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Labor Law--Arbitration--Agreements to Arbitrate in West Virginia

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LABOR LAW—ARBITRATION—AGREEMENTS TO ARBITRATE IN WEST VIRGINIA

Arbitration clauses are commonly found in commercial contracts and are generally of two types: unlimited clauses which cover any and all disputes arising out of the contract; and, limited clauses which specify that only specific disputes are to be determined by arbitration. Parties who decide that arbitration is the best means for resolving their differences generally honor their agreements to arbitrate and carry out the award of the arbitrator. However, the parties probably do not know or give little thought to the legal status of arbitration.

The settlement of disputes by arbitration is of common law origin; however, all of the states have enacted arbitration statutes of one kind or another.[1] Therefore, today's arbitration law is derived either from the common law or from statute, or from both. Many statutes are so general in nature that details have to be supplied from court decisions under common law. Other arbitration statutes are often found not to abrogate the common law but are cumulative rather than exclusive.[2] The determination of whether the legal status of arbitration is governed by the common law or by statute is critical in some contract disputes.

I. Common Law Arbitration

It is beyond the scope of this article to trace the history of common law arbitration. The more important principles in common law arbitration have been summarized as follows:

> Common-law arbitration rests upon a voluntary agreement of the parties to submit their dispute to an outsider. The submission agreement may be oral and may be revoked at any time before the rendering of the award. The tribunal, permanent or temporary, may be composed of any number of arbitrators. They must be free from bias and interest in the subject matter and may not be related by affinity or consanguinity to either party. The arbitrators need not be sworn. Only existing disputes may be submitted to them. The parties must be given notice of hearings and are entitled to be present when all the evidence is received. The arbitrators have no power to subpoena witnesses

[1] 16 S. Williston, Williston on Contracts § 1921B (3d ed. 1976).

[2] Jones, *Judicial Review of Arbitral Awards—Common Law Confusion and Statutory Clarification*, 31 S. Cal. L. Rev. 1 (1957).

or records and need not conform to legal rules of hearing procedure other than to give the parties an opportunity to present all competent evidence. All the arbitrators must attend the hearings, consider the evidence jointly, and arrive at an award by an unanimous vote. The award may be oral, but if written all the arbitrators must sign it. It must dispose of every substantial issue submitted to arbitration. An award may be set aside only for fraud, misconduct, gross mistake or substantial breach of a common-law rule. The only method of enforcing the common-law award is to file suit upon it and the judgment thus obtained may be enforced as any other judgment. In so far as a state arbitration statute fails to state a correlative rule and is not in conflict with any of these common-law rules, it may be said that an arbitration proceeding under such statute is governed also by these rules.[3]

II. STATUTORY ARBITRATION

In 1920 New York adopted one of the most comprehensive and most utilized arbitration statutes.[4] The New York Arbitration Law and the Uniform Arbitration Act have been used as models for many state statutes.[5] In the controversy of common law versus statutory arbitration, the legal status of arbitration statutes in the various states falls into three principal categories:[6]

1) states where the common law is decisive, and the provisions of statutory arbitration are cumulative and concurrent rather than exclusive;

2) states with arbitration statutes that create substantive as well as procedural rights, but common law arbitration is retained. (The parties may choose which method they will follow); and

3) states whose statutes create substantive rights and the courts have held the statutes to be so comprehensive as to rule out common law arbitration.[7]

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[3] F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 21 (rev. ed. 1960).

[4] N.Y. CIV. PRAC. §§ 7500-14 (McKinney 1963).

[5] The Uniform Arbitration Law was adopted by the National Conference of the Commissioners on Uniform State Laws in 1955, approved by the House of Delegates of the American Bar Association in 1955, and has been used as a model for arbitration statutes in eighteen jurisdictions. 16 S. WILLISTON, WILLISTON ON CONTRACTS § 1921B (3d ed. 1976).

[6] *Id.* § 1921A.

[7] The United States Congress has adopted a basic Federal Arbitration Act which declares public policy favoring arbitration. The Federal Arbitration Act is

It is not the purpose of this article to give a detailed study on the provisions of all state arbitration statutes. However, provisions along the following general lines are frequently found in the "modern" statutes.

