Washington and Lee Law Review

Volume 18 | Issue 1 Article 10

Spring 3-1-1961

Enforcement Of Agreements To Arbitrate

welfare of the child is the paramount consideration in any dispute over custody. The parents also should receive consideration, but the ultimate thoughts should be of the child's well being. This demands that judges and courts recognize that a child should not be the subject of inconsistent commands, for consistency of command is a basic precept in rearing children. When everyone is allowed to decide a question, it is decided by no one.

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ENFORCEMENT OF AGREEMENTS TO ARBITRATE

Arbitration is the submission for determination of disputed matters to unofficial persons who are selected in a manner provided by agreement or law.[1] The origin of arbitration is obscure but supposedly commercial arbitration had its beginning with the practices of the market and fair courts, and in the merchant gilds.[2] Some form of arbitration statute is in force in almost every state.[3]

The majority rule in this country is that agreements to submit existing disputes to arbitration, *i.e.*, submission agreements, are binding and enforceable, but agreements to submit future controversies, *i.e.*, future agreements, are not binding on the parties.[4] This rule

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easily made when a court is so inclined, and plausible grounds therefore can quite generally be found, it follows that the recognition extraterritorially which custody orders will receive or can command is liable to more theoretical than of great practical consequence." Morrill v. Morrill, 83 Conn. 478, 77 Atl. 1, 6 (1910).

[1]Stockwell v. Equitable Fire & Marine Ins. Co., 134 Cal. App. 534, 25 P.2d 873, 875-76 (Dist. Ct. App. 1933).

[2]Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132 (1934).

[3]See notes 4 and 9 infra.

[4]The present majority rule in the United States regarding abitration is that only submission agreements are binding. Ala. Code tit. 7, § 829 (Recomp. 1960); Ark. Stat. § 34-502 (1947); Del. Code Ann. tit. 10, §§ 5701-06 (1953); Fla. Stat. Ann. § 57.01 (1957); Ga. Code Ann. § 7-101 (1935); Idaho Code Ann. §§ 7-901-10 (1957); Ill. Ann. Stat. Ch. 10, § 1 (1941); Ind. Ann. Stat. § 3-201 (Repl. Vol. 1946); Iowa Code Ann. § 679.1 (1958); Kan. Gen. Stat. Ann. § 5-201 (1949); Ky. Rev. Stat. § 417.010 (1955); Me. Rev. Stat. Ann. Ch. 121, § 1 (1954); Md. Ann. Code art. 7, § 1 (1957); Minn. Stat. §§ 572.08-.30 (1953); Miss. Code Ann. §§ 279 et seq. (1942); Mo. Rev. Stat. §§ 435.010, 435.020 (1949); Montana: no citation available; Neb. Rev. Stat. § 25-2103-20 (1943); N.M. Stat. Ann. § 22-3-1 (1953); N.C. Gen. Stat. § 1-544 (Recomp. 1953); N.D. Rev. Code §§ 32-2901-12 (1943); S.C. Code § 10-1901 (1952); Tenn. Code Ann. §§ 23-501-19 (1956); Tex. Rev. Civ. Stat. art. 224 (1948); Utah has the Uniform Act, see note 12 infra; Vt. Stat. Ann. tit. 21, §§ 501-13 (1959) (agreements to arbitrate future labor disputes are enforceable); Va. Code Ann. §§ 8-503-06 (Repl. Vol. 1950); West Virginia, see note 8 infra; Wyoming Comp. Stat. § 3-5601-24 (1945).

has been adopted by statute or decision in twenty-nine states and modifies the old common-law rule that all agreements to arbitrate, even existing disputes, are revocable at the will of either party.[5]

Two states deviated from the common-law rule at an early date by judicial decision. Pennsylvania allowed future agreements to be binding as early as 1842.[6] It was held that future agreements were enforceable if the stipulation to arbitrate the controversy designated the arbitrators or the tribunal whose decision should govern. This Pennsylvania rule has now been liberalized by statute, and these requirements are no longer necessary to enforce such future agreements.[7] Virginia deviated from the common-law rule, holding that although future agreements were unenforceable, arbitration of a future dispute would be enforced as a condition precedent to any law suit by a party to the contract.[8] However, those states following either the old common-law rule or the present majority rule generally will not enforce future agreements.

