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August 7, 1973

ARBITRATION

A. Introduction

This is a report of an investigation into the role of the arbitrator in proceedings arising under a contractural arbitration clause.

Arbitration proceedings can be classified as either statutory or contractual. The former includes, for example, proceedings arising under the Alberta Labour Act, R.S.A. 1970, c. 196, s. 78, or the Expropriation Proceedings Act, R.S.A. 1970, c. 130, s. 19. The latter encompasses arbitrations which the parties have agreed to undertake by their own initiative. Contractural arbitrations are governed by the Arbitration Act, R.S.A. 1970, c. 21. This report is intended to deal mainly with the role of the arbitrator in arbitrations that arise out of a contract and are governed by the Arbitration Act. Labour arbitrations may be said to arise out of a contract of labour but by virtue of the Labour Act, R.S.A. 1970, c. 196, s. 78(18), the Arbitration Act does not apply to them. Expropriation arbitrations are governed by the Arbitration Act but do not arise out of a contract. The relevance of what is to be said to these and other statutory arbitrations has not been examined.

Since it is the parties themselves that set up the arbitration tribunal that they intend to use, the variety of forms that contractual arbitration tribunals can take is probably wide. Whatever the form, however, the arbitrators will either be chosen by the parties

mutually or by each party individually. The problem with which this report is concerned arises where party-nominated arbitrators sit on the tribunal. Is the nature of the role of the party-nominated arbitrators such that their conduct must be strictly impartial or can they conduct themselves as advocates of the cause of the party nominating them?

The problem will be approached by first determining the nature of the role of the arbitrator who has been appointed by the mutual agreement of the parties. Once this is done, an attempt will be made to determine what effect there is on the nature of that role where the arbitrators are nominated by the parties individually.

B. The Mutually-Nominated Arbitrator

The basic motivation behind the inclusion of an arbitration clause in a contract is the desire to employ a degree of expertise, efficiency, economy and informality in dispute settlement greater than that commonly available in court proceedings. Arbitration tribunals are frequently described as "courts" that the parties have set up for their own purposes. References to arbitration proceedings as "trials out of court" [*Campbell* v. *Irwin* (1914) 32 O.L.R. 48 at 54] and to arbitrators as "judges" [*Maule* v. *Maule* (1816) 4 Dow. 363 at 380] are common. These and other statements, which appear in a great many of the judgments quoted throughout this report, show that the courts quite consistently deal with arbitrations as proceedings of a judicial nature. Since such a characterization is fundamental to the problem under consideration, it will be useful to examine its basis.

The primary basis for the judicial characterization of arbitration proceedings is the similarity between arbitration and litigation. The functions of both are to hear evidence and argument submitted by both parties to the dispute and to determine what is a fair and just settlement. There are of course differences between the procedures that are followed in either case--arbitrators are not bound to follow the strict procedures of the courts provided that the methods they substitute do not give rise to injustice [*Knox* v. *Symonds* (1791) 1 Ves. 369; *Glen* v. *Grand Trunck Railway* (1859) 2 P.R. 377; *Campbell* v. *Irwin* (1914) 32 O.L.R. 48 revs'd on other grounds 51 S.C.R. 358; *Re Walker and North Grunsley* [1958] O.W.N. 269 (C.A.)].

Further indication of a close functional similarity between arbitrations and courts is found in the suggestion that the issues which are to be the subject of arbitration must be such that in the absence of the arbitration agreement they could have been brought to civil litigation, i.e., they must be "justiciable issues triable civilly" [Halsbury's Laws of England, 3rd Edition, Vol. 2, page 6, paragraph 10].

In *Doe* v. *Evans* (1827) 3 Car & P. 219 where the issue was whether an admission made to an arbitrator was more privileged than one made in a court in relation to its use as evidence in the trial of another cause, Vaughan B. said, at page 220:

> An arbitration-room is anything but a forum of confession and the whole difference between that and a Court of Justice is, that

> it is a tribunal chosen by the parties themselves; but still, a matter comes as adversely before an arbitrator as before any other tribunal.

It appears that the only recognized differences between a court and an arbitration tribunal are the ones of procedure and composition neither of which, it is submitted, would affect the judicial nature of the functions. The conclusion that arbitration is a judicial process would therefore seem to be well founded.

In addition, it is a conclusion which has had much application. For example, that arbitration proceedings are of a judicial nature is often the point used to distinguish between arbitrations and valuations. The leading case on this point is *In Re Carus-Wilson and Green* (1887) 18 Q.B.D. 7, where Lord Esher said at page 9:

> If it appears from the terms of the agreement by which a matter is submitted to a person's decision, that the intention of the parties was that he should hold an inquiry in the nature of a judicial inquiry, and hear the respective cases of the parties, and decide upon the evidence laid before him, then the case is one of arbitration [and not valuation]. The intention in such cases is that there shall be a judicial inquiry worked out in a judicial manner.

See also *Campbellford, Lake Ontario and Western Railway* v. *Massu* (1914) 50 S.C.R. 409.

Again, the distinction between an arbitrator and a "quasi-Arbitrator" (a person appointed to decide a dispute involving only the quality of the subject

matter of the contract) is based upon the judicial nature of arbitration. Goddard L.J. said in *Funnegan* v. *Allen* (1943) 1 K.B. 425 (C.A.) at 436:

> The person to whom the matter of quality is submitted does not as a rule act as an arbitrator to hear the parties and take evidence as an arbitrator must. . . . And the person who acts in this way is, perhaps, a quasi-arbitrator or even an arbitrator, but he is an arbitrator of a particular sort, and it is not intended that there should be the same judicial proceedings on his part as there would be in the case of an arbitrator appointed under a formal submission.

The use of the judicial characterization of arbitration proceedings to distinguish them from proceedings of other natures serves to strengthen the conclusion that the English and Canadian courts have firmly decided that the judicial characterization is correct. It may seem surprising, therefore, to find a contrary suggestion appearing in the United States. The former Dean of the Yale Law School, Wesley A. Sturges suggests in his article, *Arbitration--What is it?*, 35 New York University Law Review 1031 at 1045, that the judicial characterization may be ill-founded. The article is quoted at length.

> 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. 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. As already indicated they 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.

As pointed out above, the Supreme Court of Alabama excluded arbitration from an "act to regulate judicial proceedings." [*Crookes* v. *Chambers* (1866) 30 Ala 239]. . . .

In 1931, the New York Appellate Division summarized the disassociation of arbitrations, awards and arbitrators from judicial proceedings, judgments and the judiciary in refusing to grant an order of prohibition against a common law arbitration. . . . The court observed:

> This was an attempted common-law arbitration which is a contractual, not a judicial proceedings, and, if properly conducted, results, not in a judgment, but in a cause of action against the party who does not obey the award. The arbitrators do not constitute a judicial or quasi-judicial body whose proceedings are the subject of an order of prohibition.
>
> [*Fedelity and Deposit Co.* v. *Woltz*, 253 N.Y. Supp. 583 (4th Dep't. 1931)]

> The process of making judges of arbitrators and judicial proceedings of arbitrations 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 litigation 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.

In addition to this suggestion that arbitration should not be characterized as judicial, Dean Sturges submits earlier in the article at page 1031, that there are significant legal requirements that govern arbitrations:

> These minimum legal requirements assure:
>
> 1) Mutual rights of hearings. . . .
> 2) Mutual rights that, after hearing, the arbitrators shall render such award on the issues submitted to them as they deem fair and just--whether or not according to law.[1]

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[1]This statement that arbitrators are not bound to follow the law appears in the earlier quotation as well. It does not, it is submitted, accurately represent the law in Canada or England. Russell, *Russell on Arbitration*, 1970, Eighteenth Edition, edited by Anthony Walton, says at page 186:
[Continued on next page.]

It becomes difficult to determine what lies between that which Dean Sturges here puts forward as being descriptive of arbitration and the judicial characterization. "Judicial" is not a word that enjoys a precise definition, but it is submitted that the mere addition of the words ". . . in a manner approximating that employed by the courts" to each of the two characteristics submitted in the article as minimum legal requirements would yield a definition of the word acceptable to a Canadian court.[2]

[Continued from page 7.]

> It is the duty of an arbitrator, in the absence of express provision in the submission to the contrary, to decide questions submitted to him according to the legal rights of the parties, and not according to what he may consider fair and reasonable under the circumstances.

and he cites *Vulcan* v. *Mowenckels Rederi* [1938] 2 All E.R. 152 and *Jager* v. *Tolme* [1916] 1 K.B. 939. In addition, one ground for setting aside an award is that the record shows that the arbitrator proceeded on an erroneous view of the law. *Martineau* v. *Montreal* [1932] 1 W.W.R. 302; *Lacoste* v. *Cedar Rapids* [1928] 2 D.L.R. 1; *Fraser* v. *Fraserville* [1917] 2 A.C. 187.

[2]Judicial definitions of the word "judicial" can be found in *Royal Aquarium* v. *Parkinson* [1892] 1 Q.B. 431 at page 452:

> The word "judicial" has two meanings. It may refer to the discharge of duties exercisable by a judge or by justices in Court, or to administrative duties which need not be performed in Court, but in respect of which it is necessary to bring to bear a judicial mind--that is, a mind to determine what is fair and just in respect of the matters under consideration.

[Continued on next page.]

One is left with the conclusion that Dean Sturges' objection to the use of the word "judicial" to characterize arbitration proceedings must be based on a definition of that word which varies significantly from that accepted by Canadian courts. At any rate, the characterization that Dean Sturges would accept is sufficiently close to what other authorities would consider incorporated in the word "judicial", that the apparent inconsistency need not be considered further. A determination of what Dean Sturges would accept as a definition of the word "judicial" is beyond the purpose for which this discussion was entered.

We are left, then, with a judicial characterization of the role of the arbitrator. The consequences of this characterization are many. In general they may be summed up in the statement that the arbitrator is bound to adhere to the rules of natural justice. In particular it should be observed that a duty of impartiality is put on the arbitrator.

This can be noted in cases where the arbitrator was disqualified by reason of the fact that he and one of the parties to the contract were of such a relationship that lack of impartiality could be presumed. For example,

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[Continued from page 8.]

Also in *R.* v. *St. Lawrence's Hospital* [1953] 2 All E.R. 766 at 768:

> A body bound to 'act judicially' is one which is bound to hear evidence from both sides and to come to a judicial decision approximately in the way a court must do.

in *Summer* v. *Barnhill* (1879) 12 N.S.R. 501 (C.A.) the fact that the arbitrator had acted as solicitor for one of the parties warranted the court setting aside the award. Similarly in *Brennan and Hollingworth* v. *Hamilton* (1917) 39 O.L.R. 367, the arbitrator was an engineer employed by one of the parties to the dispute so that his award was set aside.

If no reasonable apprehension of partiality arises out of a relationship between the arbitrator and one of the parties, the award may still be set aside on the ground that the arbitrator's conduct or expressions clearly give rise to an inference of bias (*Re Ryan, Chapman & Co.* v. *Ponroy* (1852) 1 P.R. 59; *Szilard* v. *Szasy* [1953] O.W.N. 907, revs'd on other grounds [1955] S.C.R. 3).

An award can be upset, also, where the arbitrator receives evidence from one party in the absence of the other and that evidence is not communicated to the other party (*Cruickshank and Corley* (1880) 30 U.C.C.P. 466 aff'd 5 O.A.R. 415). This is so even where the arbitrator swears that the evidence so received did not influence his decision (*Walters* v. *Daley* (1858) 2 P.R. 202), and the court believes him. "The award may have done perfect justice, but upon general principle it cannot be supported" (*Walker* v. *Frobisher* (1801) 6 Ves. 70 per Lord Eldon at 72).

