals composed of merchants and guildsmen settled "the most important trading disputes of England and of much of Europe." The Law Merchant constituted "the body of customary rules and principles relating to merchants and mercantile transactions and adopted by traders themselves for the purpose

of regulating their dealings." These institutions were completely voluntary, "and if a man ignored their judgment, he [w]ould not be sent to jail." Their decisions were well-respected, "otherwise people would have never used them in the first place." No one forced a merchant to abide by his agreements or coerced him into honoring an arbitral award. His failure to do so would not place him in jail, but "neither would he long continue to be a merchant." As Wooldrige put it,

> The complete circumvention of official courts, one of the oldest and best established of civilized institutions, and the voluntary forfeiture of what would seem to be the most fundamental and essential characteristic of any court—the ability to enforce its judgments with legal coercion—present interesting questions .... [M]edieval merchants must have considered their interests better served by voluntary submission of disputes to one of their own number than by formal common-law actions. [p. 96]

Clarence Birdseye, author of ARBITRATION AND BUSINESS ETHICS (1926), once guessed that as many business disputes went to arbitration as were settled by the statist courts. He also observed that these commercial arbitrations "had no direct sanction of law, and were dependent only upon the mutual good faith of the parties for their operation and success." [p. 91] The threat of business sanctions and the desire for reciprocity were the primary motivations businessmen had for voluntarily living up to their promises.

Until the early 1920s, court decisions, some dating back to the 17th and 18th Centuries, governed arbitration proceedings in the United States. Lord Coke's opinion in Vynior's Case (Trinity Term, 7 Jac. 1), decided in 1609, formed the basis for the common law doctrine that "1) either party to an arbitration might withdraw at any time before an actual award; and 2) that an agreement to arbitrate a future dispute was against public policy and not enforceable." The precedent established in Vynior's case (from which it was extrapolated that the parties to a dispute "may not oust the court of its jurisdiction"—meaning that courts may not be deprived of their jurisdiction even by private agreement) became "the controlling decision in American arbitration law" until the New York State legislature abrogated the common law doctrine in 1920, and until a federal arbitration statute was passed in 1925. Other states soon followed suit, and for the first time in America, agreements to arbitrate future disputes were "legally binding and judicially enforceable."

These new laws actually undermined the credibility of commercial arbitration. Arbitration had flourished for hundreds of years in the absence of any State-guarantee that arbitration agreements would be enforced by the courts. History had already clearly demonstrated that mercantile conformity to arbitration agreements did not depend upon the existence of the State or its enforcement mechanisms. The Law Merchant had always prohibited appeals of arbitration awards. Arbitration tribunals were designed to avoid unnecessary litigation, as well as to render timely decisions which would not disrupt the pace of business transactions. The laws of the 1920s opened many a Pandora's box by raising a host of questions about how the new statutes would be enforced, and by creating the opportunity to appeal arbitral awards to the courts. As Bruce Benson noted: "[T]he incentives to develop non-legal sanctions [had been] undermined by these statutes.... [I]t does not follow that in the absence of modern arbitration statutes the level of arbitration would be dramatically less than it is today. Lawyers would be less prevalent, and there would be fewer appeals, but because ... stronger incentives would exist to develop mechanisms for the imposition of reputation sanctions, arbitration would still be flourishing, even outside existing associations and exchanges."

International Commercial Arbitration

In POWER AND MARKET, Murray Rothbard pointed out that "the world has lived quite well throughout its existence without a single, ultimate decision-maker over its whole inhabited surface." [p. 3] As an example of how the world fared under this anarchical reign, he could have pointed to the medieval Law Merchant, which served as an international legal system that governed without the coercive power of a centralized political state. Likewise, its successor today, international commercial law "is still largely enforced without the backing of nation-states." Bruce Benson claims that, "The international Law Merchant can be viewed as a constitutionality established system of governance for the international business community ... despite the lack of politically defined geographic boundaries and a centralized authority with coercive power to tax and punish." The most significant contribution of the international Law Merchant lies in the development of arbitration between two businessmen of perhaps different nationalities, conducting business across two or more political boundaries.

