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including heirs, legatees, and beneficiaries, are not, under the law, the real parties in interest. Nevertheless, they have an "interest which is real." A slackening of the rigidity of rule 17(a) of the Federal Rules, in this respect, would aid greatly in developing a modern and just approach in deciding cases involving nonresident administrators.

It is further suggested that the federal courts adopt and apply the "outcome" test as described earlier. Such application would bridge the gap between substantive and procedural law. Every state law thus considered by the federal courts could be uniformly tested.

It is logically concluded that the ultimate results of the present federal policy, if followed, will end in large-scale removal from state courts of the litigation of all suits wherein one of the parties, by circumstance, is a nonresident administrator. It is further concluded that this would not be the result if the state laws governing decedent administration were primarily considered.

PAUL LOW

## VALIDITY OF ARBITRATION PROVISIONS IN FEDERAL PROCUREMENT CONTRACTS

### I. INTRODUCTION

The large number of federal procurement contracts, attended by numerous disputes involving these contracts, and the spectre of ever-lengthening dockets in the Federal Courts, has drawn attention to the validity of arbitration provisions which may be placed in a procurement contract.

The process of arbitration, as the term will be employed in this comment, is to be distinguished from a process provided for by a clause contained in many procurement contracts, which shall be termed the "determination clause." Under the determination clause the contracting officer, subject to review by some other government official in some instances, decides any dispute under the contract.<sup>1</sup>

Arbitration has been defined as ". . . a mode of settling differences through investigation and determination, by one or more unofficial persons selected as a domestic tribunal for the purpose, of some disputed matter submitted to them by contending parties for decision and award . . ." <sup>2</sup> An arbitration proceeding is judicial in nature,<sup>3</sup> and the parties to an

1. 41 U.S.C. § 52.6 (appendix) providing for the handling of disputes; See 41 U.S.C. § 54.21, art. 12, which is the standard government supply contract disputes provision.

2. *Housing Authority of New Orleans v. Henry Ericsson Co.*, 197 La. 732, 2 So.2d 945 (1941).

3. *Puget Sound Bridge and Dredging Co., v. Lake Washington Shipyards*, 1 Wash. 2d 401, 96 P.2d 257 (1939).

arbitration have an absolute right to be heard and present evidence after reasonable notice of the time and place of the hearing.<sup>4</sup> It has been held that the powers and duties of the contracting officer acting under a determination clause are not those of an arbitrator; that arbitration proceedings and the arbitrator's duties are at least of a semi-judicial character, while the duties of the contracting officer are purely ministerial and involve no judicial functions;<sup>5</sup> and it has been held that such a determination clause was included not for the purpose of finally settling disputes, but for the purpose of preventing delay in the work.<sup>6</sup> Again, it has been held that the only thing which may be submitted under the determination clause are questions of fact, and that the parties are not competent to submit questions of the construction of the contract, or of law;<sup>7</sup> but parties to an arbitration may obtain a complete adjudication of their disputes.<sup>8</sup> It seems that a determination by the contracting officer under the determination clause may be made without hearing, and may be based upon information gathered *ex parte*, or from the officers' own experience.<sup>9</sup> Therefore, that although awards under determination clauses have been held to be the same as arbitration awards in legal effect,<sup>10</sup> it is the better view to differentiate the processes.<sup>11</sup>

## II. ARBITRATION BY GOVERNMENTAL UNITS—OTHER THAN FEDERAL

*Municipal Corporations:* Generally, municipal corporations may submit to arbitration any dispute in which the corporation becomes involved.<sup>12</sup> While the power to insert arbitration clauses in municipal contracts has been authorized by law in some cases,<sup>13</sup> the rule seems to be that even if not expressly authorized, arbitration is permissible in the absence of statutory provision to the contrary.<sup>14</sup> The claim to be arbitrated may be one in tort<sup>15</sup> or contract,<sup>16</sup> by<sup>17</sup> or against<sup>18</sup> the municipality, and the arbitration may be statutory<sup>19</sup> or common law.<sup>20</sup>

4. *Ibid.*

5. *Silas Mason Co. v. United States*, 90 Ct. Cl. 266, 62 S. Supp. 432, (1940).

