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## Arbitration; Letter-Bulletin, 1

American Institute of Accountants. Bureau of Public Affairs

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# AMERICAN INSTITUTE OF ACCOUNTANTS

## *Bureau of Public Affairs*

*Committee*

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May 6, 1924

### *To Members and Associates:*

The Committee on Public Affairs, in accordance with the action of the Institute, is organizing the services of members and associates in the matter of making addresses and writing articles on affairs of public interest. The Institute seeks in this way, not only to render a public service for which its members and associates are especially fitted, but to bring the work of the Institute and of practitioners of accountancy favorably to the attention of the public.

The committee has already made a survey of the possible field of its activities, and has received many helpful suggestions from members and associates in response to a circular letter which it sent out under date of January 22, 1924. From this survey and the suggestions, it appears that there are two principal fields to be covered in the making of addresses and the preparation of the articles, namely:

*First—The field of current public interest:* There are at all times before the public matters of interest that are immediately related to accountancy. Among the matters of current interest at the moment may be mentioned the revision of tax laws; the control of the crime tendency as related to the violation of fiduciary relationships; the appointment of accountants or business men as receivers and trustees; the use of arbitration for the settlement of commercial disputes and the encouragement of the passage of arbitration laws; the determination of wage scales and transportation and selling costs with respect to the production of coal and to other articles and services vital to the interest of the public; and the like.

*Second—The field of technical accountancy discussion:* There are many technical phases of accountancy that are of interest to special groups—for example, the standardizing of accounting for particular industries; bases for overhead distribution; public service accounting; the relation of accounting and auditing to credit; and the like.

The first group of subjects obviously provides greater opportunities for publicity and for organizing the influence of accountants with respect to current legislation and investigations than do the subjects of the second group. In order to cover this field, the Institute must organize its work on a national basis in such a way that speakers, competent from the technical and public-speaking viewpoints, may be provided without delay within a few days or weeks after a subject becomes of vital public interest. For example, if the bureau had been fully organized, such speakers would have been available in every state within a week or ten days after the first announcement of Secretary Mellon's plan of tax revision. The bureau in such instances would, of course, take care that the Institute should not be committed with respect to any matter of political significance, the idea being to furnish speakers who could discuss the effect of such proposals from the technical viewpoint. In much the same way speakers would be pro-

vided from time to time with respect to all subjects of an accounting nature of interest to the public.

The second field would provide a great deal of opportunity for accountants to appear before trade organizations and technical societies and for the preparation of articles to be published in the seven hundred or more trade publications of the country. Many members and associates prefer to talk upon technical subjects of this nature, although a considerable number are available for service in the broader field of public interest.

The committee has already arranged for a number of addresses before organizations of a public or quasi-public nature, and for several talks by radio. To date talks have been given with respect to the proposed revision of the tax laws, the crime wave in business, and arbitration. As the work is gradually extended, more subjects will be covered and speakers will be available in every state.

Each of the principal subjects to be covered will be brought to the attention of the members and associates by a letter-bulletin, of which this document is the first. The principal subject herein covered is the settlement of commercial disputes by arbitration—a subject of prime importance in the states in which legal provision is made for arbitration, and also of interest in the states in which arbitration legislation is pending, or in which such legislation is in contemplation.

At a later date a more detailed statement will be made of the work of the committee. At this time it is sufficient to ask the attention of the members and associates to the material hereinafter contained with respect to arbitration. It will be noted that much information is given that may be used as a basis for talks or articles, and suggestions are made as to the manner in which additional information in detailed form may be obtained. Indication is also made of the manner in which accountants may encourage the use of arbitration among clients not only to the benefit of the latter, but in such a way as to serve the professional interests of the accountants themselves.

The committee directs attention to the fact that arbitration received the specific approval of the Institute at its annual meeting held in September, 1923. The committee therefore urges all members and associates to do all in their power to encourage arbitration legislation and the use of arbitration for the settlement of commercial disputes.

*The Committee*

## *Arbitration Week*

Arbitration week is being observed this week—May 5-10, inclusive. Its slogan is, "Learn to Arbitrate."

Special efforts are being made to spread the message of arbitration among business men.