By statute, eighteen states and the District of Columbia have abro-

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[5]The common-law rule originally allowed both parties to revoke such a contract at will. It supposedly originated from dictum by Lord Coke. Vynior's Case, 8 Co. Rep. 81b, 77 Eng. Rep. 597, 598-600 (K.B. 1609). See Dolman v. Board of Commissioners, 116 Kan. 201, 226 Pac. 240, 243 (1924); Goerke Kirch Co. v. Goerke Kirch Holding Co., 118 N.J. Eq. 1, 176 Atl. 902, 904 (1935); Wolaver, The Historical Background of Commercial Arbitration, 83 U. Pa. L. Rev. 132, 138 (1934); 6 C.J.S. Arbitration & Award § 33(a) (1937).

However, nominal damages may be awarded to the non-breaching party. Electrical Research Products, Inc. v. Vitaphone Corp., 20 Del. Ch. 417, 171 Atl. 738 748 (1934). Blaisdell v. Blaisdell, 14 N.H. 78, 81 (1843). See 6 Williston, Contracts § 1927 (rev. ed. 1938).

[6]Monongahela Nav. Co. v. Fenlon, 4 W. & S. 205 (Pa. 1842). See Howard v. Allegheny Valley R.R., 69 Pa. 489 (1871); Lauman v. Young, 31 Pa. 306 (1858).

[7]Pa. Stat. Ann. tit. 5, § 161 (1930).

[8]Condon v. South Side R.R. 54 Va. (14 Gratt.) 302 (1858). The court stated that "parties, by their contract may lawfully make the decision of arbitrators or of any third person a condition precedent to a right of action upon the contract. In that case such decision is a part of the cause of action. Until the decision ... becomes complete, the courts have no jurisdiction of the case, and therefore cannot be said to be ousted of their jurisdiction by the contract." Id. at 314.

But for the exception stated in the preceding case, Virginia by statute adopts the rule that submission agreements are binding, but future agreements to arbitrate are not binding.

Va. Code Ann. § 8-503 (1950) provides: "Persons desiring to end any controversy, whether there be a suit pending therefor or not, may submit the same to arbitration, and agree that such submission may be entered of record in any court." The Code further provides that "No such submission, entered or agreed to be entered of record in any court, shall be revocable by any party to such submission, without the leave of such court...." Va. Code Ann. § 8-504 (Repl. Vol. 1957).

A contract to submit future differences to arbitration is not binding in West Virginia. Hughes v. National Fuel Co., 121 W. Va. 392, 3 S.E.2d 621, 624 (1939).

gated the common-law rules.[9] New York, in 1920, adopted an arbitration act which expressly provides that both submission agreements and future agreements to arbitrate are enforceable.[10] The American Arbitration Association shortly thereafter proposed a draft act modeled upon the New York Act which enforces both types of agreements. This act or one similar thereto has been adopted in seventeen states[11] and appears to represent the modern trend in statutory control of arbitration.

Four states have passed the Uniform Arbitration Act promulgated in 1924 by the Commissioners on Uniform State Laws.[12] The Uniform Act codifies the common-law majority rule, but it does not expressly void or invalidate future agreements[13] even though such agreements were looked upon with disfavor at the time of its passage.[14] This act was withdrawn in 1943 by the Commissioners on Uniform State Laws.

The Supreme Court of Nevada, a state which has passed the Uniform Act,[15] recently declared in *United Ass'n of Journeymen & App. of Plumbing v. Stine*[16] that a provision in a labor agreement requiring

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[9]The following statutes provide for enforcement of both types of arbitration agreements: Ariz. Rev. Stat. Ann. §§ 12-1509 — 11 (1956); Cal. Civ. Proc. § 1280 — 93 (Deering 1959); Colo. Rev. Civ. Proc. § 109 a — g; Conn. Gen Stat. Rev. § 52-408 (1958); District of Columbia: 9 U.S.C. §§ 1 — 14 (1958); Hawaii Rev. Laws §§ 188-1 — 15 (1955); La. Rev. Stat. § 9:4201 (1950) (in commercial arbitration); Mass. Gen. Laws ch. 251, § 14 (1956); Mich. Comp. Laws § 645.1 (1948); Nevada: As shown in this comment; N.H. Rev. Laws ch. 415 § 1 (1952); N.J. Rev. Stat. § 2A:24-1 (1952); N.Y. Civ. Prac. Act § 1448 (Clevenger 1960); Ohio Rev. Code § 2711.01 (Baldwin 1960); Ore. Rev. Stat. § 33.220 (future agreements in labor disputes are unenforceable. Ore. Rev. Stat. § 33.210); Pa. Stat. Ann. tit 5, § 161 (1930); R.I. Gen Laws Ann. § 47-1 (1938) (as to Labor Arbitration, see R.I. Gen. Laws Ann. § 28-9 (1938)); Wash. Rev. Code § 7.04.010; Wis. Stat. § 298.01 (1959).