6. *Lundstrom v. United States*, 53 F. Supp. 709 (D. Ore. 1941), *aff'd sub. nom. United States v. Lundstrom*, 139 F.2d 792 (9th Cir. 1943); *contra, Oltedale v. United States*, 39 F. Supp. 998 (D. R.I. 1941).

7. *Davis v. United States*, 82 Ct. Cl. 334 (1937).

8. *Brazil v. Isham*, 12 N.Y. 9 (1854).

9. *Zweig v. United States*, 60 F. Supp. 785 (N.D. Tex. 1945).

10. *Cook v. Foley*, 152 Fed. 41 (8th Cir. 1907), and cases cited therein at 152 Fed. 51.

11. *Palmer v. Clark*, 106 Mass. 373 (1871).

12. *District of Columbia v. Bailey*, 171 U.S. 161 (1898); *Brady v. Brooklyn*, 1 Barb. 854 (N.Y. 1847).

13. *City of Detroit v. A. W. Kutsche & Co.*, 309 Mich. 700, 16 N.W.2d 128 (1944).

14. *Shawneetown v. Baker*, 85 Ill. 563 (1877); *Smith v. Wilkensburg*, 172 Pa. 121, 33 Atl. 371 (1895).

15. *Kane v. Fond du Lac*, 40 Wisc. 475 (1876).

16. *Brady v. Brooklyn*, 1 Barb. 584 (N.Y. 1847).

17. *City of Marion v. Ganley*, 68 Iowa 142, 26 N.W. 40 (1885).

18. See note 16 *supra*.

19. *Cary v. Long*, 181 Cal. 433, 184 Pac. 857 (1919).

20. *Smith v. Wilkensburg*, 172 Pa. 121, 33 Atl. 371 (1895).

The rationale behind allowing the municipality to arbitrate is that since the municipality has the power to sue and be sued, it has the power to settle claims by arbitration.<sup>21</sup> From this power is derived the power to insert an arbitration clause in a contract which the municipality consummates.<sup>22</sup> However, if there is a provision in the contract limiting the ultimate liability of the municipal corporation, that limitation will be respected.<sup>23</sup>

*Counties:* A county has the authority to submit a claim asserted by or against it to arbitration.<sup>24</sup> Furthermore, the county, in its function as a municipal corporation, may insert provisions for arbitration in its contracts.<sup>25</sup>

*States:* Little law has transpired on the arbitration of claims to which the state is a party. A state holds the immunity of a sovereign from suit,<sup>26</sup> contrary to municipal corporations, which have no such immunity.<sup>27</sup> The earlier cases deal with arbitration only under special acts of the legislature.<sup>28</sup> The conclusiveness of an award rendered in an arbitration under such a special act is doubtful.<sup>29</sup>

The later cases seem to be limited to the state of Pennsylvania, which has established a state board of arbitration, having jurisdiction to arbitrate claims against the state arising out of state contracts.<sup>30</sup> The courts have vacated an award of this board<sup>31</sup> on the basis of violation of the Pennsylvania Arbitration Statutes<sup>32</sup> grounds for vacation.<sup>33</sup> Since the Commonwealth of Pennsylvania may not be sued without its consent,<sup>34</sup> and since the only provision made for the adjudication of contracts disputes to which the state is a party is through the board of arbitration, it may be assumed that the provisions of the statute are to be implied into every contract made with the Commonwealth.

21. *Shawneetown v. Baker*, 85 Ill. 563 (1877).

22. *Re Rapid Transit Subway Construction Co.*, 199 App. Div. 45, 191 N. Y. Supp. 383 (1921), *Aff'd, without opinion*, 233 N.Y. 544, 135 N.E. 911 (1922).

23. *Canuso v. City of Philadelphia*, 326 Pa. 302, 192 Ath. 133 (1937).

24. *Carter v. Krueger & Son*, 175 Ky. 399, 194 S.W. 553 (1917).

25. *West v. Coos County*,—Ore.—, 237 Pac. 961, 40 A.L.R. 1362 (1925).