The American Institute of Accountants, through its Bureau of Public Affairs, is glad to contribute its support to a movement endorsed by its membership, in which several accountants already have distinguished themselves.

# ARBITRATION

## *The Relation of Arbitration to the Profession of Accountancy*

**A**RBITRATION — a method of settling disputes between business men without resort to the courts—is rapidly becoming of importance in commercial affairs. The development of this practice, the endorsement of the general principle of Arbitration by the American Institute of Accountants, and the Institute's suggestion that members and associates do what they can to encourage this movement, make Arbitration a subject of prime importance to accountants throughout the country.

The endorsement of the Institute is contained in a resolution adopted at the annual meeting held in September, 1923, at Washington, D. C., as follows:

*"Resolved that the Institute give to the work of the Arbitration Society of America its support; that it communicate with its members throughout the country, urging them to be favorable to the introduction of the system of Arbitration in commercial disputes, and generally do everything possible to forward the popularity of Arbitration, including services as arbitrators, when called upon so to act."*

Careful study of the development of arbitration in the business life of the nation, and of its bearing on the profession of accountancy, has been made by the Bureau of Public Affairs. The bureau therefore presents herewith the results of its investigations. It makes definite recommendations as to what accountants should do, first, to aid in introducing Arbitration and, second, to develop professional practice with respect to the performance by accountants of duties as arbitrators, or as investigators or consultants in arbitrated cases.

The arbitration of commercial and business disputes is a distinct step forward from the custom of taking to the courts cases which involve only questions of fact. It is the belief of the committee that the development of Arbitration presents to practising accountants an opportunity to be of distinct service to their clients and the community, and to benefit accountancy. By employing Arbitration, business men may obtain prompt decisions and settlements of their differences, and at the same time may aid in relieving the congested condition of court calendars.

Arbitration is just coming into use in the business world. Accountants, in their capacity of business consultants and advisers, have an opportunity to be of aid in the enactment of enabling legislation in about forty of the states. Public service in this direction will be useful to business men and will undoubtedly serve to strengthen the position of accountants.

The Arbitration Society of America, 115 Broadway, New York City, is the organization, nation-wide in scope, directing the work of promoting the enactment of Arbitration statutes, and of setting up and conducting Arbitration tribunals. Moses H. Grossman is acting president; Charles M. Schwab is chairman of its general committee; and its board of governors includes such well-known men as Franklin Simon, Bainbridge Colby, Arthur S. Tompkins, James A. O'Gorman, William C. Redfield, Samuel McRoberts, Jules S. Bache, Charles L. Guy, Almet F. Jenks, Frederic Kernochan, and Frank H. Sommer. Officials of the Arbitration Society have assisted the Bureau of Public Affairs of the Institute in its study of Arbitration, and many of the facts in this bulletin were obtained from that source.

### *What Is Arbitration?*

Arbitration is a legally recognized method of settling differences between business men without ordinary litigation. Decisions are obtained by the submission of facts to one or more arbitrators, whose award is binding and legally enforceable. When disputants sign an agreement to arbitrate, this agreement, under approved arbitration laws, is irrevocable; neither side can withdraw, and both must abide by the decision.

Arbitration is a method of co-operating with the courts. It is in no sense a rival of the courts, but it is a method of obtaining a settlement of points in dispute in a few days, or weeks, instead of by litigation extending over the months or years required to take a legal action through the courts.

Hearings are held in private—there is no publicity. Each side tells its story in its own way. Rules of evidence do not exclude matter which the arbitrators believe has a bearing on the case.

Arbitrators may be chosen from a list of volunteers who serve without pay, or the disputants may agree on one or more arbitrators, and make their own arrangements as to fees. Disputants may be represented by counsel if they so desire, and may introduce, at their own expense, such expert testimony as they wish.

Arbitration tribunals are not trade courts exclusively; there are no limits to the scope of their public service.

Agreements to submit actionable differences or controversies to arbitration are called "submissions." They are written agreements, upheld by the law in some states as binding and irrevocable.

Arbitrators, under the approved laws, have the power to subpoena witnesses, compel production of books and papers, and in almost all essential respects, to exercise the same authority with which a judge is clothed in the conduct of a trial.