It becomes apparent that the judicial character of the arbitration process and the resultant requirement that the arbitrator conduct himself impartially is given strict application. There can be no question that any conduct which could be construed as partial would

invalidate the award. Therefore it is beyond doubt that a mutually-appointed arbitrator who behaved as an advocate of one of the parties would be misconducting himself in a manner which would render his award liable to vacateur.[3]

C. Party-Nominated Arbitrators

Having determined that an arbitrator mutually-appointed by the parties to the dispute could not conduct himself as the advocate of one party since this would

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[3]It may be difficult to imagine circumstances where a sole arbitrator or an umpire could conduct himself as an advocate of one of the parties since advocacy implies at least two people--one to speak and one to listen, but in *London Export Corporation* v. *Jubilee Coffee Roasting Company Ltd.* [1958] 1 W.L.R. 271 it may be possible to say that such circumstances existed. There the matter in dispute had been referred to two party-nominated arbitrators who being unable to agree appointed an umpire who made an award in favour of one party. In accordance with the provisions of the arbitration agreement, the other party appealed the umpire's award to an appeal board who heard the evidence *de novo* and heard the opinion of the umpire in the absence of the parties. The court held this procedure to be of such a nature as to render the appeal board's award invalid on the basis of the rule that a judicial tribunal cannot hear argument on behalf of one party in the absence of the other party even where the argument comes from a non-interested party, the umpire. It is submitted that another basis for the decision could have been that in presenting his opinion to the appeal board, the umpire was acting as an advocate of the party in whose favour he had made his award. Therefore the case is an example of circumstances where a mutually-appointed arbitrator conducts himself as an advocate of one party, though the court neither observes this, or bases any conclusions on it.

violate the impartiality required of him in his judicial role, it must be determined whether or not the position differs where the arbitrator is not chosen by mutual agreement but rather is nominated by one of the parties.

It is convenient to note at this point that arbitration tribunals can take one of at least three forms:

(1) Sole Arbitrator: The parties agree to refer disputes to a single arbitrator the appointment of whom is by their mutual agreement.

(2) Tripartite Board: The parties agree to refer disputes to a board of three members, one member being appointed by each of the parties and the third member being appointed by mutual agreement of the parties, or of the first two nominated members. Each member of the board, regardless of the method by which he was appointed having equal status in the decision-making process.

(3) Arbitrator-Umpire: The parties agree to refer disputes to a board of two members, each party to the dispute appointing one. Should this board fail to agree to an award, the dispute is referred to an umpire chosen mutually by the original arbitrators. The umpire is in the same position as a sole arbitrator at that point.

Party-nominated arbitrators are employed in the latter two forms of tribunal described above. It will be convenient to consider the role of the party-nominated arbitrator in three situations:

(a) In tripartite arbitration.
(b) In arbitrator-umpire arbitration before the arbitrators have disagreed and referred the matter to an umpire.
(c) In arbitrator-umpire arbitration after the dispute has been referred to the umpire, the arbitrators having disagreed.

(1) Tripartite Arbitration

Whether the role of a party-nominated arbitrator in tripartite arbitration differs from that of the mutually-appointed arbitrator is the question first to be discussed.

The early case authority does not seem to contemplate the possibility that the function of a party-nominated arbitrator in tripartite arbitration could be characterized as anything other than judicial in the same way as a mutually-nominated arbitrator's function is so characterized.

Russell states the rule in these words at page 198:

> Joint arbitrators have the same duty to act judicially as a single arbitrator or umpire notwithstanding that they may have been appointed by one of the parties. An arbitrator so appointed has no doubt an interest in favour of the party who appointed him, but he must nonetheless endeavour to act fairly and impartially. . . . The arbitrators selected, one by each side, ought not to consider themselves the agents or advocates of the party who appoints them.

> When once appointed they ought to perform the duty of deciding impartially between the parties, and they will be looked upon as acting corruptly if they act as agents or take instructions from either side.

Russell cites many cases to support these statements (*Oswald* v. *Earl Grey* (1855) 23 L.J.Q.B. 69 at 72; *Watson* v. *Duke of Northumberland* (1805) 11 Ves. 153; *Maule* v. *Maule* (1816) 4 Dow 363), but the present purpose will be amply served by quoting from just one of them. In *Calcraft* v. *Roebuck* (1790) 1 Ves. Jun 221, Lord Chancellor Thurlow says:

> Montford was appointed arbitrator. It is not uncommon for a person, appointed arbitrator, to consider himself as agent for the person appointing him. How that is so common I wonder; as it is against good faith. The bond says he is an indifferent person; and he breaks a most solemn engagement in considering himself otherwise.

There does not appear to have been any change in the position since these early cases although a dictum of Devlin J. in *Minister Trust* v. *Traps Motors* [1954] 1 W.L.R. 963 at 974 might be interpreted as contemplating a slight relaxation of the strictness of the early cases. He says:

> If two parties agree to appoint an arbitrator between them, it would be, I think, implied in the contract in order to give it business efficacy . . . that neither side would seek to interfere with his independence. If a party to a contract is permitted to appoint his agent to act

> as arbitrator in respect of certain matters under the contract, a similar term must be implied; but it is modified by the fact that a man who has to act as arbitrator in respect of some matters, and as servant or agent in respect of others, cannot remain as detached as a pure arbitrator should be.

If this statement does not hint of a relaxation it perhaps shows a willingness to recognize the practicalities of tripartite arbitration.

There is an indication in the English Arbitration Act of 1950, 14 Geo. 6, c. 27, that the party-appointed arbitrator is expected to behave judicially and impartially. Section 7 of that Act provides that where the agreement contemplates party-nominated arbitrators, if one party fails to nominate his arbitrator, the other party may appoint the arbitrator he has chosen to be the sole arbitrator whose award will bind both parties, provided that this appointment can be set aside by the court. If the Legislature is willing to allow a party-nominated arbitrator to occupy the seat usually reserved for an arbitrator chosen by the parties mutually, it must not contemplate any difference in their roles--they must both be judicial officers.

This provision was also in the 1889 English Arbitration Act upon which all of the provinces have modelled their arbitration statutes. (Citations for all of the Canadian Arbitration statutes appear in the first appendix.) Alberta (s. 6), New Brunswick, Newfoundland and Nova Scotia, have maintained the provision while the other provinces have not. Where

the provision has been dropped it has been replaced by one which permits the party who has made his appointment to apply to the court to have it appoint an arbitrator in place of the defaulting party.

Another provision of the English Arbitration Act of 1950 suggests perhaps that Parliament was prepared to allow a degree of partiality to exist on a tripartite tribunal. Section 9(2) provides that where there is a 3-man board that cannot by section 9(1) be deemed to be an arbitrator-umpire type board, the award of any two, a majority award, shall be binding. It would have been a much greater relaxation of the impartiality rule had the section provided that the award of the chairman alone was to be binding. However, it is submitted that even the acceptance of a majority award could cause a reduction in impartiality standards because before the provision was enacted the law was that in the absence of contrary expression in the contract, only a unanimous award would be binding. This was because the Arbitration Act of 1889 provided that, in the absence of expression to the contrary, the award of the arbitrators was to be final and binding. This was interpreted as meaning the award of the entire board. (*Re Juravsky and Gorestein (No. 2)* (1956) 17 W.W.R. 558).

The Arbitration Acts of Alberta, Newfoundland and Nova Scotia maintain the same provision as the English Act of 1889 (Alberta Arbitration Act, Schedule A). Those of Manitoba, New Brunswick, Ontario, and Prince Edward Island contain a provision that the award of the arbitrators or a majority of them shall be final and binding. In *Western Clay Products Ltd.* v. *United Glass*

and Ceramic Workers of North America (1965) 50 D.L.R. (2nd) 84, it was held that a similar reference in the Saskatchewan Act (which has since been amended) did not mean that a majority award would be binding in all cases. Since the provision read ". . . the award to be made by the arbitrators or by a majority of them. . . .", it was necessary to look to the agreement to ascertain which one was applicable. Therefore, where the agreement did not provide for a majority award, the decision would be binding only if unanimous. This was followed in *Longlitz* v. *Matador* [1971] 1 W.W.R. 521 (Sask. Q.B.), a non-labour arbitration case. The result is that the provisions of Manitoba, New Brunswick, Ontario, and Prince Edward Island are no different in effect than those of Alberta, Newfoundland and Nova Scotia.

Only British Columbia and Saskatchewan have followed the lead of the English Act of 1950. The British Columbia Act provides that where the reference is to three arbitrators, unless the contrary is expressed, the rule of the majority will be binding. In a 1972 amendment to its Act (which was likely passed in response to the *Longlitz* case, *supra*) the Saskatchewan Legislature has enacted that where there are more than two arbitrators, the award of the majority will be binding and if there is no majority, the award of the chairman will be binding. With the last provision, Saskatchewan has gone even further than England toward making a tripartite board susceptible to partiality in its party-nominated members.

The American courts have displayed a much clearer tendency away from the strict application of the same

standards to both party-nominated arbitrators and mutually-nominated ones. In *Astoria Medical Group* v. *Health Insurance Plan of Greater New York* (1962) 182 N.E. 2nd 85 the New York Court of Appeals was asked to intervene to prevent one of the parties from appointing a member of its own board of directors as its nominee to a tripartite arbitration. Interpreting the arbitration clause of the contract which provided, "One arbitrator shall be appointed by HIP and another by GROUP, who jointly shall appoint a third arbitrator", (page 86) Fuld, Judge said, (page 87):

> Arising out of the repeated use of the tripartite arbitral board, there has grown a common acceptance of the fact that the party-designated arbitrators are not and cannot be "neutral" at least in the sense that the third arbitrator or a judge is.

And later (page 88):

> In fact, the very reason each of the parties contracts for the choice of his own arbitrator is to make certain that his 'side' will, in a sense, be represented on the tribunal.

By permitting the appointment of the director to the arbitration tribunal, the court was taking the position that the bias that can be presumed to exist in the mind of that individual would be acceptable in tripartite arbitration proceedings.

> Once it is conceded that presumptive bias should not furnish a ground for disqualification of a partisan arbitrator, it would seem a practical necessity that mere actual bias not invalidate an award rendered by a tripartite panel since it is

> unrealistic to expect a partisan arbitrator to maintain two separate states of mind as advocate and judge.
>
> (Comment, (1963) 63 Columbia Law Review 374 at 379)

Thus, since the New York Court of Appeals is willing to allow partisan arbitrators to be appointed to a tripartite board, it would seem to follow that it would be willing to allow those arbitrators to conduct themselves as advocates before the board.

It should be observed, however, that the court went on to state (page 89) that although the arbitrator need not be neutral, this did not ". . . mean that he may be deaf to the testimony or blind to the evidence presented. Partisan he may be, but not dishonest."

It is interesting to note that in answer to the argument that

> . . . the inclusion of non-neutral arbitrators is alien to the judicial process, with its structure that judges be completely impartial and dissociated from both litigant and dispute, . . . (page 89)

the court relied on the suggestion in Dean Sturges' article (discussed earlier p. 7) that arbitration proceedings should not be characterized as judicial. The difficulty noted earlier in accepting this suggestion will be recalled.

The decision in the *Astoria* case has generally received approval in the United States. The New York arbitration statute which had, prior to the trial of the

case, provided for vacateur of an award ". . . where there was evident partiality or corruption in the arbitrators or either of them . . ." (quoted in (1962-63) De Paul Law Review 125) was amended, as a result of the decision to restrict the grounds to partiality in an arbitrator appointed as a neutral (*New York Civil Practice Law and Rules*, s. 7511, subd. (b), par. 1, cl. ii (McKinney 1963)).

In a comment on the case in 63 Columbia Law Review 374, it was said at 380:

> Judicial resolution of the problem of partisanship, it is submitted, is essentially a matter of contractual interpretation; in the absence of an express provision to the contrary, an agreement to establish a tripartite board should be presumed to permit appointment of interested arbitrators. Such a presumption is justified by common practice and further the fundamental arbitration objectives of expertiese and expediency. If impartiality is desired, the arbitration agreement should specifically provide that all the arbitrators are to be appointed as neutrals.

This would suggest that parties choosing a tripartite arrangement for their arbitration needs, intend the party-nominated arbitrators to be partisan. However a much praised article in 1954-55 Harvard Law Review (Gold and Furth, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*) where the experiences of businessmen engaged in all forms of tripartite arbitration (labor, commercial and international) were explored in detail, suggests that this is not always the case in commercial arbitration.

> Party-appointed labor arbitrators are commonly expected to vote for their party's side of the case regardless of its merits and any reservations the appointee may privately entertain. Party-appointed commercial arbitrators seem to have greater latitude in that respect. They do not automatically dissent from an adverse decision. In principle, at least, businessmen acknowledge that their appointees should vote independently of the interests of the party appointing them. (page 318)

The article goes on to point out the injustice and inefficiency that can result from the lack of certainty that exists as to the true nature of the party-nominated arbitrator's role since the mutually-appointed chairman will not know whether the views of his co-arbitrators are their own or their appointers. Also the merits of the case may be distorted unjustly if one party-nominated arbitrator is partisan and the other is not. The authors conclude at page 320:

> In the final analysis the third man on a commercial tribunal can rely only on his own judgment and on the evidence presented; the parties lose the advantage, which they would have with an all neutral board, of three men deciding instead of one.

