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SOME COMMENTS ON ARBITRATION LEGISLATION AND THE UNIFORM ACT*

MAYNARD E. PIRSIG**

In the absence of statute, an agreement to arbitrate is governed by common-law rules. These have been succinctly stated 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 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 a 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.¹

These principles were liberal in limiting the procedural requirements of the arbitration process to the minimum required for a fair hearing and in the limited grounds recognized for avoiding an award. But in most other respects they failed to serve the needs of an effective arbitration program. Two particularly serious defects were the revocability of an agreement to arbitrate and the necessity of resort to a civil action to enforce the award. The first nullified the purpose of the parties in entering into the agreement and the second did so in substantial part by forcing the successful party into expensive and time-consuming litigation.

*The Uniform Arbitration Act is the product of the National Conference of Commissioners on Uniform State Laws and was approved in its present form by that organization in 1956. While the act reflects the results of discussions within the conference as a whole, the principal research and drafting was necessarily done by a committee of the Conference. The present members of the committee are Hon. Otis S. Allen, Topeka, Kan.; Mr. Marvin J. Bertoch, Salt Lake City, Utah; Mr. Tom Martin Davis, Houston, Tex.; Mr. Martin J. Dinkelspiel, San Francisco, Cal.; and the author, chairman. The chairman of the section of which the committee is a part is Mr. Alfred M. Pence, Laramie, Wyo., who, previous to his chairmanship, was a member of the committee. While the author has had the benefit of the views of the committee which is in agreement on the provisions of the act, the views here expressed are the author's own and carry no other weight.

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1. U.S. DEP'T OF LABOR, LABOR ARBITRATION UNDER STATE STATUTES (1943).

The task of arbitration statutes is to remedy these and other defects of the common law principles. Such statutes have existed in this country from earliest times. Among the first were those patterned on the English act of 1698.² Thus the New York act of 1791³ began with the following introduction:

Whereas it hath been found by experience, that references made by rule of court, have contributed much to the ease of parties in determining their differences, because the parties thereby become obligated to submit to the award of the arbitrators, under the penalty of imprisonment for their contempt, in case they refuse submission; Now for promoting trade and rendering the awards of arbitrators the more effectual in all cases, for the final determination of controversies referred to them by merchants and traders, or others, concerning matters of account, or trade, or other matters. . . .

It then provided that the parties might agree that their submission of their dispute to arbitrators be made a rule of court. On proof of the agreement, a rule of court was to issue

that the parties shall submit to, and finally be concluded by the arbitration . . . and in case of disobedience to such arbitration or umpirage, the party refusing or neglecting to perform and execute the same, or any part thereof, shall be subject to all the penalties of contemning a rule of court, when he is a suitor or defendant in such court . . . unless it shall be made appear on oath to such court, that the arbitrators or umpire misbehaved themselves, and that such award, arbitration, or umpirage, was procured by corruption or other undue means.⁴

A similar act was passed in Virginia in 1789⁵ but with important modifications. The contempt provisions were omitted and instead the award could be entered as the judgment or decree of the court. The award could be avoided if it "was procured by corruption or other undue means, or that there was evident partiality or misbehavior in the arbitrators or umpires, or any of them."

New Jersey adopted a similar act in 1794, but retained the contempt provision. It added a curious provision that "whenever a cause shall be referred, by rule of court, to referees, the report or award of such referees, or of a major part of them, if confirmed by the court, shall be final, and conclude the parties" and that judgment should be entered thereon.⁶ It suggests the close analogy thought to exist between arbitrations under rule of court and the use of referees appointed by a court in litigation.

The same analogy was carried out further in the Massachusetts act

2. 9 & 10 WILL. 3, c. 31 (1698).

3. N.Y. Sess. Laws 1791, c. 20.

4. The language is almost identical with that of the English act of 1698.

5. Va. Laws 1789, c. 46. This act appears to be the basis of the present Virginia arbitration statute. See VA. CODE ANN. § 8-503 (1950).