The history of modern international commercial arbitration began in Paris, France under the auspices of the International Chamber of Commerce founded in 1921. The ICC International Court of Arbitration was established in 1923, and as of May 1994, had handled some 8000 cases involving international commercial disputes. The rules of the Chamber embrace a number of Law Merchant concepts. "The ICC rules provide that arbitrators should be selected from different national origins, thereby preserving an international flavor in dispute resolution. So, too, ICC arbitrators are required to be experts in commercial conciliation and in international arbitration, again reviving the commercial sophistication of the merchant judge. Finally, the ICC procedures provide for the speedy settlement of disputes through a flexible conciliation procedure, and, failing that, an adaptable arbitral process. Here, too, the ideal of an expeditious and low cost arbitration process is partially embodied in the ICC Rules." The primary benefit of using ICC Rules, or the rules of some other arbitration agency, like the American Arbitration Association, is that the parties to a dispute do not have to create their own procedures in an ad hoc manner. The ICC Rules are widely publicized, predictable, and easily used. "The International Court of Arbitration administers and supervises ICC arbitrations from the introduction of a request for arbitration to the rendering of a final Award. Disputes are not settled by the Court itself but by independent arbitrators—appointed or confirmed by the Court—who deal with the merits of a case." The Court of Arbitration serves to protect the integrity of the arbitral process, provides lists of qualified arbitrators, and reviews each award before it is finalized. The National Committees of Arbitration, which function under the ICC, often offer moral assistance in upholding ICC awards, and often form inter-arbitral agreements acceptable to their merchant mem-

bers.

Jan Paulsson, a French practitioner of international arbitration, writing in the early 1980s claimed that over 90% of all arbitral awards issued under the auspices of the International Chamber of Commerce were complied with. Charles Carabiber in his article in Martin Domke's collection, INTERNATIONAL TRADE ARBITRATION (New York: 1958) noted that, "The private character of arbitration eliminates the possibility of statistics and consequently it is not generally known that 85% of [international] arbitral awards are complied with. This figure was obtained from information given by several arbitration centers of long standing." [p. 163] These ballpark estimates were further confirmed by Rene David, in a 1982 book review of his own book, ARBITRATION IN INTERNATIONAL TRADE, which appeared in THE ART OF ARBITRATION. Regarding compliance with international arbitral awards, David wrote:

> Account must be taken, first of all, of the fact that parties to a contract do in most cases perform their duties under the contract without bothering what the law—any national law—says about the matter.... The losing party will ordinarily voluntarily comply with the arbitration award. He may be dissatisfied, but his commercial reputation is at stake, good faith impels him also to comply; he will abstain from the niceties of some lawyer's law which might perhaps allow him an opportunity to challenge the award. Ninety percent of the arbitral agreements are complied with; ninety percent of the awards are voluntarily performed without raising the question whether they would be enforceable or not "at law." [p. 91]

At the same time that the national movement for statutory arbitration was gaining ground in the United States, there was a similar movement among the major trading nations of the Western world. Under the guise of embracing international treaties to assure the enforcement of international arbitral awards, these nation-States attempted to retain control over the arbitral process. The Geneva Protocol on Arbitration Clauses of September 24, 1923, and the Geneva Convention on the Execution of Foreign Arbitral Awards of September 30, 1927, were the results of these efforts. Essentially these international agreements provided that each contracting State "is required to recognize as binding and to enforce awards rendered in the territory of another contracting State." Some of the difficulties encountered under these treaties were removed with the passage of the New York Convention of June 19, 1958, sponsored by the United Nations. By 1982, nearly 60 nations had signed this document. The New York Convention severely restricted the reasons for questioning a foreign arbitral award by the judiciary of the country in which it was being enforced. "The onus of proving that the award is not enforceable is shifted to the defendant resisting enforcement under the New York Convention."

