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A Restatement—and a Searching Inquiry

THE WORKING SCHOLAR: ARBITRATION

RAY FORRESTER*

For a man of free-ranging talents and restless energies, it is striking that Wesley Sturges would settle on a single field of law as his primary interest in the very beginning of his career and remain with it for a lifetime. Yet this is so in relation to Sturges' devotion to arbitration.

It is true that he established a prominent position in other areas. His reputation as one of the brilliant teachers of his time, regarded by many as second to none, was gained in large measure in his famous class in Credit Transactions at the Yale Law School. He wrote extensively on this subject and published a leading casebook, the first edition of which appeared in 1930.

He also devoted his attention to the law of administration of debtors' estates, completing his casebook in this subject in 1933.

The success of these books led to the production of two editions of the debtors' estates book and four editions of the casebook on credit transactions, the last appearing in 1955.

He was the author of many law review articles and public addresses in these fields and devoted a massive amount of time to them. In fact, his contributions in either of them, taken alone, would have constituted a successful academic career.

But as one surveys his total work and reads his lengthy bibliography, it is clear that arbitration came first. Studies in arbitration appeared among his earliest publications. A number were produced during the years 1925 and 1926.[1] These were published shortly after his appointment to the Yale Law faculty in 1924.[2]

It is evident that he began extensive work in arbitration soon after he entered into his academic career. This is shown not only by the papers which appeared so early, but also by the more impressive fact that he published his treatise on arbitration in 1930.[3] This volume was the first comprehensive modern study of the subject and continues to this day to be the outstanding and authoritative work. In order to complete it in

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1. *Commercial Arbitration or Court Application of Common Law Rules of Marketing?*, 34 YALE L. J. 480-98 (1925); *Commercial Arbitration in the United States of America*, INTERNATIONALES JAHRBUCH FÜR SCHIEDSGERICHTSWESEN IN ZIVIL-UND HANDELSSACHEN, Band 1, 1926, 153-67 (1926); *Commercial Arbitration*, Conn. State Bar Assoc., annual report, 1926, 33-61 (1926); Book Review, 26 COLUM. L. REV. 785-87 (1926).

2. He entered law teaching, in 1920, at the age of twenty-six at the University of South Dakota.

3. COMMERCIAL ARBITRATION AND AWARDS (1930).

1930, its author must have begun his labors at the start of his teaching career.

THE TREATISE

The treatise was fundamental to Sturges' career in arbitration. Its preparation made him the most knowledgeable man on the subject and its acceptance supplied the foundation for the fame which came to him.

The treatise provides a number of insights.

It indicates Sturges' early ideas concerning the values and the future of the arbitration process.

In the preface he suggested the following points:

First, agreements to arbitrate future disputes tend to prevent litigation and even to prevent the necessity for arbitration itself, due to the fact that the parties are inclined to take care of their own misunderstandings and difficulties before they develop to the proportions of a formal controversy.

Second, commercial arbitration is a method of dispute settlement which is flexible, and adaptable to the wishes of the particular parties.

Third, during the decade preceding the publication of the book, commercial arbitration had become an established and growing practice in American business and commerce, sponsored by professional, business and commercial organizations as well as by the American Arbitration Association.

Fourth, the legal profession has given increasing support to the use of arbitration, and assumptions of prejudice on the part of the profession are without foundation.[4]

The style of the treatise is a reflection of the author's talent, on one hand, and of his objectives, on the other.

The first few sentences of the book are written as follows:

> Nearly every American jurisdiction permits at least two general systems of arbitration. These systems are commonly designated as common law arbitrations and statutory arbitrations. In case of a common law arbitration the arbitration agreement, the arbitral proceedings, the award and matters concerning the enforcement and impeachment of the award are governed chiefly if not entirely by nonstatutory or common law rules. In case of a statutory arbitration these matters are regulated in more or less detail by statute.
>
> The view is almost uniformly held that parties may arbi-

4. *Id.* at iii-v.

