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Arbitration Clauses in Separation Agreements

may be cases where the right of inspection should be qualified.

In conclusion, the minority view appears to be more practical when the right to inspect is examined in light of the ever changing complexities of modern corporate structure and interlocking directorates. It reaches a fair and justified result by making it impossible for a hostile director to use his office as a means of carrying improper motives into execution, while preserving the right of inspection intact and unqualified where a director seeks inspection in good faith and in the proper performance of his duties.

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ARBITRATION CLAUSES IN SEPARATION AGREEMENTS

While the use of arbitration only recently entered into the field of domestic relations, controversies regarding it are already appearing in the reported cases. The recent case of *Lasek v. Lasek*[1] upholds an arbitration clause in a separation agreement between husband and wife. The court granted a stay in proceedings at law brought by the wife for payments, in order to give effect to a clause requiring arbitration of "any dispute between the parties hereto with respect to the provisions of the agreement. . . ."[2] While arbitration in domestic relations is a relatively new concept, it seems to be quite well established in the state of New York.[3] The same is not true however in the majority of states, even thought this concept seems to be particularly applicable to such a litiguous matter as domestic relations.

In the *Lasek* case, the wife by bringing an action at law for the payments was attempting to avoid the arbitration clause. The court, however, held her bound by the clause, saying, "Having so chosen to arbitrate their differences, neither may avoid the choice on the ground that the other has failed to offer an excuse for the alleged breach."[4] The refusal of the husband to make the payments was arbitrable, for the court felt the clause was "sufficiently broad to encompass a dis-

is expressed that inspection should be denied "when necessary to prevent abuse by him or his representative").

[1]13 App. Div. 2d 242, 215 N.Y.2d 983 (1st Dep't 1961).
[2]215 N.Y.S.2d at 984.
[3]Id. at 985.
[4]Ibid.

pute arising from a simple refusal to comply with the separation agreement. . . ."[5]

The primary impediment to this practice in other states is the rule that a clause providing for the arbitration of future disputes is not enforceable.[6] The reasoning given for this rule is that such clauses oust the courts of jurisdiction,[7] or are void as against public policy.[8] States such as New York which allow a future dispute to be arbitrated say, "The arbitration clauses in the separation agreement provided a substitute for the usual legal forum, in which the parties might have their differences resolved, in relative privacy, by self-chosen judges."[9] These jurisdictions provide that arbitration clauses may be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract."[10] This protects the rights of the parties where arbitration is involved, the same as where parties agree to settle a claim out of court. Since adequate protection for the parties is provided by the right to invalidate an unfair arbitration clause in a contract, and it is desirable to support methods of settling controversies amicably, provisions for settling future disputes by arbitration should be upheld.

There is little authority supporting the use of an arbitration clause in a separation agreement. Lindey on *Separation Agreements*,[11] cites only cases from New York as supporting this practice.[21] While this is a new concept, it seems the states which now allow arbitration of future disputes may adopt the practice.

The court states in the *Lasek* case, "Their right to agree upon arbitration of matters relating to marital support and maintenance under a subsisting separation agreement is not questioned, nor is it

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[5]Ibid.

[6]Hughes v. National Fuel Co., 121 W. Va. 392, 3 S.E.2d 621 (1939); Duval County v. Charleston Eng'r & Const. Co., 101 Fla. 341, 134 So. 509, 516 (1931); LaKube v. Cohen, 304 Mass. 156, 23 N.E.2d 144 (1939); Maryland Cas. Co. v. Mayfield, 225 Ala. 449, 143 So. 465, 467 (1932); Rentschler v. Missouri Pac. Ry., 126 Neb. 493, 253 N.W. 694, 700 (1934); Cocalis v. Nazlides, 308 Ill. 152, 139 N.E. 95 (1923).

[7]Corbin v. Adams, 76 Va. 58, 61 (1881); Merchants Grocery Co. v. Talladega Grocery Co., 217 Ala. 334, 116 So. 356, 359 (1928); W. H. Blodgett Co. v. Bebe Co., 190 Cal. 625, 214 Pac. 38 (1923); Johnson v. Brinkerhoff, 89 Utah 530, 57 P.2d 1132, 1139 (1936).

[8]Dunning v. Dunning, 114 Cal. App. 2d 110, 249 P.2d 609, 612 (Dist. Ct. App. 1952).

[9]215 N.Y.S.2d at 985.

[10]N.Y. Civ. Prac. Act § 1448 (1961); Manufacturers Chem. Co. v. Caswell, Strauss & Co., Inc., 259 App. Div. 321, 19 N.Y.S.2d 171, 173 (1st Dep't 1940).

[11]Lindey, Separation Agreements & Ante-Nuptial Contracts § 29 (1961).

[12]Id. at 368-74.

questionable."[13] The earlier case of *Braverman v. Braverman*[14] held the clause valid, but inapplicable because the dispute the husband sought to arbitrate was clearly not one the parties intended to encompass in the agreement. The *Braverman* case shows the attitude of the New York courts that arbitration is enforceable when the clear intent to do so is manifested. Approval of the practice of using arbitration clauses in separation agreements seems firmly established by the case usage in New York.

The New York statute is one in which future disputes are arbitrable.[15] The courts have interpreted this statute to enforce the choice to arbitrate, once the clear intent to do so is found.[16] As the court stated in *Marchant v. Mead-Morrison Mfg. Co.*:

> "Parties to a contract may agree, if they will that any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will give effect to their intention."[17]

This is the logical result of the clause to arbitrate. The parties have agreed freely to the arbitration clause, and there is no reason not to enforce their agreement.

There appears at present to be scant usage of arbitration in reference to marital disputes. For the states which now allow enforceable arbitration of future disputes by a statute similar to that of New York, the adoption of this concept should cause little difficulty. In states having less modern statutes[18] which deny the right to arbitrate a future dispute, there is an apparently simple method to authorize this concept without reference to statutory changes, which are always possible.[19]

The most effective and easiest method would be by court approval of the clause in a decree approving the agreement. Possibly this procedure has not been sufficiently considered by counsel. By incorporating the arbitration clause specifically, or the agreement generally, the court would be able to make arbitration binding on the parties. Since it is well established that incorporation of a separation

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[13] 215 N.Y.S.2d at 985.

[14] 9 Misc. 2d 661, 168 N.Y.S.2d 348 (Sup. Ct. 1957).

[15] N.Y. Civ. Prac. Act § 1448 (1961).

[16] Lehman v. Ostrovsky, 264 N.Y. 130, 190 N.E. 208 (1934).

[17] 252 N.Y. 284, 169 N.E. 386, 391 (1929).

[18] Va. Code Ann. § 8-503 (Repl. Vol. 1957); W. Va. Code Ann. § 5499 (1961); Tenn. Code Ann. § 23-506 (1956).

[19] An excellent guide for this change is provided by the proposed Uniform Statute on Arbitration of the Commissioners on Uniform State Laws. Handbook of the Commissioners on Uniform State Laws 162 (1955).