Gotaverken vs. General National Maritime

Three arbitral awards rendered in Paris, France on April 5, 1978 will serve to illustrate the working and rules of arbitration of the International Chamber of Commerce, describe their relationship to the New York Convention of 1958, and highlight the issue of party autonomy, by which the arbitration process is divorced from State-made law. ICC case numbers 2977, 2978, and 3033 involved the Swedish shipbuilder, Gotaverken Arendal AB (the large Gothenburg shipyard) and the buyer of three newly-constructed tankers, the General National Maritime Transport Company (later succeeded by the Libyan General Maritime Transport Organization). The sales contracts included a clause, according to which "all disputes arising from or in connection with the present contract ... shall be finally settled by arbitration ... [to] be held in Paris and conducted in accordance with the Rules of Conciliation and Arbitration then in force of the International Chamber of Commerce. The award shall be final, binding ... and each party agrees to abide by such decision...." Construction on the vessels had begun after a $90 million downpayment had been made. Upon completion, Libyan General refused to take delivery or pay the balance outstanding because 1) contract provisions prohibiting the use of components made in Israel had been violated, and 2) certain technical specifications had not been met. Gotaverken rejected these arguments and initiated arbitral proceedings in accord with the contract.

The dispute was submitted to ICC arbitration in Paris, and the arbitral tribunal was composed of a French chairman, a Norwegian, and a Libyan. By a two-to-one decision (which the Libyan arbitrator refused to sign), the tribunal rejected Libyan General's claims. Libyan General was ordered to accept delivery of the ships and to pay the outstanding purchase price, less a reduction amounting to about 2% for deviations from specifications. When Libyan General would not voluntarily comply with the arbitral ruling, Gotaverken petitioned the Svea Court of Appeal for the enforcement of the award in Sweden. Libyan General opposed this request on the ground that it had already begun appeal proceedings in France. It had petitioned the Court of Appeal of Paris to set aside the award. When the Svea Court of Appeal upheld the arbitration, Libyan General then instituted an appeal to the Swedish Supreme Court, asking that the Svea Court's judgment be set aside, or at least held in abeyance until the proceedings before the Court of Appeal of Paris had been decided.

The basis for the Libyan appeals was 1) under French national law governing arbitral awards, the mere fact that an application for setting aside the award was before the Courts caused the award to be temporarily suspended; 2) the arbitral award was self-contradictory in that it acknowledged the vessels failed to meet contract specifications, yet ordered Libyan General to take delivery; and 3) it would subject Libyan General to criminal sanctions in Libya for violation of boycott legislation; and finally 4) the arbitral decision violated the French public order "because it imposed on a foreign contracting party an obligation contrary to the imperative norms of its home country" (i.e., violation of the boycott law). Libyan General's strategy was to challenge the award in France, and thereby argue "that the award was not binding *anywhere* pending its challenge before the courts in the country where it was rendered."

The Svea Court of Appeals upheld the arbitral award in a decision issued December 13, 1978, and the Swedish Court of Appeals affirmed the Svea judgment on August 13, 1979. Both courts agreed that the French courts had no jurisdiction over the arbitration award, even though the arbitration proceedings had taken place on French soil. Article 11 of the ICC Rules (revised as of 1975) provided

> The rules governing the proceedings before the arbitrator shall be those resulting from these Rules and, where these Rules are silent, any rules which

the parties (or, failing them, the arbitrator) may settle, and whether or not reference is thereby made to a municipal procedural law to be applied to the arbitration.

Thus, the Swedish courts concluded that *"the challenged award was not French in nationality."* Under both the New York Convention of 1958 and the ICC Rules of Arbitration, the law of the place of arbitration would control the proceedings only in the absence of a specific agreement by the parties. Since in this case the parties had agreed to ICC Rules, the municipal law of France did not apply. Consequently, both the Svea Court of Appeal and the Swedish Supreme Court based their "decision not to take jurisdiction on the principle that parties to international arbitral proceedings are free to select the legal order to which they wish to attach the proceedings, and this freedom extends to the exclusion of any national system of law." Furthermore, they viewed the award as binding on the parties from the moment it was issued in Paris, and hence not appealable because "an award would not be binding if it were liable to an appeal."