The article also pointed out that even though impartial, a party-nominated arbitrator may be expected to be an advocate in a limited sense:

> Some businessmen expect their party appointee to perform services on their behalf in the course of the arbitration; regardless of whether or not the appointee intends to vote for the party appointing him, he can expound his party's viewpoint,

> point out circumstances justifying his position, educe supporting evidence by interrogating the witnesses at the hearing--in short, see to it that the tribunal does not over look the strong points of his party's case. (page 318)

Whether the practices of American businessmen as described in these statements are applicable to Canadian businessmen is, of course, unknown. But, it is submitted, that the American law in relation to the role of the party-nominated arbitrator in tripartite proceedings as represented by the *Astoria* case has reached a stage of development not yet approached by English and Canadian law. Perhaps the dissenting judgment of Chief Justice Desmond in the *Astoria* case is a more accurate expression of our law. He says at page 90:

> If there is anything left of the idea that a director is an agent of his corporation (*Continental Securities Co.* v. *Belmont*, 206 N.Y. 7 at 16), or anything left of the concept that an arbitrator is "a judge appointed by the parties" (*Fudickar* v. *Guardian Mut. Life Ins. Co.* 62 N.Y. 392 at 399), and that he "acts in a quasi-judicial capacity" (*Matter of American Eagle Fire Ins. Co.* v. *New Jersey Ins. Co.* 240 N.Y. 398 at 405), Dr. Baehr is as a matter of law not qualified to sit on this arbitration board. Only by so holding can we preserve a concept which is rooted not in naivete or impracticality but in integrity and principle. If Dr. Baehr can be an arbitrator when his own corporation is a party, then an individual party can name himself as his own arbitrator-judge and the whole affair becomes a cynical travesty of the arbitral process "calculated to bring the system of enforced arbitration in disrepute" (*Matter of American Eagle Fire Ins. Co.* v. *New Jersey Ins. Co. (supra)*).

(2) Arbitrator-Umpire Arbitration before Disagreement

The second situation to be considered is that where the parties have chosen an arbitrator-umpire form of arbitration and proceedings have advanced to the stage where the parties have each nominated their arbitrator and these two people are about to deal with the dispute.

Much of that which was said earlier in relation to the position of the English and Canadian courts regarding the role of the party-nominated arbitrators in tripartite arbitration is equally applicable here. That the same strict standard is to be applied is evident from the judgment of Rand J. in *Sziland* v. *Szasy* 1955, 1 D.L.R. 370 (S.C.C.) at page 371:

> From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them and *a fortiori* of one party when they are agreed upon by all, but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair-minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to.

A point upon which a distinction between party-nominated arbitrators in tripartite and arbitrator-umpire proceedings can perhaps be based is that in some cases it may not be the intention of the parties in the arbitrator-umpire situation, that their arbitrators act as arbitrators at all. Rather, it may be the intention

that they act more as mediators or negotiators whose function is, through negotiation, to come to a settlement acceptable to both parties. An element of encouragement to settle is provided by the knowledge that if agreement is not possible, the matter is to be referred to an umpire who will decide upon the merits of the dispute. In *Re Enock* [1910] 1 K.B. 327, Farwell L.J. seems to be putting forth an arrangement such as this as being the norm.

> Where a case is referred to two arbitrators and an umpire, it is well understood that the arbitrators act as counsel who try and settle the case without going into court; but the umpire or a single arbitrator occupies a judicial position and exercises judicial powers and is bound, as far as practicable, to follow legal rules.

If this is the function that the parties intend their arbitrators to perform then, of course, they must be partisan and conduct themselves as advocates. However it is submitted, that the courts should, despite the dictum in *Re Enock*, be slow to construe any arbitration clause as embodying such an intention. This is the function normally performed by counsel before it has become necessary to submit the dispute to arbitration.

That the above described procedure could not be intended by parties desiring an "arbitration" is shown by the decision in *Re Hammond and Waterton* (1890) 62 L.T. 808 which is summarized in Russell at page 48 as follows:

> Where a reference was to two persons described as arbitrators in the agreement, who were directed to appoint an umpire in case of dispute, and the question was as to the amount to be paid to a nurseryman for yielding

> up his lease, and for his plants, the court refused to enforce the decision of the umpire as an awards because it did not appear that any judicial inquiry was intended.

Because the holding of a judicial inquiry is a necessary element of arbitration, it would be inconsistent for a court to find the intention that the arbitrators act as negotiators arising out of an arbitration clause. It would also seem unlikely that the intention was simply that the two arbitrators should appoint the umpire. If this is the only duty the parties wanted done, it would be much more reasonable for them to agree to the umpire themselves rather than go to the expense of appointing two others to do it.

Presumably, therefore, it is within the contemplation and intention of the parties that the two arbitrators should, if possible, arrive at a just award on their own, making it unnecessary to appoint an umpire. If this is true, it must follow that the arbitrators cannot have been intended to conduct themselves as advocates. Advocacy necessarily implies that there will be someone to hear the submission, evaluate them and choose between them. If it is intended that two people should come to a just conclusion, it is inconsistent that they should be advocates. It would be absurd for two people to make opposing submissions to each other and then impartially choose which one to accept.

It may be noted, however, that the procedure followed in *Wessanen's Knenklijke Fabrikein* v. *Isaac Modeano Brother and Sons Ltd.* [1960] 1 W.L.R. 1243 would not fall in line with the above reasoning. In that case

> . . . each party appointed an arbitrator under the provisions of the arbitration clause, and the buyers and the sellers respectively provided their arbitrator with documents relating to the dispute. The two arbitrators did not in fact meet but had a conversation over the telephone. They disagreed and appointed an umpire. . . . At the hearing before the umpire, the buyers arbitrator presented the arguments in favour of the buyers.
> [headnote]

The issue of whether or not this procedure could be considered an arbitration at all and the possibility that the umpire's decision might not be enforced as an award as in *Re Hammond and Waterton, supra,* because there was no hearing held by the party-appointed arbitrators before they disagreed does not seem to have arisen in the case. The award was upheld, the court apparently approving of the procedure followed.

Although it seems impractical that the parties intended that their arbitrators function only as negotiators (since this function could be served adequately by counsel) and appointers of the umpire (since this could be done more economically by the parties themselves), there does seem to be an implication in the above case that this was indeed the intention and that the court is prepared to recognize it.

The English *Arbitration Act* of 1950, s. 8, provides that unless the contrary is expressed, the pary-nominated arbitrators will appoint the umpire immediately after they are themselves appointed. This would seem to provide encouragement for early disagreement by the arbitrators and submission to the umpire, at which point, as shall

be seen below, the arbitrators take on the role of advocates.

None of the Arbitration Acts of the Canadian provinces contain such a provision, they all provide that where there are two arbitrators, they can refer the dispute to an umpire should they be unable to agree, but none provide that the umpire is to be appointed at any particular time.

On the basis of logic and practicality, it can be concluded that the role of a party-nominated arbitrator in arbitrator-umpire arbitration does not include advocacy of the cause of the nominator. But it must be recognized that the possibility exists that in practice, the intention is that the arbitrator is a negotiator, and that this practice may be accepted by the courts.

(3) Arbitrator-Umpire Arbitration After Disagreement

That the position of an arbitrator in arbitrator-umpire arbitration after the dispute has been referred to the umpire differs significantly from the position of the mutually-appointed arbitrator seems to be a widely accepted proposition. The reasoning is that once they have come to disagreement and have appointed an umpire, the arbitrators have completed their judicial functions and are free to assume the role of advocates. Russell says at page 175:

> Where arbitrators are appointed who, upon disagreeing appoint an umpire whose decision is final, the arbitrators, once they have disagreed and have agreed upon an umpire, are *functus officio* as arbitrators and act at the hearing before the umpire as advocates for their respective appointers.

And later at page 198:

> In some commercial arbitration, it is the practice (unless the parties give notice of their desire to attend personally or by solicitor or counsel) for the arbitrators to present the evidence to the umpire and to act as advocates; and this is not improper. . . . In such cases, the arbitrators are *functus officio* as arbitrators, since the umpire has taken over from them.

The case cited by Russell as authority for the proposition is *French Government* v. *Tsurushima Maru* (1921) 7 Ll L R 244 (KBD) aff'd 8 Ll L R 403 (C.A.), where a dispute had arisen concerning a charter party. Pursuant to the contract, arbitrators were appointed by each party and the arbitrators being unable to agree, appointed an umpire who proceeded to make an award having heard only the submissions of the arbitrators. The party against whom the umpires award was made sought to have the award set aside on the ground that the umpire had made his award without holding the necessary hearing. It was denied that the arbitrator had been authorized to represent their interests before the umpire. In the King's Bench Division, Lush J., holding that the award should be set aside, observed at page 246:

> One must recognize, no doubt the position that they are committing no breach of duty if instead of adjudicating judicially and then, if they differ, leaving it to the Umpire to re-hear the case, they formally disagree and support the respective cases of the parties before the Umpire. It is not what one would suppose the charterers contemplated when they agreed that the arbitrators should act as arbitrators, but the authorities support this proposition.

He found, nevertheless, that it did not follow from this that the arbitrators "represented" the parties before the umpire so as to supersede the solicitors who had been appointed for that very purpose.

Bray J. differed, however on his assessment of the facts and held that the arbitrators had in fact been authorized to represent the parties and the application to have the award set aside failed.

This result was affirmed in the Court of Appeal where Banks L.J. found the practice to be (page 404):

> That unless an intimation is given to the arbitrators that they are not to act as advocates in the matter and that it is desired that either counsel or solicitors should appear--unless such notice is given according to the practice they [the two arbitrators] are to act and conduct the matter on behalf of the respective parties.

Relying on this practice and also on the fact, as he found it, that the arbitrator was instructed ". . . to act as an advocate for his clients and was given the materials which would be necessary for the purpose of his acting as an advocate", the appeal was dismissed.

The reliance on this finding of fact, it is submitted, precludes the use of this case as authority for the proposition that arbitrators automatically become advocates upon submission of the dispute to the umpire. It does however show that where the arbitrators are instructed to act as advocates, the following of those instructions will not result in unjust conduct.

In *Bourgeois* v. *Weddell and Company* [1924] 1 K.B. 539, the issue, in an application to have the award in an arbitration regarding the quality of certain meat, was whether one of the arbitrators who had inspected the meat before the arbitration began, was a competent witness before the umpire. In the course of his judgment, Lush J. said (page 546):

> An arbitrator may now act in a commercial arbitration as an advocate and as an agent for the party who appoints him. . . . [W]hen the arbitrators in a commercial arbitration have differed and the umpire has taken upon himself the burden of adjudication, each arbitrator may be and is regarded as no longer acting judicially but as a person who is entitled either to advocate the cause of the party who appointed him or to give evidence in support of that cause. . . . I have come to this conclusion with hesitation, because, speaking for myself, I think it would be very much better if the old rule as to an arbitrator's duty were still adhered to.

In *Nauman* v. *Nathan* (1930) 37 Ll. L. Rep., 249, a very strong statement of the role of an arbitrator is found in the judgment of Scrutton L.J. (page 462):

> So in commercial arbitrations many trades have arrived at a system that they think is much better and which probably is very much better than the system of the Law Courts. They each appoint an arbitrator. That arbitrator is not in the least like a judge. He acts in a way no judge would act. He hears statements from one side without requiring the presence of the other. He uses evidence submitted to him by his client, putting it forward as an advocate and not as an arbitrator. It is useless to call an arbitrator a judge. He is a negotiating advocate endeavouring to do the best he can for his client.

In *Wessanen's Konenklijke Fabrikien* v. *Isaac Modiano* [1960] 1 W.L.R. 1243, Diplock J. states at 1246:

> It is, I think, plain and fully time that the court should take judicial notice of the fact that, in commericial arbitration of this kind . . . where arbitrators are appointed who, upon disagreeing appoint an umpire, then, are *functus officio* as arbitrators and act at the hearing before the umpire as advocates of their respective appointers. . . . It is also clear that the practice, when arbitrators have been appointed in this way, is that the parties themselves are represented at the hearing before the umpire by the arbitrators and by no one else unless they express a desire to be otherwise represented.