1. Agreements to arbitrate existing and future disputes are made valid and enforceable.
2. Courts are given jurisdiction to compel arbitration, or to stay arbitration if no agreement to arbitrate exists.
3. Courts are given jurisdiction to stay litigation when one party to an arbitrable dispute attempts to take it to court instead of arbitrating.
4. Courts are authorized to appoint arbitrators where the parties fail to provide a method for appointment.
5. Majority action by arbitration boards is authorized.
6. Provision is made for oath by the arbitrator and/or witnesses, unless waived by the parties.
7. Default proceedings (in the absence of a party) are authorized under certain circumstances.
8. Provision is made for continuances and adjournments of hearings.
9. Limitation is placed upon the effect of waivers of the right to be represented by counsel.
10. Arbitrators are given the subpoena power.
11. Awards are required to be in writing and signed by the arbitrator, and some limitation is stated regarding the time within which awards must be rendered.
12. Arbitrators are granted limited authority to modify or correct awards.
13. A summary procedure is provided for (1) court confirmation of awards, (2) court vacation of awards on limited grounds stated by the statute, (3) court modification or correction of awards on limited grounds stated by the statute.
14. Courts are authorized to enter judgment upon awards as confirmed, modified, or corrected; the judgment is then enforceable as any other judgment.
15. Provision is made for appeals from court orders and judgments under the statute.[8]

Most statutes provide that such arbitration is voluntary. At common law arbitration was voluntary, and courts have generally de-

limited to transactions of a maritime nature or involving commerce. 9 U.S.C.A. §§ 1-14 (1970).

[8] F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS, 22-23 (rev. ed. 1960).

cared compulsory arbitration statutes unconstitutional on the grounds of denial of due process or right to trial by jury.[9]

III. Arbitration In West Virginia

If parties in West Virginia desire to include arbitration clauses in commercial contracts, they are faced with the problem of determining whether the arbitration clause forces the parties to final award before any litigation can be initiated to challenge the contract or any provision thereof, or if the arbitration agreement can be revoked before award.

The West Virginia Supreme Court of Appeals faced this question in the recent case of *Board of Education v. Miller*.[10] The parties had entered into a construction contract that included the following clause:

> All claims, disputes and other matters in question arising out of, or relating to this Contract or the breach thereof,. . .shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.[11]

The case was heard on appeal from an order of the Circuit Court of Berkeley County in which that court refused to dissolve a preliminary injunction obtained by the Board of Education to restrain Miller from invoking and proceeding with the arbitration procedures as provided in the contract.

The appellant, Miller, asked the court to decide whether, under state law, parties to a contract that contains a standard arbitration form have a right to revoke such agreement up to the time award issues or whether, by the execution of such contract, the parties are compelled to submit to arbitration by virtue of their mutual promises. The Board contended that the court need only

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[9] *See generally,* Annot., 55 A.L.R.2d 432, 440, 445 (1957). At the federal level, the Railway Labor Arbitration Act provides for compulsory arbitration. 45 U.S.C.A. § 151 *et seq.* (1972).

[10] 221 S.E.2d 882 (W. Va. 1975).

[11] *Id.* at 885.

decide if the parties had a right to demand the enforcement of the agreement to arbitrate future disputes. However, the court found the more conclusive issue to be "whether the parties have a contractual obligation to submit the dispute to arbitration before either may resort to court action."[12] The court held that parties may lawfully contract to make the "decision of arbitrators or any third person a condition precedent to a right of action upon the contract."[13]

In reaching its decision the court traced the history of arbitration in West Virginia. West Virginia has a general arbitration statute[14] primarily designed for commercial disputes. The West Virginia statutes provide in part:

> 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. . . .[15]
>
> 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. . . .[16]

