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Two Views of Commercial Arbitration

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Two Views of Commercial Arbitration, by Nathan Isaacs. Harvard Law Review. May, 1927. Vol. 40, No. 7.

Professor Nathan Isaacs of the Harvard Law School has published the leading article in the May issue of the Harvard Law Review, entitled: "Two Views of Commercial Arbitration." These two views it seems are: (1) that commercial arbitration is a form of treatment, less technical perhaps than that of the regular courts but nevertheless an integral part of the judicial system; and (2) that commercial arbitration is a contractual method for the settlement of disputes out of court and separate from the regular judicial organization. Professor Isaacs gives a large number of instances from judicial decisions in this country and in Europe which, by his analysis, indicate that different problems in commercial law are decided one way or the other according as the court regards commercial arbitration as a matter of contract or as a matter of judicial procedure. This grouping of cases is remarkable and quite striking to one who has not considered the subject in this precise way. It is submitted, however, that the groping is perhaps a little arbitrary in certain respects and that perhaps the facts and the decisions are sometimes made to fit the categories

more exactly than the evidence will warrant. For instance, Professor Isaacs says in general that the English courts favor the contract theory while the American courts favor the court procedure theory but on the other hand he suggests that the doctrine that the award in a commercial arbitration dispute be subject to court review on points of law is characteristic of the procedure view of the question. We find, however, in fact, that one of the important features in English commercial arbitration is that the award is always subject to court review on questions of law. This significant instance is not mentioned by Professor Isaacs at all in his alignment of judicial questions under the contract theory or the procedure theory.

The article does not reach a clear conclusion as to which theory is right but contents itself with pointing out that there is a cleavage here and that this should be recognized. The reviewer feels that Professor Isaacs' analysis is striking and that there are a number of instances which seem to fall in with his distinctions. It is suggested, however, that the difference in the decisions cannot in all instances be explained on these different theories and that many characteristics of the English system which Professor Isaacs commends seem to be incidental to the procedure theory, although he asserts that their theory is contracts.

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