It should be noted that in each of the four cases mentioned above the reference was to "commercial arbitration". The comments of Scrutton L.J. In the *Nauman* case were expressly confined to "commercial quality arbitration". In the *Tsurushima* case the arbitration procedure was established by affidavits "Sworn to by two well-known men, as to the London practice" (1921) 37 T.L.R. 961 per Scrutton L.J. at 962). In the quotations above from Russell, the *Wessanen's* case and the *Bourgeois* case, the system described is that of commercial arbitration. The obvious inference is that arbitration advocacy is acceptable only in what is known as 'commercial' arbitration. A more difficult question that also arises is what is intended to be included in the term "commercial arbitration" and what forms of arbitration are meant to be excluded therefrom.

Sankey J. in the *Bourgeois* case contemplates a distinction between "legal" arbitration and "commercial" arbitration. He says at page 589:

> The modern system of arbitration has certainly made great inroads on what was thought to be the legal practice of arbitration and there is a great difference between arbitrations conducted as legal arbitrations and arbitrations conducted as commercial arbitrations.

On the opposite side is the statement of Lord Langdale M.R. in the early case *Harvey* v. *Shelton* (1844) 7 Beav. 455 at 462: "I wholly deny the difference which is alleged to exist between mercantile arbitrations and legal arbitrations."

He went on to conclude that the same degree of procedural strictness applied to both, in particular with respect to the hearing of one party in the absence of the other. It appears from the case that the distinction between a legal arbitration and a commercial one was that the former was conducted by lawyers and the latter by merchants. If this is the basis of the distinction contemplated by Sankey J. in the above quoted passage from the *Bourgeois* case, his conclusion that there is a great difference, it is submitted, is illogical. The justice or injustice of arbitrator advocacy cannot vary with the profession of the arbitrator.

Another possible means of distinguishing between commercial arbitration and legal arbitration is the type of issue that the arbitration is intended to resolve. In the *Tsurushima* case, the *Bourgeois* case and the *Nauman* case the dispute concerned the quality of the subject matter of the contract. It is apparently recognized that quality arbitrations can, without injustice, follow a procedure radically different from more formal

arbitrations (Russell, page 179). In particular, it may not be necessary for a hearing to be held, the umpire determining for himself the quality of the subject matter. Perhaps, then, the term "commercial" arbitration is meant to refer to arbitrations where the only question is one of fact in a commercial transaction. However, the term as used in the *Wessanen's* case cannot be made to fit this definition because there the question before the arbitrators was one of law; the right of rejection of goods for an admitted breach of condition by the seller.

In three of the cases, the arbitration procedure used appear to be those adopted by a particular trade or market. The parties in the *Tsurushima* case appear to have adopted the arbitration procedure which was found to be common practice in the City of London. In *Nauman* the procedure was proven to be the "usual way" in that particular trade and in *Wessenan's* the practices of the London Cattle Food Association were adopted. Perhaps "commercial" arbitration is meant to refer to arbitrations within a particular trade or commercial market where unique procedures are provably established. It should be noted, however, that in *Bourgeois* the advocacy procedure was accepted though not proven to be an established trade procedure.

It becomes difficult to imagine in what sense the term "commercial arbitration" was used in these cases. In the absence of a definition for the term, it seems impossible to determine the basis of the distinction

between "commercial" arbitration and "legal" arbitration. The term is probably most commonly used to describe that category of arbitration proceedings undertaken to resolve disputes among business men as distinguished from the larger category, labour arbitration. In labour arbitration, it appears to be well accepted that party-nominated arbitrators are intended to be partisan and to act as advocates at all times during the arbitration. See *Re Arbitration Act, Re Gainers and Local 319 United Packinghous Workers of America* (1964) 47 W.W.R. 544 (Alta. S.C.). If it is "labour arbitration" that is intended to be excl by the use of the term "commercial arbitration" in these cases, the latter term cannot have been inteded to describe a class of arbitratration to which arbitrator advocacy before an umpire is restricted.

If any restrictive application was once intended by the use of the term "commercial" it seems to have been abandoned in the most recent cases. In *Rahcassi Shipping* v. *Blue Star*, Roskill J. refers to the *Wessanen* case and then describes the normal arbitration procedure (page 190):

> Each party to the contract contemplates that his arbitrator, if he disagrees with the other arbitrator, will join with the other arbitrator in appointing an umpire, and that each arbitrator will then appear before the umpire duly appointed under the clause and argue the case before the umpire as advocate.

This does not appear to be intended a description of the practice in a restricted area known as "commercial arbitration".

It is also worthy of note that judicial acceptance of advocacy as part of the role of the arbitrators was

at first accomplished with hesitation. This is apparent in the judgment of Lush J. in *Bourgeois* (quoted earlier). It is interesting to observe that in 1905, just 15 years before the court accepted the procedure in *Tsurushima*, it appears to have been within the contemplation of the court that the procedure would be unacceptable. In *Biglin* v. *Clark* (1905) 49 Sol. Jo. 204 motion was made to set aside the award of the umpire on the ground that one of the arbitrators had acted as advocate. The court stated that its policy or requiring arbitrators to conduct themselves as arbitrators would be strictly observed though not in the case where the complaining party knew what was going on and did not protest.

In the *Rahcassi* case it was decided that even though the arbitrator in arbitrator-umpire arbitration becomes an advocate after the matter is referred to the umpire, his authority to act is still based on the arbitration agreement which gave rise to his appointment. He does not become the agent of his appointer. Perhaps it can be said to follow from this that he is not so much an advocate of the cause of the party who nominated him but is rather an advocate of the conclusion to which he came, impartially and judicially, during the original proceedings with the other party's arbitrator, before their disagreement made necessary the appointment of an umpire. The distinction is perhaps subtle but it would seem to be less of an infringement of natural justice, if it is an infringement at all, for an arbitrator to advocate the acceptance of a conclusion which he arrived at by judicial means than for him to advocate a cause which he may not truly believe to be meritous.

The following is submitted as a possible outline of the development of the arbitrator advocacy procedure. At the turn of the century the courts held a strict view of the role of the arbitrator and would have invalidated an award on the ground that the arbitrator took on the role of advocate before the umpire. Nevertheless the practice developed within particular trades and the courts accepted it where it was proved to be the "usual way". The practice became so widespread that its acceptance by the courts in all arbitrator-umpire arbitrations followed.

At least in England, this appears to be the position of the arbitrators in arbitrator-umpire arbitration after their disagreement and the appointment of the umpire. They are no longer arbitrators but rather their function is transformed to that of an advocate.

The English Arbitration Act of 1950 in section 9(1) provides that where the parties have agreed to submit their disputes to a tribunal which consists of three men, one chosen by each of the parties and the third chosen by the first two, the third member will be considered an umpire and not a third arbitrator. This provision is not subject to contrary expression in the contract. It appears to show a definite preference for the arbitrator-umpire system. It may be noted that none of the Canadian Arbitration Acts contain such a provision.

It will be recalled that in the examination of the role of the party-appointed arbitrator in arbitrator-umpire proceedings before reference to the umpire, the suspicion arose that the intention of the parties in some cases may

be that the arbitrators are to function more as mediators and negotiators than as judicial officers. In light of this suspicion, if it is true, and what has been found to be the role of the arbitrators before the umpire, it is submitted that arbitrator-umpire arbitrations are indistinguishable from sole-arbitrator arbitrations. There is only one person whose function is to make a judicial decision in both cases. If this is the case, the provision of the English Arbitration Act discussed above can be looked upon as intending to encourage the sole-arbitrator form even when the parties have agreed to a sophisticated arrangement whereby three "arbitrators" are appointed. The Arbitration Acts of England and Canada have long shown a preference for sole-arbitrator arbitrations since they provide that where the form of tribunal is not specified in the agreement, reference shall be to a sole-arbitrator.

(4) Summary

It may be helpful at this point to summarize the conclusions arrived at above as to the role of the arbitrator.

First, as to arbitrators appointed mutually by the parties, it was found that their role could be characterized as judicial and that the main consequence of this was that they had a duty to adhere to the rule of natural justice. From this it followed naturally that they could not conduct themselves as advocates of either party's cause.

Second, as to arbitrators appointed by each party individually, it was found that the judicial characterization still applied. In tripartite arbitration this was in the face of an apparent trend in the U.S.A. away from a strict requirement of impartiality for party-nominated

arbitrators. In arbitrator-umpire arbitration, it was found that before the arbitrators disagreed and submitted the dispute to the umpire, they could not conduct themselves as advocates. The suspicion was raised, however, that the parties might have intended, in some cases, that the arbitrators function more as mediators or negotiators in which case they would not be judicial officers. It was found that after there had been reference to the umpire, the arbitrators are generally considered to be advocates of their nominators cause before the umpire. If the suspicion as to the role before reference to the umpire is correct, the arbitrator-umpire form of arbitration becomes indistinguishable from the sole-arbitrator form.

D. The Role as Seen by the Practitioner

Having arrived at these conclusions as to the arbitrator's role from an examination of the authorities, it may be useful to consider the experience of Alberta practitioners as to the role. For this purpose four interviews were conducted.

The first two of these were with Mr. B. Barron and Mr. J. McNiven of Calgary who recently served as the party-nominated arbitrators on a tripartite arbitration. The dispute arose out of a 2-million dollar construction contract between Mobil Oil and Pan West Construction. Because of delays that had occurred in the course of construction Pan West had suffered a substantial loss which they claimed from Mobil on the ground that the latter had been responsible for the delay. Mobil denied responsibility and counter-claimed for their loss due to lost production on the ground that Pan West was responsible for the delay. The

contract contained an arbitration clause which provided for a tripartite tribunal. Pan West proposed that the dispute be submitted to arbitration under this clause. Originally Mobil wanted to avoid arbitration and made application to the Alberta Supreme Court for revocation of the arbitration clause and submission of the issues to the court. Lieberman J. dismissed this application in a judgment reported in [1973] 1 W.W.R. 413.

As a result Mr. Barron was appointed arbitrator by Mobil Oil and Mr. McNiven was appointed arbitrator by Pan West. At the time of his appointment Mr. Barron was given a very general description of the problem by Mobil's counsel and he warned that he had nothing more than a layman's knowledge and understanding of the technology of the construction and oil industries. He was told that this was of no concern to his appointer and accepted the appointment. He was chosen, he feels, on the basis of his long experience in business and law. He had had no previous experience with commerical arbitration though he had been involved in labour arbitration.

Mr. McNiven was given no description of the circumstances of the dispute at the time of his appointment, it being his policy to wait until the statements of claim and defence were presented to him. He felt that the basis of his being chosen was his previous experience as house counsel to a large construction firm, Mannix Corporation Ltd. He had been involved in several arbitrations while with Mannix.

By the terms of the arbitration clause, the first function of the two arbitrators was to appoint a third, the chairman. This proved to be a very difficult process taking three months. The arbitrators agreed that the chairman

should be a man familiar with the technology involved, preferably an engineer. They also agreed that it was important to choose someone in whose qualifications and impartiality the parties could have confidence. They were therefore, met with the problem of whether or not it was proper for them to discuss with their nominators the various suggestions for third arbitrator. They decided to do so and the procedure which was adopted was for the parties or arbitrators to suggest possible third arbitrators and for the other arbitrator and his nominator to approve or disapprove. It was soon discovered that the world of oil field construction was a small one because many of the persons suggested by one party had been involved previously with the other party in some capacity which made him undesirable as an arbitrator. Some were disapproved on the ground that they were thought to have a 'contractor bias' by Mobil or an 'owner bias' by Pan West. Mr. Barron said that the parties always gave reasons for their disapproval and if either party had ever disapproved a suggestion without giving acceptable reasons he would have been inclined to withdraw the parties' opportunity to comment, and to appoint without their approval. Fortunately, just before the parties would have been forced to apply to the court to appoint an arbitrator, under s. 5(2) of the Arbitration Act, agreement was reached and a prominent Calgary engineer was appointed.

The problem then arose as to whether the arbitrator just appointed was a third arbitrator so as to make the tribunal a tripartite one or whether he was an umpire so as to make it a tribunal of the arbitrator-umpire variety. The contract did not specify this in exact terms but it did provide for the acceptability of a majority award. On

this basis and on the basis of their own preference, the arbitrators decided that they were to be a tripartite tribunal and the chairman's status as an arbitrator and not an umpire was announced at the opening of the hearing.

Both Mr. Barron and Mr. McNiven were of the opinion that a provision like s. 9(1) of the English Arbitration Act, discussed earlier at page 36, would have provided an undesirable solution to this issue. The section would apparently have applied to this situation and by it the last appointed arbitrator would have been deemed to be an umpire.