> trate under common law rules notwithstanding the existence of an arbitration statute. The arbitration statutes of the different jurisdictions are regarded as merely cumulative. Parties may choose either method. They may manifest their purpose to arbitrate under the arbitration statute of a given jurisdiction by executing a written arbitration agreement according to the requirements of the statute. If they do not so manifest their purpose common law rules of arbitration generally control. (Footnotes omitted.)[5]

This passage illustrates Sturges' rare gift for expositive writing. How often does one find so much said so cleanly and clearly? One wonders how much time went into the preparation and drafting of that brief passage.

The quotation also demonstrates the objectives of the book. In the preface, the author expressed the hope that the volume would "serve as a useful guide . . . for parties, for their attorneys, and for arbitrators in conducting an arbitration."[6]

The book is written for laymen as well as lawyers, for parties as well as arbitrators. It is designed to serve and to be understood by all who need guidance in the laws and the ways of arbitration. Though the author regarded the lawyer as a valuable aid in the procedures of arbitration, he did not believe that the rules and the methods should be concealed within a morass of technical legal nomenclature. He was inclined to give the lawyer an important place in the arbitration procedure not because of professional monopoly, but because of the actual skills of the lawyer in an adversary proceeding.

An especially interesting aspect of Sturges' objective is revealed as one reads further into the treatise. It becomes increasingly clear that the fundamental task he set for himself was to state what the law is rather than to present an appraisal of the merits of the law or an exposition of what he thought the law should be.

This should come as a surprise to anyone who met Sturges for the first time in the class room. He was the acknowledged master of dialectical teaching. The question sign was his hallmark, the quizzical smile his class room expression. Though the kindest, warmest and most gentle of men, he played the role, once seated in his professorial chair, of the dissatisfied and unsatisfiable Socrates, and he permitted many a proud and cocksure student to humble himself in the process of attempting to catch the will-o'-the-wisp which Sturges set free at the beginning of each hour.

Sturges versus textbook law was the thesis and antithesis out of which came a generation of finely trained, keenly critical lawyers.

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5. *Id.* at 2-3.
6. *Id.* at iv.

Yet Sturges' greatest written work is a textbook in which he sets forth in a matter of fact way the positive law of arbitration. He describes the law in the various jurisdictions with reference to common law and statutory arbitration. He relies heavily on quotations from statutes and judicial decisions. When specific issues have not been decided, he presents the expressions of judges on similar matters and permits this to serve as the guide as to how the courts are likely to determine the unresolved questions. He refrains almost entirely from asserting his own opinions of what the law should be.

The result is a description of the law and its status which is largely free from ambiguity, though many problems are clearly marked unanswered.

The approach is understandable when one is reminded of the basic objective of the volume, namely, to establish a guide for the layman as well as the lawyer. This goal is reached with outstanding effectiveness through the simple, clear and comprehensive description of the state of arbitration law up to the time of the completion of the manuscript. If Sturges had chosen his critical and analytical class room method as the basis for the volume, the result would undoubtedly have constituted a significant contribution but it would not have met the purpose of the treatise which Sturges considered most helpful and meaningful at the time. With arbitration moving on the unsteady and wobbly legs of its growing years, Sturges perceived, and wisely, that a sound and reliable guide was more essential at that point than a critical investigation of the highly unsettled body of law.

THE CASEBOOK

If the treatise filled the need for a positive statement of the law of arbitration and presented a simple and clear guide upon which to operate an arbitration system, the casebook which Sturges published, twenty-three years after the treatise, established a foundation for the critical appraisal of that system in its dramatic subsequent development.[7]

In its own way, this compilation of cases and materials was as significant as the earlier treatise. It was the pioneer work for the teaching of arbitration. Through the prestige of its author and excellence of its content, this book made a place for the subject of arbitration in the curriculum of a number of law schools. Though the subject is not yet established as a standard part of the usual law school program, the rapidity with which arbitration is being used and accepted in the legal and commercial world may lead to this status before long. At least, this is to be expected if the vision of its author is a reliable guide.