[10]N.Y. Civ. Prac. Act § 1448 (Clevenger 1960). "Except as otherwise prescribed in this section, two or more persons may submit to arbitration any controversy existing between them at the time of the submission . . . or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable. . . ."

[11]See note 9 supra.

[12]The following four states have passed the Uniform Act, as shown by Uniform Laws Annotated: Nevada in 1925, North Carolina in 1927, Utah in 1927, Wyoming in 1927.

[13]The Act provides that "two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this act, any controversy existing between them at the time of the agreement to submit. Such an agreement shall be valid and enforceable, and neither party shall have the power to revoke the submission without the consent of the other party . . ." Uniform Arbitration Act § 1 (9 Unif. Laws Ann. 1942).

[14]Gregory & Orlikoff, The Enforcement of Labor Arbitration Agreements, 17 U. Chi. L. Rev. 233, 239 (1950).

[15]Nev. Rev. Stat. § 38.010 to § 38.240 (1960).

[16]351 P.2d 965 (Nev. 1960).

the submission of a future controversy to arbitration is enforceable. In the *Stine* case, an employer sought damages from the union for violation of a contract providing for arbitration of any material issues before a strike could be called. The union violated this provision and in so doing, assertedly ruined the employer's business. The Supreme Court adopted the modern view enforcing future agreements although it was noted that such agreements were unenforceable at common law; that the majority of states will not enforce such agreements;[17] and that Nevada has enacted no statute enforcing future agreements. The court, admitting that the argument against the adoption of the modern view was well supported by authority, stated:

> "We are impelled by reason and logic, by fallacies inherent in the common-law doctrine... itself and by reason of the inapplicability of the common-law doctrine of unenforceability of arbitration contracts in this state as particularly illustrated by the appeal now before us, to adopt the minority view."[18]

Since there is little direct authority to support the court's conclusion,[19] it must have been found that arbitration is a highly desirable method of settling disputes and that there is no persuasive objection to the enforcement of either submission agreements or agreements to arbitrate in the future. The fact that no other state has adopted the rule so completely by decision may explain the lack of authority cited. However, it is not unreasonable to assume that in light of this decision, courts in other states which have the Uniform Act or a similar law may reach a result comparable to *Stine* upon the courts' recognition of the merits of arbitration. But this method of settling disputes will have to withstand close scrutiny before older common-law techniques will be discarded.

Justification for arbitration is simple. It is more effective, less prolonged, and generally less expensive than other methods of handling technical disputes and negotiations between unions and employers.[20]

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[17]See notes 4 and 9 supra.

[18]351 P.2d at 972.

[19]Park Constr. Co. v. Independent School Dist., 209 Minn. 182, 296 N.W. 475, 477-78 (1941); Latter v. Holsum Bread Co., 108 Utah 364, 160 P.2d 421, 423 (1945).

[20]Hughes v. National Fuel Co., 121 W. Va. 392, 3 S.E.2d 621, 624 (1939). See Taeusch, Extrajudicial Settlement of Controversies, 83 U. Pa. L. Rev. 147, 150 (1934) where it is stated that, "to a business man especially, time is money; and the vexatious delays in litigation, the interruptions to business caused by recurrent consultations and legal hearings... are all inimical to the proper formulation of business policies...." See also, Phillips, Rules of Law or Laissez-Faire in Commercial Arbitration, 47 Harv. L. Rev. 590, 591 (1934).

Trained men, with attorneys as advisors,[21] can settle disputes with greater understanding of technical issues than can a jury composed of laymen. Rigid rules of evidence used by the courts can be, and often are, limited by arbitrators in order to understand the basic problems involved.[22] Certain technical defenses may be dispensed with by the arbitration board in the interest of justice.[23] Experience makes the arbitrators better able to distinguish the pertinent facts from those which are not pertinent[24]—this reason alone perhaps justifies their right to abandon the rigid rules of evidence.

The question then arises, should not all states enforce future agreements to arbitrate as well as submission agreements? Each argument which is made in support of submission agreements can be made with equal force in support of future agreements. Furthermore, if parties at the outset desire to take advantage of this more expedient method of settlement, one must be able to contract therefor, knowing that if a dispute arises, the controversy will be settled by the method agreed upon.[25] This enhances the stability of contracts. It would appear quite undesirable that the non-defaulting party incur extra expense by having to go to court to enforce arbitration. Also the defaulting party might win an unfair advantage, for he would not have to arbitrate as contemplated, but could go to trial with hopes of winning

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[21]N. Y. Civil Prac. Act § 1454 provides that no one in an arbitration suit shall waive the right of counsel unless such waiver is evidenced in writing.