Neither of the gentlemen had had any experience with the arbitrator-umpire form of arbitration tribunal and they did not think that it was used very frequently in Alberta.

Both Mr. Barron and Mr. McNiven were of the opinion that the efficiency of the arbitration was greatly increased by the reasonableness and practicality of the respective counsel. At the opening of the hearing it was agreed that there would be no strict requirement that the rules of evidence be observed. In particular it was agreed that copies of documents would be accepted without question and that letters that were entered would be deemed to have been sent and received. The arbitrators did, however, attempt to limit the admission of hearsay testimony. It was felt that because the dispute was technologically very complicated, the strict rules of evidence would have caused the proceedings to bog down hopelessly.

Mr. Barron suggested that provision should be made in the Act that unless the contrary was expressed in the contract, the strict rules of evidence should not apply. He thought that something along the lines of the Legal Professions Act, ss. 60 and 63 might accomplish this.

One problem that Mr. McNiven observed during the course of the hearing related to the questioning of witnesses by the arbitrators. The chairman expressed a reluctance to ask questions of the witnesses being under the impression that since there was counsel present to bring out the evidence, he should be satisfied with the evidence thus brought out. He felt that there might be some undesirable reflection on his impartiality, should he ask a question not asked by counsel. Mr. McNiven assumed that the chairman was unaware of the common practice of judges questioning witnesses and advised the chairman to ask questions if he thought it necessary. Mr. McNiven observed that the transcript of the hearings showed that he, himself, had frequently asked questions of witnesses and he suggested that it would have been the same had he been chairman.

Before it was time for the arbitrators to come to an award, the parties settled their dispute between themselves. It was therefore unnecessary for the tribunal to decide how they would proceed to arrive at an award. There had been some preliminary discussion as to what the procedure should be. Mr. Barron was of the opinion that it would be profitable to have a meeting after the hearing at which he felt it would be possible to eliminate some points from those that required consideration. The chairman evidently

was of the opinion that there should not be such a meeting but rather that the arbitrators should each go off on their own to consider the merits and come to a conclusion. The procedure that would have been employed had there been no majority agreement was not discussed. Neither was the method that would be employed to draft the final award, discussed.

Mr. McNiven observed from his earlier experience that there is a discussion of the case by the arbitrators after the hearing. He agreed that at this meeting the party-nominated arbitrators do put forth the good points of their nominators case to ensure that they will be remembered during the consideration of the case. The party-nominated arbitrators evidently then make individual recommendations to the chairman as to what the award should be and the chairman considers these before making the draft award. If the chairman's award is not the same as one of the arbitrators, the tribunal meets again to attempt to arrive at a majority decision. Mr. McNiven said that this generally would have been the procedure followed in this particular arbitration.

Mr. McNiven agreed that this procedure might tend toward compromise, something which he felt the parties had not intended when they agreed to arbitration. But he felt that a reasonable arbitrator did not make an extreme position in his recommendation so as to force the chairman to come away from what might have been a medium position toward the recommended position in order to arrive at a majority award which would probably be close to that which the arbitrator had originally wanted. He felt that most chairmen would recognize and not be trapped by such manipulation should it be attempted. He said that in

their recommendations the arbitrators usually put forward what they consider a just conclusion.

Mr. Barron suggested not only that compromise often resulted but that the parties likely expect it.

Both Mr. Barron and Mr. McNiven expressed the conviction that their roles had been those of judges;--they were to conduct themselves impartially and judicially. Each had faith in the impartiality of the other and of the chairman. Mr. McNiven however observed that it was humanly impossible to rid oneself of bias which had developed over the years. He noted that he possessed built-in prejudices developed during his previous close association with a construction company which probably affected his judgment and which undoubtedly was a major reason for his nomination. Both he and Mr. Barron referred to their nominators in terms which indicated that they felt a closer relationship to them than to the other party to the dispute. Mr. Barron once referred to Mobil as the party that he 'represented' and Mr. McNiven once referred to Pan West as his 'client'. These were undoubtedly 'slips of the tongue' but perhaps they revealed a subconscious preference which could have an effect on the judgment of less professionally conscientious men.

Both Mr. Barron and Mr. McNiven expressed surprise with the suggestion in Dean Sturgis' article, the *Astoria* case and the New York Civil Procedure Act provision (all discussed earlier). Mr. Barron didn't think such a trend should be or is likely to be followed here and Mr. McNiven thought that although the New York provision might have tended toward recognition of what might be the true situation

in many cases, allowing party-nominated arbitrators to be openly biased, might destroy industry confidence in the whole arbitration procedure.

The only extent to which either of them was prepared to admit to any part of their role being that of an advocate was Mr. McNiven's suggestion that in the discussions following the hearing each party-nominated arbitrator would remind the other of the best points in favor of his nominator's case.

Mr. Barron noted that his lack of familiarity with the problem made it impossible to advocate either side of the dispute.

Mr. McNiven did point out, however, that in less formal arbitrations, where there were only the three arbitrators and the parties, i.e., no counsel, it was common procedure for the party-nominated arbitrators to conduct themselves as advocates. He said that the Calgary Construction Association frequently appointed the chairman to such arbitrations and they were conducted very informally and were usually very fast.

Both Mr. Barron and Mr. McNiven considered that the arbitration procedure obtained for the parties a greater degree of efficiency, expertise, informality and economy than available in the courts. In addition they felt that the use of arbitration permitted the parties to solve their dispute more amicably than might be possible in the courts. This was important since it was likely the parties would be parties to contracts with each other in the future.

Mr. Barron expressed no opinion as to what advantage the parties derived by employing the particular form of tribunal they did. Mr. McNiven, on the other hand, suggested that the only possible advantage of a three-man tribunal over a one-man tribunal was that a better 'mix' of expertise could be achieved. This tribunal consisted of a topnotch engineer, a very prominent lawyer, and a lawyer with a greater than average experience in the industry in question. He noted that a three-man board all the members of which were mutually appointed could probably have achieved the same degree of expertise without the risk of partiality attached to a tribunal with party-nominated members. However, he recognized that the practical difficulty of agreeing to three arbitrators would be unreasonably great in light of the difficulty experienced in finding one arbitrator that these two parties could both accept. In the absence of an equivalent to the American Arbitration Association which has had success with a system whereby the Association appoints the three arbitrators from the lists of men who are professional arbitrators and are therefore undoubtedly independent, Mr. McNiven suggested that a reasonable alternative to the three man tribunal would be a one man arbitration where the single arbitrator would have the power to call his own expert witnesses (to provide the expertise lost by the reduction from a 3-man tribunal to a 1-man tribunal). These experts would function as *amici curiae* and could be questioned by the parties to the dispute.

Both Mr. Barron and Mr. McNiven were of the opinion that procedural guidelines would be very valuable to arbitrators and the parties to an arbitration. These might

be contained in a schedule to the Act. Mr. McNiven observed that it might be difficult to arrive at the right balance of simplicity and comprehensiveness to make a set of guidelines valuable. He suggested that the rules of the American Arbitration Association might provide a reasonable base. [These rules are contained in Appendix B.] He noted that these rules work successfully largely because they have gained the confidence of the industries using them. Mr. Barron felt that although procedural guidelines would be useful the arbitrators should not be bound to follow any particular procedures after the hearing in coming to their award.

The third interview which was conducted in order to determine the experience of Alberta practitioners with regard to the role of the party-nominated arbitrator, was with Mr. W. G. Geddes who has been involved in approximately ten arbitrations in recent years. Mr. Geddes expressed very strongly that his observation was that the party-nominated arbitrators are always partial in favour of their nominator. He noted a distinction between arbitrations where the parties were represented by counsel and those where they were not. In the latter case the arbitrators are not only partial but are also advocates of their nominator's cause. In the discussion which follows the hearing, the arbitrators invariably put forth their nominator's case and take extreme positions realizing that in the bargaining process they will be forced to come down. Interestingly, it was Mr. Geddes' experience that the tribunal usually comes to a unanimous conclusion.

Mr. Geddes was not familiar with the arbitrator-umpire form of arbitration. He did not recognize a difference between an umpire and a third arbitrator.

Discussion revealed that this was logical because with the roles of the party-nominated arbitrator being as he described them, the function of the chairman becomes very similar to that of an umpire. Both are sitting between two ' arbitrators' who cannot agree as to an award and both are hearing argument from those arbitrators as to what the award should be. There are notable differences, of course, for example in the form of tribunal with which Mr. Geddes is familiar the two arbitrator-advocates still have a decision making function at the time they are conducting themselves as advocates while in the arbitrator-umpire form, the arbitrators are *functus officio* as far as their decision making capacity is concerned by the time they take on the role of advocate.

It should be emphasized that Mr. Geddes was entirely satisfied that the best role for the party-nominated arbitrator to play is that of an advocate. He felt that this was an efficient system and agreed with Mr. Barron and Mr. McNiven that arbitration is a useful tool. He also agreed that procedural guidelines would be useful.

The fourth interview was with Mr. E. F. Holmgren, an Edmonton engineer. Mr. Holmgren has had a wide experience with arbitrations having sat as a sole arbitrator on two-man arbitration boards, and, on tripartite boards. It is important to note that his experience with tripartite boards has been in cases where the parties have not been represented by counsel.

The procedure generally followed after the appointment of the board is for the parties to brief the arbitrators they have appointed so that they become familiar with

their nominator's side of the story. The arbitration board then meets to discuss the case and to determine what they want to discover at the hearing. At the hearing which follows, the arbitrator's question the parties and the witnesses. Every effort is made to ensure that all the facts are brought out and that the entire problem is clearly understood by the board. The board then meet to discuss the case. The party-nominees conduct themselves as advocates to the extent that they remind the board of the strong points of their nominator's case.

Mr. Holmgren pointed out that there is a basic difference between the attitudes of engineers and that of lawyers. Whereas lawyers are inclined only to bring out that amount of truth as is necessary to cast a favourable light on their client's case, engineers have a professional duty to see that in engineering matters every fact is taken into consideration. With this duty in mind, the party appointee is careful to see that facts which are potentially damaging to the nominator's cause enter the considerations.

After these discussions, the chairman drafts an award which is circulated to the arbitrators for approval or criticism. This process is repeated with further discussions where necessary, until an award acceptable to the whole board is arrived at. Reasons are always given for the award.

There was absolutely no question in Mr. Holmgren's mind that the arbitrators throughout this entire process were to be impartial and that their award was to be arrived at judicially. This was despite the fact that they were briefed by their appointer in the absence of

the rest of the tribunal and that they were responsible to see that the arguments supporting their nominator's position were presented to the tribunal and were within its consideration at the time of making the award.

In support of this role he pointed out that there was never any attempt on the part of a nominator to test the arbitrators' attitudes before appointment. He felt his appointments had been based on his reputation of fairness in business dealings as much as on his engineering experience. He may not have built in prejudices to the extent the other gentlemen had because he has acted as the nominee of contractors and owners alike. At the beginning of the proceedings, the chairman briefs the party nominees as to the conduct of the proceedings and generally points out the impartiality that is demanded of them. He had always had a reasonable confidence in the impartiality of the other members of the tribunal.

Usually the outcome is a unanimous award. Mr. Holmgren did not think there would be any objection to a majority award but he felt that in an arbitration where three people, acting impartially, do not come to the same conclusion every effort should be made through further consideration to eliminate the differences and come to an award that all members of the board can live with. If this is done it is more likely that the parties will be able to live with the award. Mr. Holmgren admitted that this type of procedure may yield compromise. But it is not a manipulated compromise. It is one entered so as to reconcile opinions arrived by an impartial mind in a judicial process.

The role of the arbitrator is no different in a sole arbitration or a two man arbitration. All three forms are useful in appropriate circumstances. The sole arbitrator is most useful where there is a technical problem which can be stated simply (though it may not be simple) and the parties are able to adequately represent their interests themselves or are represented by counsel.

The two-man arbitration is useful where in addition to the technical problem there is a matter of principle at stake and the parties are unable to adequately represent themselves and do not intend to employ counsel. Mr. Holmgren had never experienced a two-man arbitration where it was necessary to call in an umpire.

The three-man arbitration is most suited to the settlement of a "real mothy situation" where a great deal of discussion will be necessary.