6. N.J. Laws 1794, Pat. 141.

of 1786.⁷ But in form and content, it ignored the English act. Under this act parties could agree "to have the dispute determined by referees, mutually chosen by the parties," and submit a statement thereof to a justice of the peace who was then obligated to prepare an agreement in the form set out in the statute to be subscribed and acknowledged by the parties. The agreement provided that the persons chosen as referees were to report to the court, "judgment thereon to be final." The act provided further that "the Court of Common Pleas, to whom the report of the referees may be made as aforesaid, shall have cognizance thereof, in the same way and manner, and the same doings shall be had thereon, as though the same had been made by referees appointed by a rule of the same court." Referees so appointed were "vested with all the authority and power that referees have been, or may hereafter be vested with, who have been, or shall be appointed by a rule of court." Provision was also made for summoning of witnesses.

This limited and incomplete review of early arbitration statutes is sufficient to indicate the underlying purposes and methods of procedure which characterized such legislation. They represented an effort to provide a simple procedure by which the award of an arbitrator could be enforced without resort to a regular action in court. This took the form of either invoking the contempt powers of the court, following the English 1698 act in this respect, or, what appears to have been an innovation, permitting the award to be reduced to judgment and enforced as such. But to invoke these powers of the court, it was felt that something more than a simple agreement of the parties to arbitrate was required. The agreement must be expressed with some formalism, and the analogy of referees appointed by the court was drawn upon. Any other position would have been at variance with the formalism which characterized all judicial proceedings of the times.

The statutes had limited objectives. They were confined to agreements to arbitrate existing disputes as distinguished from disputes arising after the agreement was made. They did not abrogate common law principles applicable to those agreements not coming within the terms of the statutes.

It was against this background that a new, and, for the times, a radically different arbitration statute appeared in the New York revision of 1829.⁸ This statute undertook to present a rather comprehensive code on the subject. The success of the venture is indicated by the fact that it has served as a model for legislation in many other states which still survives to this day.

7. Mass. Laws 1786, c. 21.

8. N.Y. REV. STAT. 1829, pt. 3, c. 8, tit. 14.

The objectives of the revisors are indicated by their note to section 1:

Instead of enforcing an award by process of contempt, in cases where such process is not applicable, (Section 18 limited contempt proceedings to judgments on awards requiring an act other than the payment of money.) it is proposed to authorize a regular judgment to be entered, filed and docketed, and an execution to be issued against the property or person, conformably to the laws of Massachusetts, 1 v. p. 266; of Virginia, v. 1, p. 454; of Missouri, v. 1, 137. By this means, the parties will be saved the necessity of an expensive and perplexing action, on the bond or the award; and the object of the statute 'to contribute much to the ease of parties, in the determining their differences,' as expressed in its preamble, will be more effectually obtained. The remedies for relief will be found to be as ample as by the existing law, or as are afforded by an action.

The act provided that the parties "may, by an instrument in writing, submit to the decision of one or more arbitrators, any controversy existing between them, which might be the subject of an action at law, or of a suit in equity . . . and, may, in such submission, agree that a judgment of any court of law and of record, to be designated in such instrument, shall be rendered upon the award made pursuant to such submission."⁹

It excluded certain actions relating to real estate, incorporating the common law in this respect.¹⁰ It provided for the hearing and its postponement¹¹ in language which has survived in many present day statutes, prescribed an oath for the arbitrators,¹² provided for subpoenas,¹³ and required the award to be in writing subscribed by the arbitrators and attested by a subscribing witness.¹⁴ On proof of the submission "by the affidavit of a subscribing witness" and similarly of the award, within one year, the court by rule in open court was to confirm the award.¹⁵

The act then provided in terms common in present-day statutes, including those of New York, for the vacation of an award¹⁶ or for its modification.¹⁷ On confirmation, the award was to be reduced to judgment to be filed and docketed.¹⁸ The grounds for vacation were those which the revisors thought represented the common law on the subject. The grounds for modification were intended to remedy the defect of the common law which did not give such power to the court.