In the casebook, Sturges brought together a set of materials based on thirty years of teaching and research. The questions which he and his

7. CASES ON ARBITRATION LAW (1953).

students had identified are preserved for the use of others. One needed only to listen to and participate in Sturges' classes in which he used the book, to appreciate how skillfully he had selected cases which described the basic principles and at the same time provoked a flood of questions concerning the validity of those principles and the directions which the courts and the legislatures should take in filling new needs and resolving unsettled issues.

In comparison with the approach taken in the treatise, Sturges called attention in the preface of the casebook to the fact that many court decisions and arbitration statutes "deserve candid re-examination by the courts and legislatures to verify their expediency as legal regulations of the arbitral process in present-day usage."[8]

To those in his arbitration classes, it was evident that the students were being trained to participate in the "candid re-examination."

It should be noted, however, that in the casebook as in the treatise, Sturges presented the materials in a chronology which followed the normal progression of an arbitration proceeding. He started early in both books with a consideration of the arbitration agreement. Then he moved on through the appointment and qualifications of arbitrators, the arbitral proceedings, and finally the problems concerning awards, their validity and effect, their enforcement and impeachment.

This type of orderly and systematic arrangement, typical of Sturges' work, had a teaching value of its own.

OTHER PUBLICATIONS

Dean Sturges wrote and spoke often during his career on the subject of arbitration.

An article which appeared in 1937, early in his career, is helpful as an indication of why he was interested in arbitration.[9]

He stated:

> To lawyers the arbitration of commercial causes conducted under adequate rules and regulations has fully proved itself a more flexible and expeditious remedy than traditional proceedings in the courts; it is less technical; it is sufficiently judicial. More specifically stated: By the use of the arbitral process, the judge or judges may be selected by reason of his or their special qualifications to hear and decide the particular case; the many questions arising in traditional litigation involving only niceties of service of legal process, sufficiency of pleadings, admissibility of evidence under rules frequently of only traditional validity, and other matters of procedure which are likely to have no

8. *Id.* at i.

9. Foreword to *Symposium on Arbitration Law*, 1 ARB. J. 85 (1937).

> bearing on the decision of the ultimate issues in the cause, are reduced to a minimum, if not entirely obviated in an arbitration; the "merits" of the case may be brought on directly for hearing and decision in an arbitration.[10]

His disenchantment with the litigation process is evident here. He saw value in arbitration not only in its intrinsic merits, but also in the fact that the traditional litigation process had faltered and a substitute was needed. He believed that the complex procedure of the litigation process often prevented the merits of the dispute from being decided, and so he approved of the resort to the simple procedure of arbitration. But the rule of law was not to be abandoned. He felt that arbitration must be carefully regulated ("conducted under adequate rules and regulations") so that the process would remain "judicial" though unencumbered with the hurdles of procedure. The proof of the value of arbitration to him was not conceptual but based upon experience ("arbitration . . . has fully proved itself").

This view of arbitration as being a judicial process was reiterated in the following quotation:

> On the other hand, while these are the advantages of arbitral procedure over litigation in commercial causes, it is not amiss to emphasize the dependence of the procedure upon the lawyer. Experience has verified that interdependence. Just as the complexity of modern commercial transactions and the intricacy of the controversies arising out of them prompt the selection of judges who are specially qualified by their knowledge and training to understand the particular controversy and its commercial background, so does the professional training of the lawyer serve the indispensable purposes of identifying and settling the issues of the case. So does the lawyer's professional training qualify him for the presentation of fit evidence in understandable fashion; so does his training in the method of advocacy serve a necessary function in the presentation of briefs and oral argument on the merits of the cause.[11]

In effect, Sturges wanted arbitration to be judicial process with the disagreeable aspects removed. He sought reform by abandoning the traditional methods and by adopting a more simple process known as arbitration.

However, in an article written in 1960, he objected to the view that arbitration is a substitute for litigation in the courts.

He said:

> It should be noted, if not emphasized, that in the . . .

10. *Id.* at 86.
11. *Id.* at 87.