Mr. Holmgren felt that arbitration proceedings of all types were valuable and met objectives that motivated resort to arbitration rather than litigation. He feared that too often a court case is decided on the basis of technical presentation but that the degree of informality possible in an arbitration prevents this result. Mr. Holmgren was also of the opinion that procedural guidelines would be very useful. When he was appointed to his first arbitration tribunal he had looked for guidance in the Arbitration Act and had found none. He had discovered what procedure was to be followed and what was expected of him through inquiries to other engineers and to lawyers.

One other observation made by all of the gentlemen interviewed is worthy of note. Arbitration clauses are

apparently common in contracts, especially construction contracts. However the frequency of arbitration is not great. Mr. Barron and Mr. Geddes thought that this might be because parties who include arbitration clauses do so because they want to solve their disputes amicably. They therefore have a high propensity to find a solution through negotiation before even arbitration is necessary. Mr. McNiven felt that arbitration is used as a club to encourage a negotiated settlement more often than as a tool of settlement in itself. Mr. Holmgren observed that in the construction industry there is an individual, the architect or engineer, whose job includes acting as a sort of arbitrator between the contractor and the owner so that disputes requiring resort to arbitration are prevented.

It may be useful to summarize the role of the arbitrator as seen by the gentlemen interviewed:

1) Mr. Barron was very strongly of the opinion that his role as a party-nominated arbitrator was that of a judge, completely impartial and judicial.

2) Mr. McNiven was of the same problem but he recognized built-in bias which made it humanly impossible for him to remain totally impartial though every effort to discount these biases was made.

3) Mr. Holmgren also thought the arbitrators should be impartial and come to their decision judicial though it was not inconsistent with this for them to present the case of their nominator and to stress its strong points.

4) Mr. Geddes was of the opinion that it was not only impossible for party nominees to be impartial but it was unnecessary. They ought to function as advocates of their nominator's cause and openly push for an award in his favour.

E. Conclusions and Recommendations

(1) Tripartite Arbitration

It would be unscientific, to say the least, to suggest that any firm conclusions can be made to the role commonly played by party-appointed arbitrators in Alberta, on the basis of only four interviews. It is possibly to observe, however, that this small cross-section of those familiar with non-labour arbitration displayed an interesting stratification of opinion as to the role of the party nominee. Factors giving use to this divergence might include the size of the sum claimed in the arbitration, the technical or legal complexity of the issues involved, the experience of the arbitrators, and the presence or absence of counsel for the parties. Whatever the cause of the difference of opinion, the most serious result is a confusion as to the role, which tends toward a greater likelihood of injustice and the frustration of any benefit which the parties hoped to derive from a three-man board. (see Gold and Furth, *Tripartite Arbitration* (1954-55) 68 Harvard Law Review 293 at 319). It is submitted therefore, that a provision ought to be added to the Arbitration Act to provide clarity.

On the basis of the earlier discussion in this report where it was concluded that the courts look upon

the party-appointed arbitrator as a judicial officer and demand the same impartiality as is demanded from a mutually-nominated arbitrator, it is submitted that this addition to the Act should specify that the party-appointed arbitrator is to be an impartial judge and is not to conduct himself as an advocate.

However, it is recommended that this provision be made subject to any contrary expression in the agreement. An arbitration tribunal should remain the creation of the parties since one of the main attractions of arbitration is that the parties can mold their 'court' to suit their purposes. If the parties desire that their appointees should be advocates of their respective causes, this cannot be denied them. But with the recommended provision, they will be forced to specify that this is their desire. With the role of the party nominees being clearly understood, the chairman will know how the submissions of the nominees are to be taken. In all likelihood he will become a sole arbitrator.

If the parties do not specify an alternate role, they would get, if the above recommendations were accepted, a completely impartial three-man board. For such a board, the requirement of an unanimous award would serve no useful purpose. The parties knowing that all three arbitrators are impartial should be willing to accept a majority award. It is therefore suggested that a provision be added to the effect that a majority award be sufficient.

The present requirement of unanimity, it is submitted, creates a hazard of injustice for the tribunal where appointee

advocacy is practiced. The decision making process becomes one where compromise is the most likely result. This is undesirable where the compromise result is different from the result reached by the chairman judicially. Even a requirement of a majority award would be undesirable if in order to get a majority, the chairman had to leave the award he reached impartially and accept a position of compromise with the award of a party-nominee which was reached with partiality. It is therefore submitted that the above suggested acceptance of a majority award ne restricted in application to a completely impartial tribunal. It is recommended that a provision be added to allow the award of the chairman alone to be binding if no majority award is possible where the party-nominated arbitrator's role is specified to be that of an advocate.

It is unnecessary to make any change to the Act with respect to providing relief should the party-nominated arbitrator contrary to the above recommended provision where it applies, fails to remain impartial throughout the arbitration. Section 11 of the Act provides adequate remedy.

The following is suggested as a possible wording of a provision which would incorporate the above recommendations:

1) Where an arbitration agreement provides that the reference shall be to three arbitrators, one to be appointed by each of the parties and the third to be appointed by the mutual agreement of the

parties, or by the two appointed parties, all three members of the tribunal are deemed to have a judicial function with a duty of impartiality, unless a contrary intention is expressed in the arbitration agreement.

2) Where by subsection (1) the members of the three-man arbitration tribunal are deemed to have a judicial function with a duty of impartiality, the award of a majority of them shall be final and binding on all parties and persons claiming a contrary intention.

3) Where subsection (1) does not apply because a contrary intention is expressed in the arbitration agreement, the decision of the majority shall be final and binding on all the parties and persons claiming under them respectively; but in the absence of a decision of the majority, the decision of the arbitrator chosen by mutual agreement of the parties or by the two first appointed parties shall be final and binding on all the parties and persons claiming under them respectively, unless a contrary intention is expressed in the arbitration agreement.

(2) Arbitrator-Umpire Arbitration

The interviews revealed that at least in the experience of three practitioners, the arbitrator-umpire

form is not used in Alberta to any significant extent. It may be therefore that any provisions in the Act specifying the role to be played by party-nominated arbitrators would be superfluous from a practical standpoint. It may be said that a provision encouraging the arbitrator-umpire form, like the English Arbitration Act, section 9(1) would be most inappropriate.

However, it is submitted that if a provision is added to the Act, it should be for the purpose of providing clarity, not for the purpose of dictating a role. Again, it is recommended that, as to the role before reference to an umpire, the position found to be that of the courts be adopted subject to contrary intention being expressed. It is also recommended, that, for the sake of certainty, there be a requirement that if the arbitrators are to conduct themselves as advocates before the umpire it be only with the written authorization of the parties made at the time of appointment as an arbitrator. Notice to the other party of this authorization should be made before the arbitration begins.

A possible wording of these recommendations might be:

(1) Where the arbitration agreement provides that the reference shall be to two arbitrators, one to be appointed by each party, the arbitrators are deemed to have a judicial function with a duty of impartiality.

(2) Where the arbitrators are unable to agree to an award, they may appoint an umpire and submit the reference to him.

(3) The arbitrators may function as advocates for the cause of the party nominating them before the umpire only

(a) when they have been given written authorization at the time of their appointment, and

(b) notice of that authorization was given to the other party before the commencement of the arbitration.

(4) This section is subject to any contrary intention expressed in the agreement.

(3) Sole-Arbitrator Arbitration

The interviews revealed that there is little advantage to the use of an arbitration tribunal with party-nominated members. Whatever advantage is gained in the way of expertise is lost, it is submitted, to the risk of natural bias of which even the most conscientious arbitrator cannot rid himself. It is submitted that the current policy of the Act which is to encourage reference to a sole arbitrator is desirable. It is recommended that

to provide the expertise that the parties may feel is lost when a sole arbitrator is employed, a provision in words similar to the following be enacted in accordance with Mr. McNiven's suggestion:

> (1) Where the reference is to a single arbitrator the arbitrator may himself call expert witnesses to testify at the hearing.
>
> (2) The parties of their counsel shall be provided with an opportunity to question expert witnesses so appointed.
>
> (3) This section is subject to any contrary intention expressed in the arbitration agreement.

It may be that a provision like this should not be restricted in application to the single arbitrator situation.

(4) Guidelines

It is recommended that a set of procedural guidelines be drafted for the purpose of assisting arbitrators to perform the function as efficiently as possible.

Since what these procedures should be is beyond the purposes of this report, the area has not been explored. The rules of the American Arbitration Association are attached, as Appendix B, however, as an example of such a set of guidelines.

It may be helpful to note that there is a Canadian equivalent to the American Arbitration Association being organized in Ontario. It is the Canadian Arbitration Society Extension Inc. and can be contacted at Suite 2100, 44 King Street West, Toronto, Ontario, M5H 1G4.

It may also be useful to observe that since arbitration tribunals are not created by statute the Administrative Procedures Act, R.S.A. 1970, c. 2, has no application to them.

F. Appeals

It was also requested that a quick investigation of the proper occasions for a procedure on appeal be made.

It may first be noted that there is a considerable variation in the manner in which the various provincial Acts deal with the matter of appeals.

The Manitoba Act provides in section 32 that where it is provided in the submission that the reference is to be subject to appeal, it shall be to the Manitoba Court of Appeal and shall be subject to the same rules of procedure as an appeal from a lower court to the Court of Appeal. Similar provisions exist in the Acts of Prince Edward Island (s. 21(2)), Saskatchewan (s. 14) and Ontario (s. 16). In the Saskatchewan and Ontario sections, special procedures as to notice and time for appeal, records, exhibits, and statements from the arbitrators are provided for.

The Newfoundland Arbitration statute (Judicature Act) provides in s. 213(8) that it is an implied term of every submission that the award is final and binding on the parties and presumably, therefore not open to appeal.

The Acts of Nova Scotia, New Brunswick, British Columbia and Alberta, like Newfoundland, do not mention appeals. They contain a provision that the award of the arbitrators shall be final and binding but this is subject to any contrary intention expressed in the arbitration agreement.

A provision in an arbitration agreement that there should be an appeal from the award would certainly, it seems, be an expression of a contrary intention. The question arises whether such a provision would be recognized by the courts. Can parties agree to confer appellate jurisdiction on a court?

There is high authority in *A.G.* v. *Sillem* [1864] 10 H.L.C. 703, 11 E.R. 1200 to support the conclusion that only a statute can create a right of appeal. The Lord Chancellor (Lord Westbury) says at page 720: "The creation of a new right of appeal is plainly an act which requires legislative authority."

In *Johnson* v. *Miller* (1898) 7 B.C.R. 46 Wakem J. said at page 47:

> . . . the mere fact that both parties agreed that there should be an appeal to this court gives us no jurisdiction. . . . Consent cannot give jurisdiction where none exists. Moreover an appeal only lies when given by statute in express terms.

Other cases supporting the conclusion that only a statute can confer appellate jurisdiction are cited in Holmested and Langton, *The Judicature Act of Ontario*, 5th edition at p. 37. On this basis it is submitted that a provision in an arbitration agreement that the award was to be subject to an appeal to a court would be ineffective. (This is not to say that a provision allowing the commencement of court proceedings which would not be in the nature of an appeal but rather would be a new presentation of the evidence and trial of the issues, would be ineffective.)

It may be noted that the parties can create their own appeal tribunal in the same way they created the original arbitration tribunal, and an appeal can be taken to it (Russell page 342). Also it may be noted that Rule 507 of the Alberta Rules of Court seem to contemplate an appeal from an award.

Whether appeal is possible or not, there is ample opportunity provided by the Arbitration Act for judicial supervision of the arbitration process:

(a) Section 4 provides that the court may order a stay of proceedings where application is made to it, on the ground that the issues are ones that the parties have agreed to submit to arbitration.

(b) Section 5(2) provides that the court may appoint an arbitrator, umpire or third arbitrator when application is made to it in certain circumstances.

(c) Section 6(2) provides that the court may interfere to set aside on the unilateral appointment of a sole arbitrator under section 6(1).

(d) Section 7(6) provides that the arbitrators may "state an award as to the whole or part in the form of a special case for the opinion of the court."

(e) Section 9 provides that the court may extend the time for making an award.

(f) Section 10 provides that the court may remit the matters under arbitration for the recommendation of the arbitrators.

(g) Section 11(1) provides that the court may remove an arbitrator who has misconducted himself.

(h) Section 11(2) provides that if the arbitrator has misconducted himself or the award has been improperly procurred, the court may set aside the award.

(i) Section 12 provides that if the court gives its leave the award may be enforced in the same manner as a judgment or order.

(j) Section 14 provides that the arbitrator may state a special case for the opinion of the court on any question of law.