The appeal before the Court of Appeal of Paris by Libyan General to set aside the ICC award was declared invalid in a judgment rendered February 21, 1980. The Court of Appeal pointed out that 1) none of the parties or the arbitrators had designated any procedural law to govern the arbitration; 2) therefore the only binding rules were those of the ICC; and 3) the arbitral award could not be considered a French award because there was no connecting link to the French legal system, because neither of the parties were French, nor was the contract to be performed on French soil; and 4) that under the New York Convention of 1958, the winning party need not "as a precondition to enforcement elsewhere, seek confirmation of the award by the courts of the country where it was rendered"; or conversely, the country of the seat of arbitration (in this case, France) need not recognize the arbitral award in order for it to be recognized and enforced elsewhere (in this case, in Sweden). The ultimate effect of all three court decisions (two in Sweden and one in France) was to allow Gotaverken to exercise its right of attachment over the three ships, and to proceed with a judicial auction of the ships in order to satisfy its lien against them.

Party Autonomy or State Control

The decision in the Gotaverken case set off a debate among lawyers, jurists, and academics because it presented the question of whether or not it was possible for parties to international arbitration agreements to structure the proceeding and the resulting award so as to be totally independent of the jurisdiction of any nation-state. Could the parties divorce themselves from State control by private agreement, even though their arbitration proceedings had to occur in the territory of some nation-state? Jan Paulsson came closest to supporting the voluntaryist position when he maintained that "the binding force of an international [arbitral] award [is] derived from the contractual commitment to arbitrate in and of itself, that is to say, without a specific national legal system serving as its foundation." Others, such as F. A. Mann, defended the statist position that nothing is legal except what the State permits. Mann maintained that in reality there was no such thing as international arbitration because every "international" arbitration was "subject to a specific system of national law." As he explained:

> No one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law. Every arbitration is subject to the law of a given State. No private person has the right or the power to act on any level other than that of municipal law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law .... [p. 160]

Mann presents some very fundamental questions about the nature of the State. *"Is not every activity occurring on the territory of a State necessarily subject to its jurisdiction"* even if the participants desire to remove themselves from its control? He admits that some States may give the parties more leeway in this regard, but he observes that no State has ever totally abdicated its control over what takes place in its geographic territory. Thus Mann concludes that "No act of the parties can have any legal effect except as the result of the sanction given to it by a [specific State's] legal system." [p. 161] The principle of party autonomy is an illusion, and the municipal law of the seat of the arbitration must be the law governing the arbitral award. As he adds, "It would be intolerable if the country of the seat [of the arbitration] could not override whatever arrangements the parties may have made. The local sovereign does not yield to them except as the result of freedoms granted by himself."

Jakubowski is another who concurs that, "States have adopted the principle of their exclusive jurisdiction to settle disputes between people," but then admits that certain exceptions (one of them being arbitration) have been granted to non-State courts. He says that the State and State courts are clearly necessary, if for no other reason, than they provide the only final means of dispute settlement. As Jakubowski puts it:

> Arbitration could act outside the limits of the State's 'concession', but in such a case the winning party would depend for the performance of obligations established in the arbitral award, on the good will of the other party. Because of the uncertainty of whether the award will be carried out by the losing party, the guarantees of legislation and the assistance of the State are indispensable for arbitration. Practice has shown the limited effectiveness of social pressures (in international trade—the pressure of business circles and professional organizations of businessmen, e.g., chambers of commerce) as a means of enforcing arbitral awards. [p. 178]

Although Jakubowski's evaluation of arbitration history clearly conflicts with that of Benson and Wooldridge, he at least grants that it is possible for transnational arbitration to function in a manner wholly divorced from the State, provided the arbitration process depends only on non-State enforcement mechanisms. Mann, on the other hand, upholds the supremacy of State law, even when the parties want nothing to do with it:

> How do we, how do arbitrators, know that their decision, based on their standards of fairness, is [fairer] than the law? Absolute perfection not being attainable, it is infinitely more dangerous to allow discretion to arbitrators than to compel [the] parties to accept the law, its relative certainty, its authority and, above all, its nondiscriminatory character. *The law is rarely an instrument of op-*

pression. [p. 176, emphasis added]

The law is always "an instrument of oppression" because, unlike arbitration, it does not require the consent of the parties. There is a need for the final and conclusive settlement of disputes, but it is a false assumption to believe that the coercive State is the only way to achieve this objective. The free market approach to this problem is to let the disputing parties themselves select from among competing agencies, all of which offer dispute settlement services. The voluntaryist position is that competing institutions of final dispute settlement would exist (and, in fact, have existed, as arbitration history proves), would not require the State to function, and that the State's involvement in the process is not supportive, but only destructive.