> identification of arbitration as a substitute for litigation, the substitute (arbitration) bears little resemblance to the litigation process. This is true because the arbitral proceeding can be initiated and carried out without traditional pleadings. . . . Moreover, it is generally for the arbitrator to determine finally whether to receive or reject testimony or other evidence—subject to required deference for the parties' right of hearing. Traditional presumptions and burdens of proof of the law of pleading and of the law of evidence do not govern. Unless the parties require otherwise, the arbitrator generally may disregard (or estimate and follow) what might be the law of the case were it to be established in litigation; and distinctions between "issues of fact" and "issues of law" as conceived in the law of civil procedure have no comparable role in arbitration. In short, unless the parties require otherwise in the given case, arbitration displaces all significant aspects of civil litigation except the right of hearing. . . . To restrict it to "justiciable" controversies, as if in deference to the scope of civil litigation, can claim little validity in the prevailing conception of arbitration.[12]

He also challenged the identification of arbitration as a part of litigation. He regarded this analogy as unreliable because:

> There being no court, pleadings or rules of civil procedure to govern and there being little constraint by the law of evidence or by what might be the substantive law of the cause were it in litigation, unless the parties agree otherwise, it is difficult to catch any substantial resemblance between arbitration and an "action," "suit" or "other proceeding."
>
> Judicial refusal to include arbitration within these categories of litigation appears in various contexts in most of the American cases.[13]

He recognized that:

> Sometimes arbitration is cited as being a "quasi-judicial tribunal" and arbitrators as being "judges" of the parties' choosing, "judicial officers" or officers exercising "judicial functions." Here, again, the presentation of arbitration or arbitrators in the role of courts or judiciary is necessarily based upon remote resemblances. "Quasi-judicial tribunal" and the other foregoing terms are not very meaningful. Opinions designating the courts or the judiciary as "quasi-arbitral tribunals" or the judiciary or jury as "arbitrators," or the like, have not been observed. It is true that as judges and juries hear and decide litigated matters, so do arbitrators hear and decide matters submitted to them by parties. But here the resemblance ends.

12. *Arbitration—What Is It?*, 35 N.Y.U.L. Rev. 1031, 1033-34 (1960).
13. *Id.* at 1037-38.

> Arbitrators, as distinguished from judges, are not appointed by the sovereign, are not paid by it, nor are they sworn to any allegiance. Arbitrators exercise no constitutional jurisdiction or like role in the judicial systems—state or national. . . . [T]hey are generally not bound to follow the law unless the parties so prescribe and, as likely as not, they are laymen technically unqualified (and not disposed) to exercise the office of the professional judge.[14]

He concludes by stating:

> The process of making judges of arbitrators and judicial proceedings of arbitration seems to be at its best, when used *arguendo* to reaffirm the parties' right of hearing in arbitrations, to raise the finality and conclusiveness of awards to those of "a judgment" or to lend stature to some set of facts being made up in a given case as cause for disqualification of the arbitrator, as for insufficient "honesty" or "impartiality," undue "bias" or "misconduct."
>
> As further litigations centers upon arbitrations and awards, so may the usages of analogy, metaphor and the making of classifications in the course of the judicial process confound and complicate the role of the arbitral process as presently conceived in legal tradition.

A footnote to this last sentence states:

> Arbitration, like other terms and concepts in legal lore, is, of course, ever subject to judicial revision to make the term mean what the judge may think he should make it mean for the given case.[15]

Another article which requires a particular mention as an indication of Sturges' specific views on arbitration appeared in 1952, entitled *Some General Standards for a State Arbitration Statute*.[16] In this paper Sturges listed a number of technical formalities required by older state statutes which he included among the "don'ts" for a model state arbitration law. Among them were formal and detailed requirements regarding the arbitration agreement, the conduct of the hearing, and the nature, effect and enforceability of the award. He took the position that statutory provisions of this type encumbered the arbitration process and diminished its effectiveness by applying rules reminiscent of the hurdles of common law procedures. He was particularly critical of older statutes which limited arbitration to existing controversies and which did not permit agreements to arbitrate future disputes.

He then posed positively the more desirable standards of a state arbitration statute. Among them he stressed the following:

14. *Id.* at 1045-46.
15. *Id.* at 1047.
16. 7 ARB. J. (n.s.) 194 (1952).