26. *Cohens v. Commonwealth of Virginia*, 19 U.S. (6 Wheat.) 264 (1821).

27. *City of Long Beach v. Metcalf*, 103 F.2d 483 (9th Cir. 1939), *cert. denied*, 308 U. S. 602 (1939).

28. *State v. McGinley*, 4 Ind. 7 (1852); *Hewitt v. Craig*, 9 Ky. L. Rep. 232, 5 S.W. 280 (1887); *Jack v. State*, 14 Miss. (6 Smedes & M.) 494 (1846); *Coxe v. State*, 144 N.Y. 396, 39 N.E. 400 (1895); *Martin v. State*, 51 Wisc. 407, 8 N.W. 248 (1881).

29. *State v. Doyle*, 38 Wisc. 92 (1875) held the act contemplated approval by another official, which approval was discretionary, and until such approval was secured, no money could be paid under the award.

30. 72 P.S. 4651-1 *et. seq.*

31. *Seaboard Surety Co. v. Commonwealth*, 350 Pa. 87, 38 A.2d 58 (1944). See *Kaufman Construction Co. v. Holcomb*, 357 Pa. 514, 55 A.2d 534, 174 A.L.R. 189 (1947), where it was held that a court may look to jurisdiction and regularity of the proceedings even where, as in Pennsylvania, the order of the tribunal is made unappealable (by P.S. § 4651-4, making awards of the board of arbitration unappealable).

32. 5 PA. STAT.

33. 5 PA. STAT. § 170.

34. *Kaufman Construction Co. v. Holcomb*, 357 Pa. 514, 55 A.2d 534, 174 A.L.R. 189 (1947).

III. ARBITRATION AND ARBITRATION PROVISIONS INVOLVING  
THE FEDERAL GOVERNMENT

*Case Law to 1953:* A leading decision on the validity of arbitration to which the United States is a party is *United States v. Ames*.<sup>35</sup> The case arose out of the building of dams by the United States on its land, and by Ames on his property. Each dam created a flowback which ran onto the other parties' land. A dispute arose, which was submitted to arbitration by the United States District Attorney and by Ames, and an award was had. Subsequently the United States brought this action of trespass on the case, and the award was set up as a plea in bar. The court held the award invalid, basing its decision on the rationale<sup>36</sup> that the judicial power had been vested by the Constitution in the Supreme Court and such inferior courts as Congress might establish, and that it cannot be vested anywhere else by any department or officer; and therefore, in the absence of legislative authority, there can be no valid submission and hence no valid award.

It would seem that if the court's reasoning is correct, and subversion of the judicial power is the test of validity, there could by the same reasoning be no valid submission or award in any case triable in a federal court, since any arbitration and award would be just as much a subversion of the judicial power as an arbitration by the government or its agents. That this is not the case is patent. The United States Supreme Court has held that arbitration is to be encouraged, and that every presumption will be given to the validity of an award.<sup>38</sup> The Court has held that trial by arbitration, when the parties consent to it, is a method of prosecuting a suit to judgment as well established and fully warranted by law as a trial by jury,<sup>39</sup> and all of these rulings occur in cases triable in federal courts.<sup>40</sup> Subversion of the judicial power does not seem to be a valid basis for denial of the power to arbitrate where the United States is a party.

In *Brannen v. United States*,<sup>41</sup> it was held that an officer of the United States could not submit a claim to arbitration when he has no jurisdiction of the claim. However, the question of how far the authority extends when the officer does have jurisdiction was left open.

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35. 1 Woodb. & M. 76, 24 Fed. Cas. 784, No. 14,441 (D. Mass. 1845). It may be noted that Mr. Charles Woodbury, the court reporter, appears also to have been counsel for the United States; and the opinion was rendered by Circuit Justice Levi Woodbury. Just what effect, if any, this had on the decision and the report will be left to the realistic jurisprudentialists.

36. *Ibid.* at 789, 790.

37. *Burcell v. Marsh*, 58 U.S. (17 How.) 344 (1854).

38. *Ibid.*

39. *Hecker v. Fowler*, 69 U.S. (2 Wall.) 123, (1865).