"An institution of initiated force is not necessary to compel disputants to treat arbitration as binding. The principle of rational self-interest, on which the whole free market system is built, would accomplish this end quite effectively." There is not only a moral satisfaction in acting out one's honesty, but there is an economic benefit, too. Linda and Morris Tannehill point out:

> Men who contract to abide by the decision of a neutral arbiter and then break that contract are obviously unreliable and too risky to do business with. Honest men, acting in their rational self-interest, would check the records of those they did business with and would avoid having dealings with any such individuals. This kind of informal business boycott would be extremely effective in a governmentless society .... [p. 66]

In a society without a State, no judicial or arbitration agency would have compulsory jurisdiction, by which they could drag unwilling participants into court. Of course, it would be possible to try a defendant in absentia and issue a boycott judgment against a convicted party. The "convicted" would suffer as a result of the social consequences of his actions, even though no invasive force would be inflicted directly upon him.

The Tannehills have also pointed out that "a court system which has a monopoly guaranteed by the force of statutory law will not give as good quality service as will free market arbitration agencies which must compete for their customers." This is similar to the observation made by Bruce Benson and others that under a customary law system, "the more effective institutional arrangements replace the less effective ones." In other words, where customers are free to migrate between competing judicial and arbitration agencies, they will choose to patronize those that offer the best quality service at the lowest possible prices. As Bruce Benson explained in THE ENTERPRISE OF LAW, "there appears to be substantial benefit from not having monopoly [as in a single legal system], just as there is for the production of all other goods and services." [p. 300]

Arbitration and the (Voluntaryist) Sources of Law and Order

Imagine for an instant, as William Vandersteel posited in No. 14 of THE VOLUNTARYIST, that you had to operate in both your social life and business life as though you had no State courts to resort to in the event that someone caused you a harm or failed to abide by their contractual agreements. You would not be able to employ coercive third-party enforcement measures. Two countervailing tendencies would come into operation. First of all, you would be very careful with whom you had dealings. You would only want to interact with those who had a first-rate reputation and an honorable record of fulfilling their promises in all circumstances. Your second inclination would be to guard your own reputation to the utmost. "Individuals would strive always to act properly and with the highest integrity, knowing that any blemish on their reputation would virtually bar them from participating in any future business ventures."

If we define customary law as a legal system which develops from the bottom up through voluntary arrangements, we will discover that such a system operates in much the same manner as envisioned by Vandersteel. Bruce Benson in his article "The Impetus for Recognizing Private Property and Adopting Ethical Behavior," notes that among small groups of people who frequently interact, there is little need for formal institutional arrangements to insure credible behavior. Everyone is knowledgable about everyone else's reputation. As the size of the group expands, the likelihood of dealing with someone whose reputation is not known is increased, as well as the probability that some person(s) might not fulfill their promises. "Therefore, for such expansion to occur, each party's commitments to accept commonly accepted norms of behavior must be credible." [p. 51]

If a dispute arises between people belonging to different mutual support groups, the disputants may either resort to violent self-help, abandon their claim against the other party, or attempt to negotiate a peaceful settlement. Mutual support groups, whether family, commercial, or social, not only strengthen the position of the solitary individual, but they also act as a means of sharing the expense of dispute settlement. Violence, whether individual or in concert with others, is almost always more expensive than a peaceful resolution. Thus "acceptance of nonviolent dispute resolution will become a customary obligation that is required for group membership," and the "resort to violence without first trying to achieve a nonviolent solution will result in ostracism by the group." [p. 53]