1—Recognition of the validity of agreements to arbitrate future controversies whether justiciable or not.[17]

2—Simple and informal requirements concerning the arbitration agreement.

3—Recognition that arbitration agreements may be irrevocable and specifically enforceable, if desired by the parties.

4—Requirements that the arbitral board must follow the basic concepts of due process, notably, notice and hearing.

5—Provisions permitting the arbitral board to subpoena witnesses and evidence and to proceed with the hearing and render an award upon the evidence presented, even though a recalcitrant party may refuse to appear.

6—Simple and speedy procedure for enforcing the award or for considering actions to vacate, modify or correct the award.

Throughout these recommendations it is evident that the overriding consideration in Sturges' mind is the importance of maintaining the simplicity of the arbitration process and preventing technicalities in arbitration similar to those of customary legal procedure.

His views regarding compulsory arbitration were set forth in one of his last publications, which appeared in 1961. His main point was that truly compulsory arbitration such as is used occasionally in certain labor controversies is not really arbitration at all within the customary meaning of the term.[18]

ARBITRATION AWARDS

Dean Sturges participated actively as an arbitrator and as a member of arbitration organizations. Among his activities, he served for many years as chairman of the board of the American Arbitration Association and for a time as interim chairman of the Board of Conciliation and Arbitration of the United States Steel Corporation and the United Steelworkers of America.

A number of his opinions and awards in labor arbitration have been published.[19]

17. In this regard, note the provisions of § 7501 of the New York Civil Practice Law and Rules:

> A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute. As amended L. 1963, c. 532, § 47.

18. *"Compulsory Arbitration"—What Is It?*, 30 FORDHAM L. REV. 1 (1961).

19. Among those published are:

Carnegie-Illinois v. United Steelworkers, 15 Lab. Arb. 818 (1951);

In reviewing those available in printed form, one is impressed with the care and thoroughness with which each grievance was considered. Again, the qualities of simplicity and clarity are to be found in well-written opinions. In view of the complexity of some of the factual and contractual aspects of the cases, the opinions are notably brief and to the point.

The reader is able to perceive no viewpoint cast toward one side or the other. There is evident impartiality in the manner in which the problems are analyzed. The results are indicative of the fact that this arbitrator called them as he saw them without regard to balancing the winning and losing scores of the parties. Among the awards which have been read in connection with this paper, the grievances were more frequently denied than granted.

In reviewing Sturges' career in arbitration one is impressed with the pioneering nature of his work, with its high quality, and with the impact that one man has had on a vast and growing area of law through his continued and unremitting efforts to improve it.

Evidently, Sturges saw as a young legal scholar that the established forms of legal procedure were not working properly—that they had become slow, expensive, and overly technical. He found a solution, in part at least, in the arbitration process. This is suggested late in his career as he continues to preach "the gospel of *Simplification*"[20] in a paper published in 1957:

> I venture, with like thought in mind, to urge law school endeavors to simplify—to simplify *far and wide*—current practice and procedure in the many different courts of the land. The arbitral process as currently practiced indicates and emphasizes how much could be done—remains to be done, I will say—to bring to more practical use the courts of our times.[21]

In effect, his dedication to arbitration was his way of working toward reform in the law's delays and uncertainties. His way went beyond the generalities of most critics and substituted a specific method of alleviating the difficulty.

He became the acknowledged intellectual leader of the world of arbitration. Through his heroic capacity for hard work, his devotion to the ideal of procedural reform, and his rare talents for teaching and research the name of Sturges has become forever identified with the accomplishments and the future of arbitration.

National Tube v. United Steelworkers, 16 Lab. Arb. 517 (1951);
Carnegie-Illinois v. United Steelworkers, 16 Lab. Arb. 794 (1951);
American Steel & Wire v. United Steelworkers, 18 Lab. Arb. 219 (1952).

20. *Legal Education—Some Compliments Due It*, 1957 WASH. U.L.Q. 1, 15.

21. *Id.* at 16.