40. See notes 37, 38 and 39 *supra*.

41. 20 Ct. Cl. 219 (1885).

*Benjamin v. United States*<sup>42</sup> held that unless officers were authorized by statute to make awards or allowances, they could not submit the claim to arbitration. The question raised by this case is whether the officer may make awards or allowances under authority of statute—can he settle the case? Or, does the officer have *jurisdiction* to settle? If he does not have, then he may not submit the case; *ergo*, it appears by implication that if he can settle, he can submit the case to arbitration.

In *Welch v. United States*,<sup>43</sup> the court held that the government officer in question had no authority to enter into a contract containing an arbitration clause, that the clause was void, and that since there could be no valid submission, or even contract, the award was invalid. The court relies on the present state of the law; but that state is undefined by either rationale or citation.

*Administrative Attitudes:* In 1921 the General Accounting office was created,<sup>44</sup> with extensive authority vested in the Comptroller General regarding final decisions as to the expenditure of public moneys. Since government agencies needed the approval of the Comptroller General before payment, the question of whether or not they could provide for submission of disputes to arbitration was submitted to him on various occasions. The answers of various Comptrollers General has been in the negative.<sup>45</sup>

In 5 *Comp. Gen.* 417 (1925), it was decided that payment of boards of arbitration was prohibited unless specifically authorized by Congress, on the basis that boards of arbitration were included in Section 9 of the Act of March 4, 1909,<sup>46</sup> and that act required specific authorization before payment. The same reasoning has been advanced on several other occasions by the Comptroller General.<sup>47</sup> Section 9 has never been construed by a court; however, Attorney General George W. Wickersham held that it was *not* necessary to have specific authorization, but it was enough if the board were generally authorized by law, noting in a learned opinion the legislative history of the act.<sup>48</sup> Again, Attorney General Wickersham held that the power to create a board under the act could be implied.<sup>49</sup> It may be noted that while the General Accounting office has been given the duty of settling and adjusting all claims and demands whatsoever by or against the government of the United States,<sup>50</sup> this authority has been judicially limited to money due on contracts,<sup>51</sup> not including breach of

42. 29 Ct. Cl. 417 (1894).

43. 8 Rep. Ct. Cl., No. 199, p. 39 (1859).

44. 42 STAT. 24 (1921), 31 U.S.C. §§ 41-60 (1952).

45. 19 COMP. GEN. 700 (1940); 8 COMP. GEN. 96 (1928); 6 COMP. GEN. 140 (1926); 5 COMP. GEN. 417 (1925).

46. 35 STAT. 1027 (1909), 31 U.S.C. § 673 (1952).

47. See note 45 *supra*.

48. 27 OPS. ATT'Y GEN. 432 (1909).

49. 27 OPS. ATT'Y GEN. 437 (1909).

50. 42 STAT. 24 (1921), 31 U.S.C. 71 (1952).

51. *U.S. ex rel Coates v. St. Louis Clay Products Co.*, 68 F. Supp. 902 (E.D. Mo. 1946).

contracts or tort claims.<sup>52</sup> Furthermore, the power does not apply to judgments of the Court of Claims.<sup>53</sup> In fact, the scope of action of the Comptroller General and the General Accounting office seems to be restricted to that of auditors,<sup>54</sup> and their activities *leave unimpaired a judicial remedy*.<sup>55</sup> It has been held that a plaintiff was entitled to recover despite the wishes and actions of the Comptroller General where the Comptroller General was not a party to the contract, and the contract was a valid one.<sup>56</sup>

In 33 OP. ATT'Y GEN. 160 (1922), Attorney General Daugherty gives his opinion that when government officers are authorized by statute to fix the price of sale of government property, at their discretion, they have no authority to submit to arbitration because that would be a surrender of their authority to fix the price. The learned Attorney General does not discuss the reason why the submission is not an exercise of the discretionary power conferred.