9. *Id.* § 1.

10. *Id.* § 2. And see revisors' note to the section.

11. *Id.* §§ 3, 7.

12. *Id.* § 4.

13. *Id.* § 6.

14. *Id.* § 8.

15. *Id.* § 9.

16. *Id.* § 10.

17. *Id.* § 11.

18. *Id.* § 14.

Applications to vacate or modify an award were to be by motion.¹⁹ On such motions the court could direct a rehearing by the arbitrators.²⁰

But the revisors were unwilling to break very far with common law principles. The Act was not to "be construed to impair, diminish, or in any way affect the power and authority of the court of chancery over arbitrators, awards, or the parties thereto; nor to impair or affect any action upon any award, or upon any bond or other engagement to abide by an award."²¹ Also common law revocability of any submission to arbitration was recognized but with liability for "all the costs, expenses, and damages which (the opposing party) may have incurred in preparing for such arbitration."²² Likewise, recovery on any bond given to insure against revocation was permitted.²³

The act was thus an interesting mixture of earlier statutes of New York and other states, of common law principles and of some wholly new and progressive provisions.

The act remained practically unchanged until 1880 when there was considerable clarification of procedure, some additions such as the effect of death of a party, some changes deemed needed to conform the act to the existing judicial procedure and some modifications of substance such as the requirement that submissions and awards be acknowledged "in like manner as a deed to be recorded."²⁴ But in general, the basic structure of the 1829 act remained unchanged. It was incorporated in substantially this form in the Civil Practice Act of 1920, and is still the basis of the present New York act on the subject.

Aside from some of its overly technical features, the basic defect of the 1829 act and its successors was their failure to encompass agreements to arbitrate disputes arising subsequent to the agreement. Such an act failed to meet the needs of twentieth century trade and industry. In 1920 New York adopted a short act of major significance specifically directed at validating agreements to arbitrate future disputes and providing a simple and summary procedure for their enforcement.²⁵ Section 2 provided:

A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure (This refers to the chapter based on the 1829 act discussed above) shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.

19. *Id.* § 12.

20. *Id.* § 13.

21. *Id.* § 22.

22. *Id.* § 23.

23. *Id.* § 24.

24. N.Y. CODE CIV. PROC. 1880, § 2365.

25. N.Y. Sess. Laws 1920, c. 275.

It provided also a motion procedure for compelling a party to proceed with the arbitration. The issues whether there was an agreement to arbitrate and whether there had been failure to comply therewith were to be tried by a jury. Any action involving an issue subject to arbitration was to be stayed. Appointment of arbitrators by the court, when the agreed method failed, was also provided for.

The provisions of the existing arbitration statutes were incorporated by reference "so far as practicable and consistent with this chapter." To eliminate the former requirement that the parties agree that a specified court could render judgment, it was provided that the supreme court should have jurisdiction.

The provisions of the old act recognizing the revocability of an agreement to arbitrate were expressly repealed.

Curiously, at the same session of the New York legislature, the old act was substantially re-enacted as part of the Civil Practice Act without incorporating the new law.²⁶ The two acts were not integrated into a single unit until some years later, the history of which will not be traced here. The result was that the law of New York on the subject, while representing a major step forward, was not in a form suitable for adoption by other states. It still represents to this day a hodgepodge of patchwork legislation, confusing and difficult to understand. To fill the need, the American Arbitration Association prepared a model act patterned on the New York law.²⁷ A number of leading states soon began to enact such legislation. A federal act was enacted in 1925.²⁸ At the present time, some fifteen states have enacted similar laws although none of them are identical in terminology or even in substance.²⁹