The grounds for which an award may be set aside under section 11 or ((f) above) remitted to the arbitrators under section 10 ((h) above) are very generally stated in Russell at page 350:

> (i) where the award is bad on its face;
>
> (ii) where there has been an admitted mistake and the arbitrator himself asks that the matter be remitted;

> (iii) where there has been misconduct on the part of the arbitrator;
>
> (iv) where additional evidence has been discovered after making the award.
>
> (quoting *Montgomery, Jones & Co.* v. *Liebenthal & Co.* (1898) 78 L.T. 406.)

In addition, want of jurisdiction might be included (*Fraser* v. *Fraserville* [1917] 2 A.C. 187, 34 D.L.R. 211) as well as a general ground that inadvertent injustice had been done (Russell p. 350). A full discussion of the grounds for remission or setting aside an award are considered beyond the scope of this discussion.

A motion to have an award set aside can be made under Rule 507 of the Alberta Rules of Court.

It may be useful to note that

> . . . the court has no power to direct the issue of orders of *certiorari* or of prohibition addressed to an arbitrator directing that a decision by him should be quashed or that he be prohibited from proceeding in an arbitration, unless he be acting under powers conferred by statute.
>
> (*R.* v. *Disputes Committee of the National Joint Council for the Craft of Dental Technicians and Others* Ex parte *Neale and Another R* v. *Same* [1953] 1 All E.R. 327 headnote).

The question for debate is whether the various opportunities for supervision of the arbitration process by the court are sufficient or should provision for appeal of an award to the courts be made (assuming the accuracy of the submission that no appeal is presently allowed)?

It seemed to be the general feeling of those interviewed that despite the fact that an appeal tends to frustrate the purpose of having an arbitration, there should be a reluctance to force the parties to content themselves with an award that is unjust. In answer to this it may be said that the parties choose their arbitrators and had the opportunity to ensure that just men made up the tribunal. But then, even just men have been known to come to unjust conclusions.

If the parties have agreed that they should have the opportunity to appeal to the court, can there be any sound reasons for not making this possible?

Mr. McNiven expressed the opinion that possibly even the existing occasions for court supervision can frustrate an arbitration. He felt that one party should not be able to run to the court until the arbitration was finished and an award delivered. Such unilateral reference to the court can lead to unnecessary delays. If both parties mutually decide to go to the court before the award is delivered this should be allowed. And after the award is set down, either party should be able to appeal to go to the court as they presently can.

The provisions of the Saskatchewan and Ontario Arbitration Acts with respect to appeals are set out in Appendix C.

Brian Burrows

APPENDIX A

ARBITRATION STATUTES

Canadian

Alberta	- *Arbitration Act*, R.S.A. 1970, c. 21
British Columbia	- *Arbitration Act*, R.S.B.C. 1960, c. 14.
Manitoba	- *Arbitration Act*, R.S.M. 1970, c. A-120
New Brunswick	- *Arbitration Act*, R.S.N.B. 1952, c. 9
Newfoundland	- *Judicature Act*, R.S.N.1952, c. 114 ss 194-214
Nova Scotia	- *Arbitration Act* R.S.N.S. 1967, c. 12
Ontario	- *Arbitrations Act*, R.S.O. 1970, c. 18
Prince Edward Island	- *Arbitration Act*, R.S.P.E.I. 1951, c. 12
Saskatchewan	- *Arbitration Act*, R.S.S. 1965, c. 106 amended S.S. 1972, c. 6

England

Arbitration Act, 52 & 53 Victoria, 1889, c. 49, repealed by Arbitration Act, 14 & 15 Geo. VI, 1950, c. 27.

United States

New York - Civil Practice Laws and Rules Act 75 (McKinney 1963).

APPENDIX B

AMERICAN ARBITRATION ASSOCIATION COMMERCIAL ARBITRATION RULES

CONTENTS

Section 1. Agreement of Parties

The parties shall be deemed to have made these Rules as part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association or under its Rules. These Rules and any amendment thereof shall apply in the form obtaining at the time the arbitration is initiated.

Section 2. Name of Tribunal

Any Tribunal constituted by the parties for the settlement of their dispute under these Rules shall be called the Commercial Arbitration Tribunal.

Section 3. Administrator

When parties agree to arbitrate under these Rules, or when they provide for arbitration by the American Arbitration Association and an arbitration is initiated thereunder, they thereby constitute AAA the administrator of the arbitration. The authority and obligations of the administrator are prescribed in the agreement of the parties and in these Rules.

Section 4. Delegation of Duties

The duties of the AAA under these Rules may be carried out through Tribunal Clerks, or such other officers or committees as the AAA may direct.

Section 5. National Panel of Arbitrators

The AAA shall establish and maintain a National Panel of Arbitrators and shall appoint Arbitrators therefrom as hereinafter provided.

Section 6. Office of Tribunal

The general office of a Tribunal is the headquarters of the AAA, which may, however, assign the administration of an arbitration to any of its Regional Offices.

Section 7. Initiation under an Arbitration Provision in a Contract

Arbitration under an arbitration provision in a contract may be initiated in the following manner:

(a) The initiating party may give notice to the other party of his intention to arbitrate (Demand). which notice shall contain a statement setting forth the nature of the dispute, the amount involved, if any, the remedy sought, and

(b) By filing at any Regional office of the AAA two (2) copies of said notice, together with two (2) copies of the arbitration provisions of the contract, together with the appropriate administrative fee as provided in the Administrative Fee Schedule.

The AAA shall give notice of such filing to the other party. If he so desires, the party upon whom the demand for arbitration is made may file an answering statement in duplicate with the AAA within seven days after notice from the AAA, in which event he shall simultaneously send a copy of his answer to the other party. If a monetary claim is made in the answer the appropriate fee provided in the Fee Schedule shall be forwarded to the AAA with the answer. If no answer is filed within the stated time, it will be assumed that the claim is denied. Failure to file an answer shall not operate to delay the arbitration.

Section 8. Change of Claim

After filing of the claim, if either party desires to make any new or different claim, such claim shall be made in writing and filed with the AAA, and a copy thereof shall be mailed to the other party who shall have a period of seven days from the date of such mailing within which to file an answer with the AAA. However, after the Arbitrator is appointed no new or different claim may be submitted to him except with his consent.

Section 9. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these Rules by filing at any Regional Office two (2) copies of a written agreement to arbitrate under these Rules (Submission), signed by the parties. It shall contain a statement of the matter in dispute, the amount of money involved, if any, and the remedy sought, together with the appropriate administrative fee as provided in the Fee Schedule.

Section 10. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. If the locale is not designated within seven days from the date of filing the Demand or Submission the AAA shall have power to determine the locale.

Its decision shall be final and binding. If any party requests that the hearing be held in a specfic locale and the other party files no objection thereto within seven days after notice of the request, the locale shall be the one requested.

Section 11. Qualifications of Arbitrator

No person shall serve as an Arbitrator in any arbitration if he has any financial or personal interest in the result of the arbitration, unless the parties, in writing, waive such disqualification.

Section 12. Appointment From Panel

If the parties have not appointed an Arbitrator and have not provided any other method of appointment, the Arbitrator shall be appointed in the following manner: Immediately after the filing of the Demand or Submission, the AAA shall submit simultaneously to each party to the dispute an identical list of names of persons chosen from the Panel. Each party to the dispute shall have seven days from the mailing date in which to cross off any names to which he objects, number the remaining names indicating the order of his preference, and return the list to the AAA. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an Arbitrator to serve. If the parties fail to agree upon any of the persons named, or if acceptable Arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from other members of the Panel without the submission of any additional lists.

Section 13. Direct Appointment by Parties

If the agreement of the parties names an Arbitrator or specifies a method of appointing an Arbitrator, that designation or method shall be followed. The notice of appointment, with name and address of such Arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any such appointing party, the AAA shall submit a list of members from the Panel from which the party may, if he so desires, make the appointment.

If the agreement specifies a period of time within which an Arbitrator shall be appointed, and any party fails to make such appointment within that period, the AAA shall make the appointment.

If no period of time is specified in the agreement, the AAA shall notify the parties to make the appointment and if within seven days thereafter such Arbitrator has not been so appointed, the AAA shall make the appointment.

Section 14. Appointment of Neutral Arbitrator by Party-Appointed Arbitrators

If the parties have appointed their Arbitrators or if either or both of them have been appointed as provided in Section 13, and have authorized such Arbitrators to appoint a neutral Arbitrator within a specified time and no appointment is made within such time or any agreed extension thereof, the AAA shall appoint a neutral Arbitrator who shall act as Chairman.

If no period of time is specified for appointment of the neutral Arbitrator and the parties do not make the appointment within seven days from the date of the appointment of the last party-appointed Arbitrator, the AAA shall appoint such neutral Arbitrator, who shall act as Chairman.

If the parties have agreed that their Arbitrators shall appoint the neutral Arbitrator from the Panel, the AAA shall furnish to the party-appointed Arbitrators, in the manner prescribed in Section 12, a list selected from the Panel, and the appointment of the neutral Arbitrator shall be made as prescribed in such Section.

Section 15. Nationality of Arbitrator in International Arbitration

If one of the parties is a national or resident of a country other than the United States, the sole Arbitrator or the neutral Arbitrator shall, upon the request of either party, be appointed from among the nationals of a country other than that of any of the parties.

Section 16. Number of Arbitrators

If the arbitration agreement does not specify the number of Arbitrators, the dispute shall be heard and determined by one Arbitrator, unless the AAA, in its discretion, directs that a greater number of Arbitrators be appointed.

Section 17. Notice to Arbitrator of His Appointment

Notice of the appointment of the neutral Arbitrator, whether appointed by the parties or by the AAA, shall be mailed to the Arbitrator by the AAA, together with a copy of these Rules, and the signed acceptance of the Arbitrator shall be filed prior to the opening of the first hearing.

Section 18. Disclosure by Arbitrator of Disqualification

Prior to accepting his appointment, the prospective neutral Arbitrator shall disclose any circumstances likely to create a presumption of bias of which he believes might disqualify him as an impartial Arbitrator. Upon receipt of such information, the AAA shall immediately disclose it to the parties who, if willing to proceed under the circumstances disclosed, shall so advise the AAA in writing. If either party declines to waive the presumptive disqualification, the vacancy thus created shall be filled in accordance with the applicable provisions of these Rules.

Section 19. Vacancies

If any Arbitrator should resign, die, withdraw, refuse, be disqualified or be unable to perform the duties of his office, the AAA shall, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these Rules and the matter shall be reheard unless the parties shall agree otherwise.

Section 20. Time and Place

The Arbitrator shall fix the time and place for each hearing. The AAA shall mail to each party notice thereof at least five days in advance, unless the parties by mutual agreement waive such notice or modify the terms thereof.

Section 21. Representation by Counsel

Any party may be represented by counsel. A party intending to be so represented shall notify the other party and the AAA of the name and address of counsel at least three days prior to the date set for the hearing at which counsel is first to appear. When an arbitration is initiated by counsel, or where an attorney replies for the other party, such notice is deemed to have been given.

Section 22. Stenographic Record

The AAA shall make the necessary arrangements for the taking of a stenographic record whenever such record is requested by a party. The requesting party or parties shall pay the cost of such record as provided in Section 49.

Section 23. Interpreter

The AAA shall make the necessary arrangements for the services of an interpreter upon the request of one or more of the parties, who shall assume the cost of such service.

Section 24. Attendance at Hearings

Persons having a direct interest in the arbitration are entitled to attend hearings. The Arbitrator shall otherwise have the power to require the retirement of any witness or witnesses during the testimony of other witnesses. It shall be discretionary with the Arbitrator to determine the propriety of the attendance of any other persons.

Section 25. Adjournments

The Arbitrator may take adjournments upon the request of a party or upon his own initiative and shall take such adjournment when all of the parties agree thereto.

Section 26. Oaths

Before proceeding with the first hearing or with the examination of the file, each Arbitrator may take an oath of office, and if required by law, shall do so. The Arbitrator may, in his discretion, require witnesses to testify under oath administered by any duly qualified person or, if required by law or demanded by either party, shall do so.

Section 27. Majority Decision

Whenever there is more than one Arbitrator, all decisions of the Arbitrators must be at least a majority. The award must also be made by at least a majority unless the concurrence of all is expressly required by the arbitration agreement or by law.

Section 28. Order of Proceedings

A hearing shall be opened by the filing of the oath of the Arbitrator, where required, and by the recording of the place, time and date of the hearing, the presence of the Arbitrator and parties, and counsel, if any, and by the receipt by the Arbitrator of the statement of the claim and answer, if any.