*Immunity From Suit as an Objection:* Turning now to the problem of the immunity of the sovereign from suit<sup>57</sup> as an objection to the validity of arbitration provisions and arbitrations, it is settled that if the United States consents to the suit an action will lie;<sup>58</sup> however, the United States may prescribe the terms and conditions under which it may be sued.<sup>59</sup> Assuming that consent to an attempted recovery has been given, no reason appears to bar arbitration of the dispute. If it be true that only one court—*pro exempla*, the Court of Claims has jurisdiction of the suit in question, that fact may be no less true in any suit between any parties, and should not militate against the validity of arbitration or arbitration clauses in contracts. If we assume a diversity of citizenship case between two private citizens, falling only in the jurisdiction of the United States District Court,<sup>60</sup> it would obviously not be contended that the cause could not be arbitrated. The fact that a particular tribunal is established for the litigation of certain claims would not appear to prevent the arbitration of those claims.

Connected with this problem is the question of the limitation of liability on the part of the United States which may be contained in the consent.<sup>61</sup> Assuming such a limitation of liability to be extant, it seems that it would be implied into the contract just as effectively when the dispute is being arbitrated as when it is being tried in a court. Naturally,

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52. *Ibid.*

53. *United States v. Jones*, 119 U.S. 477 (1886).

54. *Sowle v. United States*, 38 Ct. Cl. 525 (1903).

55. *Ibid.*

56. *J. H. Mathis & Co. v. United States*, 79 F. Supp. 703 (D. N.J. 1948).

57. *United States v. Clarke*, 33 U.S. (8 Pet.) 436 (1834).

58. *Ibid.*

59. *Young v. United States*, 95 U.S. 641 (1877).

60. 28 U.S.C. § 1332 (1952).

61. *Geo. H. Evans & Co. v. United States*, 169 F.2d 500 (3rd Cir. 1948), granting motion to dismiss for lack of jurisdiction where the claim was greater than the concession of liability under the enabling act.

the limitation of liability will apply to an arbitration award; and it will be remembered that limitations of liability under the contract by a mere municipal corporation will be enforced.<sup>62</sup>

*The Principle of Statutory Grant:* Regarding the principle of statutory grant implied in the *Ames* case,<sup>63</sup> that Congress may by statute authorize arbitration of claims by the government or government agencies, this principle was acted upon by Congress in the Contract Settlement Act of 1944,<sup>64</sup> which provided for the arbitration of disputes without regard to the amount in controversy.<sup>65</sup> Probably the enactment of legislation on the general ability to arbitrate would be the best solution to the problem.

*The Federal Agency as a Corporate Body:* It appears that at least some federal corporations are not to be placed on the same footing as other government agencies in regard to the question of arbitration provisions in contracts. Many of these corporations are given the right to sue and be sued in their charters;<sup>66</sup> it has been held that in the absence of express grant the capacity to sue and be sued may be implied,<sup>67</sup> and that the United States may shed its sovereign immunity by becoming a corporation.<sup>68</sup> The power is implied very readily where the corporation has the characteristics of a private corporation.<sup>69</sup> In those federal corporations where the power to sue and be sued exists, if not in all such corporations, it seems no problem will arise as to the validity of a provision for arbitration in a procurement contract; it should be treated precisely as if the corporation were a private corporation; and arbitration clauses in procurement contracts executed by federal corporations have in fact been upheld.<sup>70</sup>

*Case Law: A Modern View:* In *Grant v. United States*<sup>71</sup> the court of claims considered the validity of an arbitration made under a provision in a government procurement contract. In this case, the plaintiff, *Grant*, contended that the arbitration clause was void, relying on the *Ames*<sup>72</sup> and *Welch*<sup>73</sup> cases. The court held the arbitration provision valid,<sup>74</sup> on the

62. *Canuso v. City of Philadelphia*, 326 Pa. 302, 192 Atl. 133 (1937).

63. *United States v. Ames*, 1 Woodb. & M. 76, 24 Fed. Cas. 784, No. 14,441 (D. Mass. 1845).

64. 58 STAT. 647 (1944), 41 U.S.C. § 101 *et. seq.* (1952).

65. 58 STAT. 660 (1944), 41 U.S.C. § 113 (c) (1952).