A few states have recognized the validity of agreements to arbitrate future disputes by judicial decision.³⁰ In the remaining states, such agreements cannot be enforced. Most of these states have statutes for the enforcement of agreements to arbitrate existing disputes. They are of infinite variety, most of them reflecting in greater or less meas-

26. N.Y. Sess. Laws 1920, c. 925, art. 83.

27. See AMERICAN ARBITRATION ASS'N, THE PRACTICE OF COMMERCIAL ARBITRATION 227. For a more recent draft of a model act by a committee of the Association, see 7 ARB. J. (n.s.) 202 (1952). This draft was of substantial help to the committee which drafted the uniform act.

28. 9 U.S.C.A. §§ 1-14 (1953, Supp. 1956).

29. ARIZ. CODE ANN. §§ 27-301 to 27-311 (1939); CAL. CODE CIV. PROC. §§ 1280-93 (Deering 1953); CONN. GEN. STAT. §§ 8151-67 (1949); LA. REV. STAT. §§ 9:4201-17 (1950); MASS. GEN. LAWS c. 251, §§ 1-22 (1932); MICH. COMP. LAWS §§ 645.1-.24 (1948); N.H. REV. STAT. ANN. §§ 542:1-:10 (1955); N. J. REV. STAT. § 2A:40-1 to 40-2 (1951); OHIO REV. CODE ANN. 2711.01-.15 (Baldwin 1953); ORE. REV. STAT. §§ 33.210-.340 (1953); PA. STAT. ANN. tit. 5, §§ 161-200 (1930); R.I. GEN. LAWS ANN. c. 475, §§ 1-17 (1938); WASH. REV. CODE § 7.04.040-.220 (1951); WIS. STAT. §§ 298.01-.18 (1955).

30. *E.g.*, Park Construction Co. v. Independent School Dist., 209 Minn. 182, 296 N.W. 457 (1941).

ure the New York law of 1829. Some of them appear to be descendants of legislation predating the 1829 act.³¹

When one considers the extensive growth of the use of arbitration in both the commercial and labor-management fields, with the activities affected extending in many instances beyond state lines, the need for a uniform act incorporating modern experience and thinking on the subject seems evident. The National Conference of Commissioners on Uniform State Laws undertook the preparation of such an act in 1924 but became embroiled in a controversy over its applicability to future disputes clauses. The act which emerged was limited to agreements to arbitrate existing disputes. It was adopted in but few states and was later withdrawn by the Conference.

The present uniform act represents a simplification and modernization of the New York arbitration law and its prototypes in other states. All in all it is a very simple act. Its essential purpose is to make an agreement to arbitrate effective whether relating to existing or future disputes. For this purpose it enlists the aid of the court by a simple non-technical and summary procedure which safeguards the parties against claims for arbitration not warranted by their agreement and which effectively enforces the agreement to arbitrate as made and the award made in conformity with the agreement. Its main features will be summarized.

Validating Arbitration Agreements

The act provides:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives (unless otherwise provided in the agreement).³²

All that is required is that the agreement be in writing. It need not be subscribed, or attested by a witness, or acknowledged. No formality of any kind, other than that the agreement be in writing, is needed in order to secure the assistance of the court in enforcing the agreement or the award made under it. The issues agreed to be arbitrated may relate to real estate or any other subject so long as considerations of public policy are not adversely affected as in divorce and criminal cases. The act does not apply to appraisals since these have been held not to be arbitrations.³³ The act does not extend to oral arbitration

31. Cf. DEL. CODE ANN. tit. 10 §§ 5701.06 (1953).

32. UNIFORM ARBITRATION ACT § 1.

33. *In re Fletcher*, 237 N.Y. 440, 143 N.E. 248 (1924). The New York act was amended in 1941 to include appraisals. N.Y. CIV. PRAC. ACT § 1448. See *Fitzgerald v. Continental Ins. Co.*, 275 App. Div. 453, 90 N.Y.S.2d 430 (3d Dept. 1949).

agreements as to which the common law principles will continue to apply. It was considered unwise to permit an irrevocable arbitration agreement to be left to the uncertainties of a claimed oral transaction.