The awards of arbitrators, under the approved laws, may be confirmed by the court if so desired, and they then become a judgment of that court. In a majority of cases the awards of arbitrators are not entered on court records, the provisions being carried out by the disputants without an order from the court.

### *Present Legal Status*

Arbitration laws, making arbitration valid, irrevocable and enforceable, are now in effect in New York and New Jersey. Other states, such as Idaho, Illinois, Kansas, Maine, Massachusetts, Nebraska, North Dakota, Tennessee, Texas, Utah, and Wisconsin, also have arbitration laws, but these are not fully satisfactory, as they permit a withdrawal of a disputant after he has signed an agreement to arbitrate, or contain some other loop-hole. The amendment of these laws is desired.

A similar measure, affecting practice in federal courts and providing for the arbitration of interstate and maritime disputes, is now pending in Congress. This measure was introduced by Senator Thomas Sterling and Congressman Ogden L. Mills.

There are thirty-five states in which the first steps for legalization of Arbitration have yet to be taken. Measures are being considered in states whose legislatures convene this year, and next year.

Requests for co-operation in obtaining the enactment of Arbitration laws have been received by the Arbitration Society of America from Arizona, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Idaho, Indiana, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, Pennsylvania, Tennessee, Texas, Washington, West Virginia, and Wyoming.

### *General Steps to Be Taken*

The general steps to be taken on behalf of Arbitration may be summarized thus:

1. The public, particularly business men and women, should be educated as to the advantages of arbitration.
2. Approved Arbitration laws should be enacted in all states and territories of the United States which do not already have such laws.
3. Business men and women should be encouraged to have clauses providing for the arbitration of commercial disputes involving questions of fact inserted in contracts.

4. A list should be made (and published) of men and women willing to serve as arbitrators, either with or without compensation.

5. Trade organizations should be encouraged to co-operate in general Arbitration tribunals.

### *Experiences of Accountants*

A public arbitration tribunal has been conducted in the City of New York for a year and one-half. At the request of commercial organizations and others interested in furthering arbitration, many men prominent in the community agreed to serve as volunteer arbitrators, without fee. Others expressed a willingness to serve as arbitrators, the fees to be fixed in proportion to the amounts and the time involved in the various cases in which they were called to act.

Among those who consented to serve as arbitrators were a number of practising accountants of New York and New Jersey. These men have been called upon and have served to the complete satisfaction of the disputants. In many of the cases very few hearings were found to be necessary and but little of the accountant-arbitrator's time was required.

One accountant reports that he neglected to make inquiry before accepting an invitation to serve as arbitrator in a certain case, as to how much time would be required and as to the nature of the points in controversy. As a result he has been compelled to hold more than thirty hearings and the case is not yet finished. This accountant believes that it is advisable for those who are asked to serve as arbitrators, to make inquiry as to the nature of the case and the amount involved so that an approximate agreement as to compensation may be reached in advance.

No matter whether an accountant serves as a volunteer arbitrator or on the basis of fees, he may feel that he has performed an important public service—a service that enabled disputants to reach a prompt and economical settlement of their differences and that has relieved to some extent the congested court calendars.

In one state, practising public accountants have interested themselves actively in a campaign for the enactment of a law providing for arbitration of business disputes. They are co-operating with commercial organizations and other bodies.

### *A Dignified Public Service*

Model arbitration laws, such as the 1920 New York statute, confer on arbitrators the powers of judges. They become, in effect, officers of the courts. The responsibility thus placed upon an accountant when chosen to serve as an arbitrator is in accord with the responsibilities involved in other public services which the profession of accountancy may reasonably be expected to assume. Practising accountants have not shirked their duty to the public in the matter of commercial arbitration, as shown by the work of those who have served as arbitrators. In fact, these men have brought additional lustre to the profession.

## *Ways of Encouraging Legislation*

Comparatively few of the states and territories have as yet enacted laws providing for the arbitration of business disputes, giving full legal force and effect to decisions of arbitrators, and preventing the withdrawal of one of the parties after an arbitration agreement has been signed.

If your state has no such law, your efforts in behalf of arbitration might well be directed to organizing, stimulating and directing sentiment for the enactment of such legislation.