In a case involving submission under the statute, the West Virginia Supreme Court of Appeals found that when parties voluntarily agree to submit a controversy to arbitration, providing the award shall be entered as the judgment of the court, the agreement could not be revoked without leave of such court.[17] However, the court has acknowledged the viability of common law arbitration principles by holding that while agreements to submit existing disputes are not revocable, and bar a suit upon the demand submitted, a provision to submit any future controversy will not prevent an action.[18] The language of the arbitration statute, "[p]ersons desiring to end any controversy,"[19] was felt to imply that the provision applied only to existing controversies. At common law, as a general rule, a party can always revoke its agreement to arbitrate before award, but under the West Virginia arbitration

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[12] *Id.* at 883.
[13] *Id.* at 882.
[14] W. VA. CODE ANN. § 55-10-1 *et seq.* (1966).
[15] *Id.* § 55-10-1.
[16] *Id.* § 55-10-2.
[17] Stiringer v. Toy, 33 W. Va. 86, 10 S.E. 26 (1889).
[18] Turner v. Stewart, 51 W. Va. 493, 41 S.E. 924 (1902).
[19] W. VA. CODE ANN. § 55-10-1 (1966).

statute, an agreement by the parties, in court or out of court, that the award be entered as judgment in court is not revocable.[20] The West Virginia statutory provisions are supplementary to common law arbitration, providing a remedy rather than a substantive right.[21] Common law arbitration is decisive in West Virginia, and matters not covered by the current statutory provisions have been and will be supplied by court decisions under the common law. Additionally, the arbitration statutes are applicable only to submission of arbitration agreements and not to the arbitration clause itself.

In holding that the parties in *Miller* could agree to binding arbitration, the court utilized a common law exception that an agreement to arbitrate future controversies is not revocable where it has been made a condition precedent to a right of action.[22] This exception was first recognized in West Virginia in 1891.[23] Notwithstanding the common law exception, the court still had to find that the language in the arbitration clause created a condition precedent to the right of the parties to sue.[24]

According to *Miller, Pettus v. Olga Coal Co.*[25] established a "broad rule which greatly diminished the scope of the old common-law right to revoke agreements to arbitrate future disputes."[26] *Pettus* held that:

> A contract providing a procedure for arbitration of disputes, and providing that "all claims, demands or actions growing therefrom or involved therein shall be by the contracting parties settled and determined *exclusively* by the machinery provided in the" contract, creates a condition precedent to any right of action or suit arising under the contract.[27]

In holding that the language created a condition precedent to the right of the parties to sue, the *Pettus* court found the word

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[20] Riley v. Jarvis, 43 W. Va. 43, 26 S.E. 366 (1896).

[21] Hughes v. National Fuel Co., 121 W. Va. 392, 3 S.E.2d 621 (1939).

[22] Condon v. South Side R.R. Co., 55 Va. (14 Grat.) 302 (1858).

[23] Kinney v. Baltimore & Ohio Emp. Rel. Ass'n., 35 W. Va. 385, 14 S.E. 8 (1891).

[24] A condition precedent may arise not only by express language but also by necessary implication in the arbitration procedure. Pettus v. Olga Coal Co., 137 W. Va. 492, 72 S.E.2d 881 (1952).

[25] *Id.*

[26] 221 S.E.2d at 885.

[27] 137 W. Va. at 493, 72 S.E.2d at 882 (Syllabus point 3).

"exclusively" to be significant in creating a condition precedent by necessary implication in the arbitration procedure. The court found the language differences in the arbitration clauses in *Pettus* and *Miller* to be minor and insignificant. In *Miller* the phrases "shall be decided by arbitration" and "shall be specifically enforceable" were crucial in creating a condition precedent.[28] In the court's opinion, such language rendered "proceeding by arbitration mandatory."[29] The majority held that the *Pettus* application of the common law exception to the common law rule was valid. In the dissenting opinion, Justice Berry agreed with the common law exception that if arbitration is made a condition precedent to any right of action, the arbitration agreement cannot be revoked or rejected. However, in the present case, he did not feel the language in the arbitration clause under consideration supported such a conclusion.[30]