The controversy agreed to be arbitrated need not arise out of the contract containing the arbitration clause and it need not be one of which a court would take cognizance.³⁴

The act applies to arbitration clauses in labor contracts unless the contract provides otherwise. Existing statutes validating future disputes clauses sometimes include such contracts. Some do not. The rash of cases in which arbitration is sought under section 301 of the Taft-Hartley Act would appear to indicate that enabling legislation in the states which do not now validate such clauses would meet a strong need. There was evidence of concern, however, by labor interests over the possible unforeseen effects of the adoption of the uniform act. The act as drawn satisfied this concern as far as could be ascertained.³⁵ An alternative considered was to require that the labor contract affirmatively provide that the act should apply. In the absence of such a provision, the common law would then apply. This was rejected as unworkable. With the uniform act in existence, there would be the very real prospect that the parties would assume its application to their contract and neglect to incorporate the required contract provision. At a later crucial time they would find nothing but an unenforceable arbitration clause to look to.

Compelling Arbitration

The uniform act permits a party to proceed by way of a motion to obtain a court order directing the parties to proceed to arbitration.³⁶ If he is one who is resisting a demand for arbitration, he may by motion ask for an order staying the arbitration.³⁷ If an action has been brought on an issue which the defendant considers comes within an agreement to arbitrate, he may apply for an order in the action itself staying the action and directing arbitration.³⁸ In each of these procedures the question under the act is: Was there an agreement to arbitrate?

By these provisions some important problems of the relation of the courts to the arbitration process are raised about which a few words should be said as to the intentions of the committee who were

34. See UNIFORM ARBITRATION ACT § 12, stating, "But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." See also O'Neal, *Resolving Disputes in Closely Held Corporations: Intra-Institutional Arbitration*, 67 HARV. L. REV. 786 (1954).

35. See Isaacson, *A Partial Defense of the Uniform Arbitration Act*, 7 LAB. L.J. 329 (1956). This article was written before the 1956 amendments removing the provisions criticized by the author.

36. UNIFORM ARBITRATION ACT § 2(a).

37. *Id.* § 2(b).

38. *Id.* § 2(d).

given the task of preparing the act. The central questions which will be raised by these procedures are: What issues, controversies or disputes have the parties by their contract agreed to arbitrate and who is to decide this question?

What is being sought is the enforcement of a contract. If arbitration is demanded of a dispute which does not fall within the terms of the agreement to arbitrate, the opposing party should not be compelled to submit to it. That is the *core* of voluntary arbitration. In many instances it is desirable to incorporate in the agreement a provision that what issues are to be arbitrated shall be determined by the arbitrator. The uniform act permits this in the broad coverage of section 1.³⁹ But if they have not done so, it seemed to the committee that in the present state of the practices and assumptions of parties in making these agreements, the usual principle should apply that the court must ascertain the existence of the agreement to arbitrate which it is asked to enforce. A party should not be required by a court to submit a claim to arbitration when he has not agreed to do so.

If the parties always made their intentions clear, there would be little difficulty in carrying out these principles. But they do not,⁴⁰ either because they have not thought through all the specific applications of their agreement or because the delicate negotiations leading to the contract do not permit them to be fully canvassed. The problems of construction that ensue may be considered under three general categories. It is recognized that these are not exhaustive in their coverage and that their differences are in some measure ones of degree. Cases may be envisaged which do not fall within these categories and which still call for construction of the parties' agreement to arbitrate. But the classification is believed to be sufficient to illustrate the principles incorporated into the uniform act and applicable to any case which might arise under it.