One very effective method of demonstrating the advantages of arbitration of business disputes in states where it is not provided for by law, is to bring about the submission of differences to arbitration. Though the decisions of the arbitrators in such cases could not be enforced by law, the mere fact that the disputes were submitted to arbitration will, in a large majority of cases, bring about their amicable adjustment and, at the same time, serve as an example for other business men.

Co-operation with commercial organizations and bar associations in your state, to secure the introduction of a model arbitration law based on the New York and New Jersey acts, would be a great help. For example, you might be able to present the matter to the members of a business men's club, a chamber of commerce, or a trade organization.

Accountants, because of their confidential relations with clients, are in a position to point out the advantages of this recent development in business, and at the same time to perform a public service.

### *What It Means to Serve as an Arbitrator*

To be called upon to serve as an arbitrator is regarded as a mark of respect and a high honor.

Under the existing laws in several states, arbitrators are invested with the powers of judges. Their decisions are enforceable at law, just as is a judgment of a court of record.

Arbitrators in such states are empowered to call witnesses and to require the submission of papers and books. They have the right to say what evidence shall be admitted, and the practice is to receive everything bearing on the case at issue, the restrictions of the rules of evidence being removed.

The arbitrator allows each side to present its case and tell its story in its own way, producing such witnesses as it may see fit.

Attorneys are not barred and may represent one or both of the disputants. They are frequently called upon to act as arbitrators.

Arbitrators, after weighing all the evidence, hand down a decision which may later, under approved laws, be entered as a court record if either or both sides desire. It has all the weight of a court decision.

Arbitrators hold their hearings in private. This is one of the advantages of arbitrating business disputes as there is no attendant publicity.

The spirit of conciliation, but not the spirit of compromise, should prevail in all hearings, and arbitrators should endeavor to remove all doubts and misunderstandings between the disputants.

### *Mode of Operation*

To bring about the arbitration of an existing dispute, disputants are first required to sign an agreement to submit the matter to one or more arbitrators.

The parties then agree upon one or more arbitrators who may be chosen from lists submitted by the arbitration tribunal in their locality, or who may be men suggested by the disputants themselves.

The hearings are held at the time and place agreed upon by the arbitrator and the disputants.

At the conclusion of the hearings a decision is rendered. If an award is found necessary, the arbitrators usually express their reasons for the award.

The whole transaction is usually undertaken and consummated in a brief period of time and at a very small percentage of the cost of a court action.

### *Additional Information*

Accountants and their clients who are interested in having additional information concerning any of the points raised in this bulletin, and who wish to be kept informed as to the progress made in spreading the principle of Arbitration, may obtain such information from the Arbitration Society of America, 115 Broadway, New York, N. Y. The Bureau of Public Affairs of the American Institute of Accountants will be glad to answer inquiries and will make public late developments from time to time.

## Sample Clauses for Arbitration Contracts

Two model clauses have been suggested by the Arbitration Society of America for inclusion in contracts providing for arbitration. The second clause, it will be noted, is suitable for use when disputes are to be arbitrated in accordance with the rules of a board of arbitration. The clauses follow:

"Any dispute arising under, out of, in connection with or relation to this contract shall be submitted to Arbitration in accordance with the laws of the state of ....."

"Any dispute arising under, out of, or in connection with or relation to this contract, shall be submitted to Arbitration under the rules of the Board of Arbitration of the ..... which rules, we, the parties hereto, have read and do hereby accept."

# The Relation of Accountants to Arbitration

*Prepared by a member of the Arbitration Society  
for the Bureau of Public Affairs*

What is Arbitration—when did it arise—what are its functions—and what should be the relation of accountants to the general subject? Arbitration was presumably the first method of deciding questions in controversy. Unquestionably it existed long before the time of Abraham for we find that it was a recognized method in his day when the elders “sat in the gates” and listened to the dispute and rendered their decision. It is the method of presenting questions at issue to the consideration and determination by a jury of a man’s peers. Theoretically that is what was supposed to be the method when trial by jury was first established, but we all know that today no question that comes before an organized court is so tried.