The Arbitrator may, at the beginning of the hearing, ask for statements clarifying the issues involved.

The complaining party shall then present his claim and proofs and his witnesses who shall submit to questions or other examination. The defending party shall then present his defense and proofs and his witnesses, who shall submit to questions or other examination. The Arbitrator may in his discretion vary this procedure but he shall afford full and equal opportunity to

all parties for the presentation of any material or relevant proofs.

Exhibits, when offered by either party, may be received in evidence by the Arbitrator.

The names and addresses of all witnesses and exhibits in order received shall be made a part of the record.

Section 29. Arbitration in the Absence of a Party

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party, who, after due notice, fails to be present or fails to obtain an adjournment. An award shall not be made solely on the default of a party. The Arbitrator shall require the party who is present to submit such evidence as he may require for the making of an award.

Section 30. Evidence

The parties may offer such evidence as they desire and shall produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute. When the Arbitrator is authorized by law to subpoena witnesses or documents, he may do so upon his own initiative or upon the request of any party. The Arbitrator shall be the judge of the relevancy and materiality of the evidence offered and conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the Arbitrators and of all the parties, except where any of the parties is absent in default or has waived his right to be present.

Section 31. Evidence by Affidavit and Filing of Documents

The Arbitrator shall receive and consider the evidence of witnesses by affidavit, but shall give it only such weight as he deems it entitled to after consideration of any objections made to its admission.

All documents not filed with the Arbitrator at the hearing, but arranged for at the hearing or subsequently by agreement of the parties, shall be filed with the AAA for transmission to the Arbitrator. All parties shall be afforded opportunity to examine such documents.

Section 32. Inspection or Investigation

Whenever the Arbitrator deems it necessary to make an inspection or investigation in connection with the arbitration, he shall direct the AAA to advise the parties of his intention. The Arbitrator shall set the time and the AAA shall notify the parties thereof. Any party who so desires may be present at such inspection or investigation. In the event that one or both parties are not present at the inspection or investigation, the Arbitrator shall make a verbal or written report to the parties and afford them an opportunity to comment.

Section 33. Conservation of Property

The Arbitrator may issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of the dispute.

Section 34. Closing of Hearings

The Arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies, the Arbitrator shall declare the hearings closed and a minute thereof shall be recorded. If briefs are to be filed, the hearings shall be declared closed as of the final date set by the Arbitrator for the receipt of briefs. If documents are to be filed as provided for in Section 31 and the date set for their receipt is later than that set for the receipt of briefs, the later date shall be the date of closing the hearing. The time limit within which the Arbitrator is required to make his award shall commence to run, in the absence of other agreements by the parties, upon the closing of the hearings.

Section 35. Reopening of Hearings

The hearings may be reopened by the Arbitrator on his own motion, or upon application of a party at any time before the award is made. If the reopening of the hearing would prevent the making of the award within the specific time agreed upon by the parties in the contract out of which the controversy has arisen, the matter may not be reopened, unless the parties agree upon the extension of such time limit. When no specific date is fixed in the contract, the Arbitrator may reopen the hearings, and the Arbitrator shall have thirty days from the closing of the reopened hearings within which to make an award.

Section 36. Waiver of Oral Hearing

The parties may provide, by written agreement, for the waiver of oral hearings. If the parties are unable to agree as to the procedure, the AAA shall specify a fair and equitable procedure.

Section 37. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these Rules has not been complied with and who fails to state his objection thereto in writing, shall be deemed to have waived his right to object.

Section 38. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA for good cause may extend any period of time established by these Rules, except the time for making the award. The AAA shall notify the parties of any such extension of time and its reason therefor.

Section 39. Communication with Arbitrator and Serving of Notices

(a) There shall be no communication between the parties and a neutral Arbitrator other than at oral hearings. Any other oral or written communications from the parties to the Arbitrator shall be directed to the AAA for transmittal to the Arbitrator.

(b) Each party to an agreement which provides for arbitration under these Rules shall be deemed to have consented that any papers, notices or process necessary or proper for the initiation or continuation of an arbitration under these Rules and for any court action in connection therewith or for the entry of judgment on any award made thereunder may be served upon such party by mail addressed to such party or his attorney at his last known address or by personal service, within or without the state wherein the arbitration is to be held (whether such party be within or without the United States of America), provided that reasonable opportunity to be heard with regard thereto has been granted such party.

Section 40. Time of Award

The award shall be made promptly by the Arbitrator and, unless otherwise agreed by the parties, or specified by law, not later than thirty days from the date of closing the hearings, or if oral hearings have been waived, from the date of transmitting the final statements and proofs to the Arbitrator.

Section 41. Form of Award

The award shall be in writing and shall be signed either by the sole Arbitrator or by at least a majority if there be more than one. It shall be executed in the manner required by law.

Section 42. Scope of Award

The Arbitrator may grant any remedy or relief which he deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract. The Arbitrator, in his award, shall assess arbitration fees and expenses in favor of any party and, in the event any administrative fees or expenses are due to the AAA, in favor of the AAA.

Section 43. Award upon Settlement

If the parties settle their dispute during the course of the arbitration, the Arbitrator, upon their request, may set forth the terms of the agreed settlement in an award.

Section 44. Delivery of Award to Parties

Parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail by the AAA, addressed to such party at his last known address or to his attorney, or personal service of the award, or the filing of the award in any manner which may be prescribed by law.

Section 45. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party, furnish to such party, at his expense, certified facsimiles of any papers in the AAA's possession that may be required in judicial proceedings relating to the arbitration.

Section 46. Applications to Court

(a) No judicial proceedings by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.

(b) The AAA is not a necessary party in judicial proceedings relating to the arbitration.

Section 47. Administrative Fees

As a nonprofit organization, the AAA shall prescribe an administrative fee schedule and a refund schedule to compensate it for the cost of providing administrative services. The schedule in effect at the time of filing or the time of refund shall be applicable.

The administrative fees shall be advanced by the initiating party or parties, subject to final apportionment by the Arbitrator in his award.

When a matter is withdrawn or settled, the refund shall be made in accordance with the refund schedule.

The AAA, in the event of extreme hardship on the part of any party, may defer or reduce the administrative fee.

Section 48. Fee When Oral Hearings are Waived

Where all Oral Hearings are waived under Section 36 the Administrative Fee Schedule shall apply.

Section 49. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses.

The cost of the stenographic record, if any is made, and all transcripts thereof, shall be prorated equally among all parties ordering copies unless they shall otherwise agree and shall be paid for by the responsible parties directly to the reporting agency.

All other expenses of the arbitration, including required travelling and other expenses of the Arbitrator and of AAA representatives, and the expenses of any witness or the cost of any proofs produced at the direct request of the Arbitrator, shall be borne equally by the parties, unless they agree otherwise, or unless the Arbitrator in his Award assesses such expenses or any part thereof against any specified party or parties.

Section 50. Arbitrator's Fee

Members of the National Panel of Arbitrators serve without fee in commercial arbitrations. In prolonged or in special cases the parties may agree to the payment of a fee.

Any arrangements for the compensation of a neutral Arbitrator shall be made through the AAA and not directly by him with the parties.

Section 51. Deposits

The AAA may require the parties to deposit in advance such sums of money as it deems necessary to defray the expense of the arbitration, including the Arbitrator's fee if any, and shall render an accounting to the parties and return any unexpected balance.

Section 52. Interpretation and Application of Rules

The Arbitrator shall interpret and apply these Rules insofar as they relate to his powers and duties. When there is more than one Arbitrator and a difference arises among them concerning the meaning or application of any such Rules, it shall be decided by a majority vote. If that is unobtainable, either an Arbitrator or a party may refer the question to AAA for final decision. All other Rules shall be interpreted and applied by the AAA.

Administrative Fee Schedule

The administrative fee of the AAA is based upon the amount of each claim as disclosed when the claim is filed, and is due and payable at the time of filing.

Amount of Claim	Fee
Up to $10,000	3% (minimum $50)
$10,000 to $25,000	$300, plus 2% of excess over $10,000
$25,000 to $100,000	$600, plus 1% of excess over $25,000
$100,000 to $200,000	$1,350, plus ½% of excess over $100,000

The fee for claims in excess of $200,000 should be discussed with the AAA in advance of filing.

When no amount can be stated at the time of filing, the administrative fee is $200, subject to adjustment in accordance with the above schedule if an amount is subsequently disclosed.

If there are more than two parties represented in the arbitration, an additional 10 per cent of the initiating fee will be due for each additional represented party.

Other Service Charges

$30.00 payable by a party causing an adjournment of any scheduled hearing;

$25.00 payable by each party for each hearing after the first hearing;

$5.00 per hour payable by each party for hearings on Saturdays, legal holidays, and after 6:00 P.M. weekdays.

Refund Schedule

If the AAA is notified that a case has been settled or withdrawn before a list of arbitrators had been sent out, all the fee in excess of $50.00 will be refunded.

If the AAA is notified that a case has been settled or withdrawn thereafter but before the due date for the return of the first list, two-thirds of the fee in excess of $50.00 will be refunded.

If the AAA is notified that a case is settled or withdrawn thereafter but at least 48 hours before the date and time set for the first hearing, one-half of the fee in excess of $50.00 will be refunded.

APPENDIX C

Appeal Provisions in Ontario and Saskatchewan

(1) Ontario Arbitration Act, R.S.O. 1970, c. 18, s. 16.

Where submission provides for appeal

16.—(1) Where it is agreed by the terms of the submission that there may be an appeal from the award, an appeal lies to a judge in court and from him to the Court of Appeal. R.S.O. 1950, c. 20, s. 16 (1), *amended*.

Procedure by party taking up award

(2) Where by the agreement of the parties or by the provisions of any statute there is an appeal from an award, the party taking up the award shall file it with the registrar of the court and shall serve a copy of it and a notice of its filing upon the opposite party.

Notice of appeal

(3) Notice of appeal may be served within fourteen days returnable within thirty days after service of the copy of the award and notice of filing.

Taking evidence in writing

(4) In all cases in which there is a right of appeal, the evidence of the witnesses shall be taken down in longhand and be signed by the witnesses, or be taken in shorthand.

Evidence to be transcribed only on on appeal

(5) It is not necessary that evidence taken in shorthand be transcribed unless an appeal is taken.

Exhibits, transmission to registrar

(6) Upon the request of the party appealing, the exhibits shall be transmitted by the arbitrator to the office of the registrar of the court for the purpose of the appeal.

Oath of stenographer

(7) A stenographer employed to take evidence in shorthand shall be sworn to take down and transcribe the evidence faithfully and shall certify to the accuracy of all copies supplied.

Statement of proceeding on view or special knowledge

(8) Where the arbitrators proceed wholly or partly on a view or any knowledge or skill possessed by themselves or any of them, they shall also put in writing a statement thereof sufficiently full to enable a judgment to be formed of the weight that should be attached thereto.

Requiring further report from arbitrator

(9) The court may require explanations or reasons from the arbitrator and may remit the matter or any part thereof to him for further consideration.

Powers of court as to extension of time

(10) The court may extend the time limited by this section either before or after its expiry or may dispense with compliance with the requirements of this section. R.S.O. 1950, c. 20, s. 16 (2-10).

(2) Saskatchewan ARbitration Act, R.S.S. 1965, c. 106, s. 14.

APPEAL FROM AWARD.

Appeal to a judge

14.—(1) Where it is agreed by the terms of the submission that there may be an appeal from the award, the reference shall be conducted, and an appeal shall lie to a judge of the Court of Queen's Bench, in the same manner and subject to the same restrictions as in the case of a reference under an order of the court.

(2) The evidence of the witnesses examined upon the reference shall, subject to subsection (3), be taken down in writing and shall, at the request of either party, be transmitted by the arbitrator or umpire, as the case may be, together with the exhibits, to the registrar of the court at Regina.

(3) The arbitrator or arbitrators may cause the evidence to be taken in shorthand by a stenographer who shall before acting make oath that he will truly and faithfully report the evidence.

(4) A transcript of the evidence so taken or of any part thereof, certified by the reporter to be correct, has the same legal force and validity as a similar transcript by an official court stenographer in an action.

(5) Where the arbitrators proceed wholly or partly on a view or any knowledge or skill possessed by themselves or any of them, they shall put in writing a statement thereof sufficiently full to enable a judgment to be formed of the weight that should be attached thereto. R.S.S. 1953, c. 99, s. 16.