[22]"Every year has seen more arbitrations than in the preceding year. This is because arbitration is speedier, less costly, free from technical rules of evidence and court room procedure, and the controversies [are] decided by business men experts, rather than a jury of men who not only are unfamiliar with the intricacies of the business involved, but who are incapable of comprehending them and who are easily swayed in their decision by the eloquence or clever psychological by-plays of lawyers. Arbitration is speedier; ordinarily an award may be rendered within two weeks after the demand for arbitration has ben served, whereas, because of the congested condition of the court calendars in most of the large cities through the country, cases cannot be reached for trial until two or more years after the pleadings are filed. Arbitration is less expensive than trial of the controversy at law, because there are no expert witnesses to be paid, no jury fees, no court costs, no expensive stenographic record to be typed, no costly transcripts of record on appeal, and because no appeal lies from the arbitrator's award." Whitney, Modern Commercial Practices § 440 (1958).

[23]In re Exeter Mfg. Co., 254 App. Div. 496, 5 N.Y.S.2d 438 (1st Dep't 1938). See also United Culinary Bar & Grill Employees v. Schiffman, 272 App. Div. 491, 71 N.Y.S.2d 160 (1st Dep't 1947), aff'd, 299 N.Y. 577, 86 N.E.2d 104 (1949); Phillips, Rules of Law or Laissez-Faire in Commercial Arbitration, 47 Harv. L. Rev. 590, 616 (1934).

[24]See note 22 supra.

[25]For a case discussing the instability of this type of contract, see McCullough v. Clinch-Mitchell Constr. Co., 71 F.2d 17, 20 (8th Cir. 1934), cert. denied, 293 U.S. 582 (1934).

on some technicality. Additional reasons for permitting future agreements to be binding are summed up in the following quotation:

> "The parties were of full age. They weighed the benefits and obligations of the contract they were about to make, and the benefits tipped the scales. After breach, one party claims the right to repudiate his pact. To support this right he calls upon a rule founded on a misunderstanding of the principles of law, strengthened by a jealousy of jurisdiction now discountenanced, continued only by respect for authority. The experience of centuries of commercial arbitration casts doubt upon his sincerity—it is the defaulting party who breaks his promise to arbitrate, the party who has most to gain by delay and technicality. The common knowledge of mankind bears out these facts."[26]

The factors weighing against arbitration are few and relatively insignificant. Two general criticisms against arbitration are that contracts to arbitrate oust the courts of jurisdiction, and therefore are against public policy;[27] and that, where future agreements are made enforceable, the stronger party at the time of making the contract will be able to enforce his will upon the weaker party.[28] For years, however, courts and writers have refuted such reasons for disallowing arbitration.[29] In addition, this form of adjudication would alleviate the current problem of crowded court dockets.

In conclusion, it is noted that the *Stine* case, although reaching a commendable result, leaves the arbitration law in Nevada rather confused. The Uniform Act adopted by Nevada provides only for enforcement of submission agreements and has not been repealed,

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[26]Cohen, The Law of Commercial Arbitration and the New York Statute, 31 Yale L.J. 147, 158 (1921).

[27]"In most jurisdictions wherein the subject has been judicially considered, the rule recognized is that, in the absence of statute to the contrary, a provision whereby parties to a contract stipulate to submit to arbitration... future disputes which may arise thereunder is invalid, or at least 'unenforceable'." Annot., 135 A.L.R. 79, 80 (1941). The author of the annotation then cites numerous cases from various jurisdictions which have held that such stipulations are invalid as depriving the courts of jurisdiction.

[28]Parsons v. Ambos, 121 Ga. 98, 48 S.E. 696, 697 (1904). See 53 A.B.A. Rep. 337, 352 (1928).

[29]Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984 (2d Cir. 1942); United States Asphalt Ref. Co. v. Trinidad Lake Pretroleum Co., 222 Fed. 1006, 1008 (S.D.N.Y. 1915) (dictum); Scott v. Avery, 5 H.L. 811, 10 Eng. Rep. 1121 (1855); Gregory and Orlikoff, The Enforcement of Labor Arbitration Agreements, 17 U. Chi. L. Rev. 233, 235-37 (1950); Annot., 135 A.L.R. 79, 91 (1941). It should be noted that the Commissioners on Uniform State Laws withdrew the Uniform Arbitration Act in August of 1943. See Handbook of the National Conference of Commissioners on Uniform State Laws 73 (1943).