Arbitration has always been resorted to where the contestants would agree upon leaving a decision of the issue to such a tribunal, but formerly, even in such cases, a contestant who felt that he had not received his rights under the decision could reject it if so disposed. Under the present Arbitration Act in New York State and New Jersey, such a rejection would not be possible provided the contestants had agreed under the proper form of stipulation that the issue be tried before arbitrators. Their decision is final and absolute, subject to no appeal, except for fraud, corruption, misconduct or excess of authority on the part of the arbitrator, and is enforceable by the courts. Very recently the United States Supreme Court has held that in a case arising in New York, the arbitration statute of that State is applicable and the remedy available, and State Courts have in several instances so decided. In Massachusetts a bill providing for similar enforcement of arbitration has been introduced in the legislature and is meeting with the hearty support of the representative trade organizations and bar associations.

## *The Procedure*

The procedure is very simple. Where an agreement exists between the parties in a transaction to submit any differences which may arise to such a decision, or where in the absence of a prior agreement, the parties interested agree to accept such a settlement, it remains only for them to arrange as to time and place for the hearing and to select the arbitrator or arbitrators to listen to and decide the question at issue. In the selection of the arbitrator or arbitrators, each side has the right to make such a selection from among those who he believes, will intelligently, fairly and justly consider the evidence and decide thereon. In case there be but one arbitrator, both sides, of course, must agree upon such an one. If each side select one, then the two may join in the selection of a third, but in any case the selection will naturally be made of those men who are qualified to understand and pass upon the particular questions. If they involve trade practices and customs, naturally the men who speak the language of that trade and understand its imports would

be chosen. How much vastly better this is than to leave such a question to the unintelligent determination of an average jury.

In the history of arbitration cases covering the last two or three years, it is probable that nearly all but a small percentage have been settled through a very few hearings held within a very few days, or at most weeks, of time and at a cost of only a small percentage of the expense which would be incurred in ordinary court proceedings. By contrast, when we consider the congested calendars of nearly all courts and the length of time required to finally bring an issue to trial and the expense involved therein, the advantages of arbitration become increasingly conspicuous.

## *Of Interest to Accountants*

This whole question of arbitration is of immediate and practical interest to accountants. Clients are often embarrassed because of the difficulty, delay and expense in having important questions determined, and we have an opportunity to bring this matter before them and to urge, to the extent that we properly can, that they avail themselves of the opportunities of this quick method of deciding disputes.

Again many such questions require that there should be special study of accounting matters in order that the facts contained therein may be expressed in clear, definite and logical manner so that the arbitrators will be able to understand the issue as readily as possible. The third manner, and perhaps the most important in which we can be of service, is through our serving as arbitrators in questions where accounting records are materially involved. It is so evidently of advantage to disputants that where such questions are to be considered they may be considered by those who are familiar and intelligent in such matters, rather than by an ordinary panel jury. We have probably all realized the hopelessness of having such a jury understand the intricacies of accounting records and testimony.

For all these reasons, so briefly described, it is believed that accountants should take an interest in the extension and development of the principles and practice of arbitration. Bills promoting the enforcement of uniform state arbitration laws have been and are now under consideration in at least three states, namely, Louisiana, Maryland, and Virginia, and according to advices received, the accountants of those states are energetically promoting their passage. This is notably true in Louisiana, where the Society of Certified Public Accountants is actively co-operating. In Louisiana an accountant is chairman of a special legislative committee and is obtaining the co-operation of the Louisiana Bar Association. For all these reasons this matter is brought before you for your earnest consideration and in the hope of securing your interest and support.

## Statement by E. L. Suffern

*Chairman, Accountants' Committee, Arbitration Society of America*

Members of the American Institute of Accountants should be especially interested in Arbitration, as its use in the settlement of business disputes in place of litigation tends to stimulate business activity in the community, saves time and money and good will for clients, and offers accountants an unique opportunity for the highest type of professional service.

The confidential relationship existing between the accountant and his client—the latter of whom frequently exercises a wide sphere of influence in the community—makes it possible for members of the American Institute to become potent factors in the nationwide Arbitration movement being directed by the Arbitration Society of America. A few practical suggestions may be of interest:

*First:* Arbitrate your own disputes with clients or other persons with whom you have business relationships—it will save you time and money and retain your business friendships.