In his concurring opinion, Justice Neely asserted that the majority should not have relied on an exception to the common law rule, but should have abolished "archaic rules regarding arbitration which are passe' and ineffective."[31] Once the court recognized the advantage of binding arbitration, Justice Neely felt the court should have overruled all outdated prior cases and clearly stated that "parties who undertake to arbitrate must do so, and further that the judgment of the arbitrator cannot be challenged in the courts except for fraud."[32]

At common law, arbitration was favored as a means of ending litigation.[33] Nevertheless, the principle that parties could not by agreement deprive the courts of their jurisdiction has been used to justify the common law rule that either party could revoke his agreement at any time prior to award.[34] Clearly the majority in *Miller* believed that to overrule this common law principle would be too drastic a change.[35] Since the court felt the "wisdom of the

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[28] 221 S.E.2d at 885.

[29] *Id.*

[30] *Id.* at 890.

[31] *Id.* at 886.

[32] *Id.* at 888.

[33] Mathews v. Miller, 25 W. Va. 817 (1885); Boring v. Boring, 2 W. Va. 297 (1867).

[34] Kill v. Hollister, 1 Wilson 129 (K.B. 1746).

[35] W. VA. CONST. art. VIII, § 13 provides in part:

Such parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall

Legislature should be employed to insure that standard arbitration clauses in commercial contracts, fairly consented to by the parties, be enforceable, whether the disputes covered thereunder be of present existence or of future contemplation," the majority seized upon the common law exception and found that the language in the arbitration clause implied that arbitration was a condition precedent to a right of action.[36]

IV. Conclusion

Common law arbitration is still decisive in West Virginia. While it is recognized that arbitration clauses in commercial contracts should be enforceable, the court will not enforce an agreement to arbitrate future disputes unless it is expressly or impliedly a condition precedent to a right of action. *Miller* did not say whether the arbitration clause would have implied a condition precedent if a procedural method for arbitration had not been provided in the agreement.[37] Without such a provision, standards to be used in the arbitration proceeding would have to be supplied by case precedents from court decisions under the common law.

The statutory arbitration procedures in West Virginia are inadequate. A modern and comprehensive statute should be enacted by the legislature. To enforce an arbitration agreement, the courts should not find it necessary to torture the language of an arbitration clause to make the agreement come within an exception to an obsolete common law rule. Parties who voluntarily agree in writing to arbitrate should be bound by statute and should not as an afterthought be permitted to escape through the portals of the common law.[38] If, as Justice Neely suggests, the court should overrule all prior case law in West Virginia insofar as they promote and protect the common law, statutory guidelines must be established.

Voluntary agreements to arbitrate should be encouraged, but machinery should be available to enforce such agreements and awards if compulsion becomes necessary. The only limitation on

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be and continue the law of the State until altered or repealed by the legislature. . . .

[36] 221 S.E.2d at 886.

[37] The arbitration clause provides that the arbitration procedure shall be conducted according to the Construction Industry Arbitration Rules of the American Arbitration Association. See note 11 *supra* and accompanying text.

[38] Crofoot v. Blair Holding Corp., 119 Cal. App. 2d 156, 260 P.2d 156 (1953).

arbitration should be the extent to which the parties are willing to submit their differences to decision by an outsider. Parties should be able to reach agreement on submitting both existing and future controversies to binding arbitration, and such agreements, made in good faith, should be irrevocable.

Statutory law gives arbitration a legal foundation with safeguards and remedies not available under common law arbitration. An affirmative legal right to arbitrate gives legal security to the parties. Such statutes can make submissions legally binding and provide that an action or suit in the same manner be stayed until the arbitration has been held. Statutory law can provide that if a party defaults the court may direct arbitration to proceed or appoint arbitrators upon application of the other party. A hearing is assured and the court will not affirm the award as a judgment unless the arbitrators are free from bias and corruption. Importantly, the statute can provide that parties can agree to submit future disputes to arbitration in the same manner as existing disputes. Failure to arbitrate or carry out an award may be held to be contempt of the court.

The recent opinion of the West Virginia Supreme Court of Appeals in *Miller* clearly demonstrates the need for legislative action in West Virginia. The legislature must provide a method for commercial arbitration. The court cannot.

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