Arbitration plays a pivotal and important part in this process of peaceful dispute settlement. Benson describes how boycott and ostracism work under the customary law, and it is readily apparent how this applies to arbitration in the absence of a State enforcement apparatus:

> [C]ustomary law is tightly bound with all other aspects of life. Fear of this boycott sanction reinforces the self-interest motives associated with the maintenance of reputation and reciprocal arrangements. It also deters intentional offenses. In other words, because each individual has made an investment in establishing himself as part of the community, (e.g., establishing a reputation), that investment can be "held hostage" by the community, in order to insure that the commitment to cooperate is credible. [p. 54]

Under a customary law system, arbitration "decisions can be enforced without the backing of a centralized coercive authority." [p. 55] The key to dispute settlement process in customary law systems is that the loser must "buy back his reputation" by honoring the arbitral award. Failure to do so will result in his ostracism by the entire group. The individual is faced with the choice of living as a social outcast or honoring his commitment to abide by the result of the arbitration. Under such a system, the same incentives apply to the arbitrator as well as to the disputants. Arbitrators must be acceptable to both sides of a dispute.

The arbitrator's "only real power is that of persuasion" and he relies upon the consent of the parties, which he has obtained before hand, to insure that they will abide by his award. The arbitrator is concerned with the fairness of his judgement, since his own reputation and standing in the community are at stake if either party to the arbitration refuses to honor his decision.

Benson also demonstrates how the customary law of non-violent sanctions can operate among members of different support groups, where normally there would be little potential for the boycott sanction to be effectively applied by a member of one group against a member of another group. "Each individual must feel confident that someone from the other group will not be able to take advantage of him and then escape to the protection of that other group. Thus, some sort of intra-group insurance arrangement becomes desirable" and some sort of formalized dispute settlement apparatus is set up between the groups.

> For instance, in order to develop a group's reputation the membership might bond all members in the sense that they will guarantee payment if a member is judged to be in the wrong in a dispute with someone from the other group. The mutual support group becomes a surety group as well. Membership in a group then serves as a signal of reputable behavior to members of another group, and lack of membership serves as a signal that an individual may not be reputable [or at least that he has no surety backing]. Furthermore, if a member of one group cannot or will not pay off a debt to someone in the other group, [as] established by an acceptable arbitrator, then the debtor's group as a whole will [pay the debt] in order to maintain the benefits of the group's reputation. And as a consequence, the individual for whom the group has had to pay will owe his own group members rather than someone from a separate group. [This is known as subrogation in the contemporary insurance industry. Letters of credit in the banking industry serve the same purpose.] In this way the boycott threat comes into play once again. Members of a group are not going to continue bonding an individual who generates debts to the group's membership but does not pay them off. [By this process of subrogation, the] large long-term benefits of intra-group interaction [and] the self interest incentives to maintain intra-group relationships come [back] into play. [p. 62]

How effective are these non-State sanctions? How do shunning, excommunication and the boycott operate? In his book, WHAT IS MUTUALISM? (1927), Clarence Lee Swartz wrote: "Under certain circumstances the boycott and its companion, ostracism, may constitute a most drastic penalty. On account of the gregarious habits of human beings, to be put wholly beyond the pale of society would be more painful to many than to be incarcerated in a prison with others.... It is simple; it is easily and inexpensively applied; it involves, theoretically, none of the elements of physical force; and, above all, it is not an invasive act. What more ideal method of correcting the erring tendencies and antisocial activities of our fellow-men can be conceived?" [pp. 165-166]

Certainly these observations are true with respect to one of the best known historical examples of excommunication, which involved Baruch Spinoza (1632-1677) in 1656. Spinoza's excommunication, known in Hebrew as a 'kherem' or 'herem', was pronounced by the Jewish rabbis of Amsterdam because he denied the existence of angels, "the immortality of the soul, and God's authorship of the Torah." No Jew was to conduct business with him, stand within four paces of him, or even speak to him. The decree of 'kherem' meant "the virtual expulsion of the person upon whom it was inflicted," and his exclusion "from the religious and social life of the community." Recognizing the severity of the consequences, the Rabbinic authorities did not permit its use except in the most serious cases.