*Second:* Urge your clients to settle their civil disputes through Arbitration rather than through liti-

gation; even if your State has no effective Arbitration Law, which would make it impossible to enforce an Arbitrator's award, the mere fact that the dispute has been submitted to Arbitration will, in a large majority of cases, bring about its amicable adjustment.

*Third:* Offer to serve as an arbitrator, whenever occasion presents, especially in disputes involving technical accountancy problems; even if you are not compensated for the time devoted to such work, you will find it tremendously worth while because of the high type of public service rendered in judging disputes among your fellow men, and because of the training it offers for a judicial approach to business problems.

*Fourth:* Co-operate with commercial organizations and bar associations in your State to secure the introduction of a model Arbitration Law based on the New York and New Jersey Acts; the Arbitration Society of America will be glad to furnish copies of such a model bill and other literature to help you properly present the matter.

## Arbitration Upheld by Court Decisions

Decisions recently handed down by the Supreme Court of the United States and by the Appellate Division of the Supreme Court of the State of New York uphold the principle of commercial arbitration and declare arbitration agreements to be valid even without enabling statutes, although specific remedies cannot be invoked unless they have been provided by statute.

The case that went to the United States Supreme Court involved also a decision by the New York Court of Appeals. The case, which was in admiralty, involved a contract between a steamship company and a company which chartered one of its boats. A dispute arose as to whether or not the master of the chartered vessel had made a certain voyage with proper dispatch, and hence, whether or not certain amounts paid by the charterer should be returned. The charterer attempted to have the case taken into admiralty court, holding that the New York contract with its arbitration clause was no barrier. The decision is that the New York contract is enforceable and that the parties must proceed to arbitration. The decision states: "New York had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, as well as by the law of the state, which is con-

tained in a contract made in New York, and which, by its terms, is to be performed there."

The decision was written by Judge Brandeis, and all but one of his associates concurred.

In the second case, the decision by the Appellate Division of the Supreme Court of the State of New York upholds the right of an arbitrator to make personal investigation of the facts in an issue before him, in an honest effort to arrive at a just award.

In this case one of the parties after an award had been made and confirmed by the courts, moved for a re-argument on the ground that the arbitrator made personal investigations after the hearing and considered statements of persons who had no connection with the proceeding, and thus, that the petitioner was denied the opportunity for cross-examination. The court vacated the award on the ground of misbehavior on the part of the arbitrator, but an appeal from this order of the court resulted in a unanimous decision by the Appellate Division of the Supreme Court, which vindicates the arbitrator and reverses the order vacating the award.

In both of these cases it is brought out that if one of the parties to an arbitration agreement is unwilling to proceed to an arbitration, the court is empowered to name an arbitrator for him and to compel him to proceed to arbitration.

# HOW ACCOUNTANTS MAY HELP

## From the Public Service Point of View

### *First:*

Accountants may address public and quasi-public organizations and trade bodies advocating the use of Arbitration, and the inclusion of Arbitration clauses in contracts. *Sample clauses will be found on page 5.*

### *Second:*

Accountants may assist in Arbitration legislation in the states and territories which have no such laws, or in which strengthening amendments are needed.

*Definite information as to the legislative status of Arbitration in any state may be obtained from the Arbitration Society of America, 115 Broadway, New York City.*

### *Third:*

Accountants may, if they desire, offer their services to arbitration tribunals as volunteer arbitrators, and they may assist in securing the co-operation of trade bodies with arbitration tribunals. It is pointed out by the Arbitration Society that it is the almost universal feeling among men of affairs that few functions in life hold more of usefulness, dignity and honor than that of acting as an impartial judge between men in their honest differences.

## From the Professional Point of View

### *First:*

Accountants may recommend the principle of Arbitration to their clients, suggesting that business contracts be made to include a clause providing for the Arbitration of disputes which may arise from these contracts.

### *Second:*

Accountants may act as arbitrators and as advisers to disputants when called upon to do so. Fees for services as arbitrators may be agreed upon in advance, and may fairly bear relation to the amount involved in the case and to the number of hearings which may be required.

### *Third:*

Accountants may perform investigative, auditing, or other accounting work for clients who submit matters to Arbitration. A majority of cases will be settled on the basis of statements and accounts, for the preparation of which the services of accountants will be needed.