66. *Keifer & Keifer v. RFC*, 306 U.S. 381 (1939); *Federal Land Bank v. Priddy*, 295 U.S. 229 (1934), *reh. den.* 295 U.S. 769 (1934); *Sloan Shipyards Corp. v. United States Emergency Fleet Corp.*, 258 U.S. 549 (1921).

67. *Keifer & Keifer v. RFC*, 306 U.S. 381 (1939).

68. *Bank of United States v. Planters Bank*, 22 U. S. (9 Wheat.) 904 (1824).

69. *Casper v. Regional Agricultural Credit Corp.*, 202 Minn. 433, 278 N.W. 896 (1938).

70. *Application of RFC*, 106 F. Supp. 358 (S.D.N.Y. 1952), *aff'd*, 204 F.2d 366 (2d Cir. 1953), *cert. den.* 346 U.S. 854 (1953).

71. 124 Ct. Cl. 202, 109 F. Supp. 245 (1953).

72. See note 63 *supra*.

73. *Welch v. United States*, 8 Rep. Ct. Cl. No. 199, p. 39 (1859).

74. 124 Ct. Cl. at 207, 109 F. Supp. at 247.

rationale that the United States Supreme Court has held determination clauses valid,<sup>70</sup> and that those clauses were a ". . . sort of arbitration . . ." <sup>77</sup> which violated as completely as any "real" arbitration the doctrine of the *Ames* case,<sup>78</sup> that of subversion of the judicial power as a bar to the authority to arbitrate. The court held that a request for arbitration by the plaintiff was a condition precedent to bringing suit.<sup>79</sup> The rationale seems valid.

*Power to Submit or to Make Contract: Attorney:* Under the U. S. rule, an attorney may submit his client's cause to arbitration, that being one form of trial.<sup>80</sup> It is submitted that this power should apply to the United States Attorney.

*Agent:* The general rule is that an agent may not submit a claim to arbitration, or, impliedly, contract therefor.<sup>81</sup> However, as the *Grant*<sup>82</sup> case implies, the federal agency and agent are not to be included in the general rule, on the basis of the validity of the determination clauses,<sup>83</sup> and the fact that they may be treated as conclusive.<sup>84</sup>

#### V. CONCLUSION

The *Grant* case<sup>86</sup> is a beacon to both the contractors engaged in supplying the tremendous needs of our federal government, and to that government's agencies and officers. It offers the prospect of a speedy, inexpensive, impartial determination of disputes, without the bitterness and suspicion attendant on the judgment of a cause by an interested party, or the prospect of years of waiting on a court calendar. Socially accepted, morally justified, legally rational, it appears that arbitration provisions in government procurement contracts have a bright future. *Arbitrium est iudicium boni viri, secundum aequum et bonum.*<sup>86</sup>

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75. See discussion, Introduction, *supra*.  
 76. *United States v. Wunderlich*, 342 U.S. 98 (1951); *United States v. Mooman*, 338 U.S. 256 (1949).  
 77. 124 Ct. Cl. at 207, 109 F. Supp. at 247.  
 78. See note 63 *supra*.  
 79. See note 77 *supra*.  
 80. *Holker v. Parker*, 11 U.S. (7 Cranch) 436 (1813); *Abbe v. Rood*, 1 Fed. Cas. 7, No. 6. (D. Mich. 1854); *Denny v. Brown*, 7 Fed. Cas. 490, No. 3,805 (S.D.N.Y. 1844).  
 81. *California Lima Bean Growers Ass'n v. Mankowitz*, 9 N.J. Misc. 362, 154 Atl. 532 (1931).  
 82. *Grant v. United States*, 124 Ct. Cl. 274, 109 F. Supp. 245 (1953).  
 83. *United States v. Wunderlich*, 342 U.S. 98 (1951).  
 84. *Ross Engineering Co. v. Pace*, 153 F.2d 35 (4th Cir. 1946); *P. H. McLaughlin & Co. v. United States*, 36 Ct. Cl. 138 (1901).  
 85. See note 82 *supra*.  
 86. *Berry v. Perry*, 3 Bulst. 62 at 64, 81 Eng. Rep. 54 at 55 (1626).