The Jewish custom of 'Kherem' is also the underlying basis for the everyday functioning of the world's diamond bourses. Jews have been involved in the diamond trade since the Middle Ages, congregating in Antwerp and Amsterdam, after they were expelled from Spain in 1492. "The diamond industry has systematically rejected state-created law." In its stead, a highly sophisticated system of private governance has evolved which relies upon mandatory pre-arbitration conciliation and arbitration. There is a striking parallel between Orthodox "Jewish law and the modern organization of the diamond industry." As Lisa Bernstein has noted:

> [U]nder Jewish law, a Jew is forbidden to voluntarily go into the courts of non-Jews to resolve commercial disputes with another Jew. Should he do so, he is to be ridiculed and shamed. Jewish law also provides rules governing the making of oral contracts and lays down rules for conducting commercial arbitration. In the diamond industry, Jewish law provided a code of commercial fair dealing that gradually adapted to meet the industry's changing needs; yet, even as the force of religious law broke down, the system remained strong. [p. 141]

Even today, "the largest and most important" diamond bourse in the United States, the New York Diamond Dealers Club, has a large Jewish membership. Each member, upon joining, agrees "to submit all disputes arising from the diamond business between himself and another member to the club's arbitration system," which is final, binding, and non-appealable to the New York State courts. Should a member violate this agreement, the Club's Floor Committee will impose either a fine or expulsion. In the latter case, the errant member's name and photo are posted in bourses all over the world, so that he is effectively prevented from participating in the foreign diamond trade. The New York Diamond Dealers Club, in turn, is affiliated with the World Federation of Diamond Bourses, which is an organization composed of the world's twenty diamond bourses. Each of these bourses extends trading privileges to members in-good-standing in their local diamond trading club. "As a condition of membership in the federation, each bourse is required to enforce the arbitration judgments of all member bourses." In addition, the World Federation maintains its own board of arbitrators, which is responsible for settling disputes between two or more bourses themselves; and for determining which bourse should hear an arbitration case when the parties to it are members of different bourses.

Conclusion

Arbitration is a universal, human institution which preceded the monopoly system of law embraced by contemporary nation-states. Arbitral anarchy has threatened State supremacy because it offers businessmen or others

disaffected with the State legal system a way of solving their problems without involving the State. As Steven Lazarus put it, arbitration offers a "mechanism by which the debilitating forces of legalistic sovereignty can be circumvented." [p. 174] Throughout history, arbitration has been the hallmark of all customary law systems. The practices of the Law Merchant prove beyond doubt "that custom may have the force of law, as a means of social discipline, although it does not rest on the will of the political sovereign, but on objective standards of reason."

Arbitration is a purely voluntaryist means of settling societal disputes. In an interesting insight on means and ends, Bruce Benson, Murray Rothbard, and others have noted that customary law and the private sector must provide the underlying foundation of property rights for the free market system. It is impossible in the nature of things for a compulsory, monopoly legal system to supply the laws required by a totally competitive system. "Politically dictated rules" and statutory law are "not designed to support the market system; in fact, government-made law is likely to do precisely the opposite." A coercive, non-competitive judicial system simply cannot be made to define property rights because it is based upon the supremacy of the political sovereign. In its absence, a customary law system based on private property and personal property rights would evolve, and arbitration would become one of the major ways of settling disputes.

Joseph Jenkins in his article, "The Peacemakers," highlights the importance of arbitration to humankind. He says that "if men are ever to realize their potentials, they must master the art of living together peacefully.... They must devise means of settling their differences by words instead of swords or ... warfare.... [I]t seems ... that when the concepts of conciliation, mediation, and arbitration were introduced into human society, an immense stride was made in the problem of enabling people to live peacefully together." He calls arbitrators 'peacemakers' "because they have it within their power to contribute more to the maintenance of good relations between conflicting forces in our society than any other group, ..." Mankind "must be mature enough and wise enough to solve their problems without government .... This is the very essence of self-government" and voluntaryism. [pp. 436 and 467] V

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