First, the arbitration clause may be clear and precise and it is plain that the dispute sought to be arbitrated does not fall within it. The clause in a sales contract may be limited to disputes over quality and the claim sought to be arbitrated is for non-delivery of an installment. Or the clause is only as to wage adjustments and arbitration is demanded for wrongful discharge of an employee. Unless his contract is to be completely ignored, the opposing party should not be compelled in such cases to submit his contentions to arbitration. There is no such agreement to arbitrate.

Second, in defining the scope of the issues intended to be submitted to arbitration, the terms employed are substantially the same as those used in other parts of the contract spelling out the respective rights

39. See note 32 and related text *supra*.

40. See Lowden, *Labor Arbitration Clauses: Draftsmanship Avoids Litigation*, 43 VA. L. REV. 197 (1957).

of the parties. To illustrate, a collective bargaining agreement specifies the wages to be paid and provides that any differentials "in wages" between different classes of workers shall not be made without first securing the approval of the union. The agreement is silent on bonuses. It provides that any dispute as to the meaning or application of the contract with respect to *wages* shall be settled by arbitration. The company contends that a bonus is not wages. The union insists the term was intended to include bonuses and demands arbitration. Quite logically, it can be said that it is for the court to determine the meaning and scope of the word "wages" used in defining the scope of arbitration. Such construction, however, is destructive of the clause itself. It leaves to the court, on this preliminary application for arbitration, the decision as to the meaning of the contract term "wages" which by express stipulation of the parties was left to arbitration.

This is but a simple illustration of the infinite variety of situations which contract provisions may create when the construction of the arbitration clause by a court would also settle the meaning of other provisions of the contract intended by the parties to be left to arbitration. It is the purpose of the uniform act to leave these questions to arbitration. This is what was intended by the parties when they made their contract. The primary difficulty of the committee was to express this purpose in appropriate legislative terms. There was nothing to serve as a guide in existing legislation. A simple formula was decided upon. The sole issue under the act on these preliminary hearings to compel or stay arbitration is: "Is there an agreement to arbitrate?"⁴¹ In the above illustration there obviously was, and hence the court would order arbitration.

Third, the contract, after stating the terms of the agreement between the parties, concludes with a general arbitration clause that disputes over the meaning, interpretation and application of the contract shall be submitted to arbitration. It provides for wages, hours of employment, discharges, etc. It is silent as to the right of the employer to sublet any portion of his production or his right to close his factory and open a new one in another part of the country. The union insists that it was implicit in the contract that production was to continue during the life of the contract substantially along the lines existing when the contract was made. The employer contends that in subletting or moving his operations he is merely exercising the prerogatives retained by management. The union demands arbitra-

41. In § 2(a) the issue for determination on a motion to compel arbitration is raised "if the opposing party denies the existence of the agreement to arbitrate . . ." Under § 2(b) "the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate." While not so explicitly stated, the intention is plain that the same principles govern under § 2(c) (d) when an application is made in a pending action for an order staying the action and directing arbitration of an issue involved in the action and "referable to arbitration."

tion. Here again the argument may be maintained that the right to arbitrate is limited to matters arising out of the contract. What is not in the contract is not subject to arbitration. The court must, therefore, determine the limits of the contract to ascertain what it is that may be arbitrated.

Again, the argument ends in destroying the agreement of the parties that the meaning of the contract shall be determined by the arbitrator. If the terms and meaning of the contract are determined by the court in the process of defining the scope of permissible arbitration, there is nothing left for the arbitrator to consider except the possible limited factual question whether the particular case comes within the contract as construed by the court. In the illustration given, if the court should decide that the contract did not restrict the right of the employer to sublet his production or move his factory, there plainly would be nothing for the arbitrator to consider on the dispute which has arisen. The terms and interpretation of the contract have been decided by the court. This is the sole issue in dispute. Should the court decide that the contract did restrict the right of the employer in the respects indicated, it would be difficult for the arbitrator to exercise any choice but to adhere to the decision. Either decision constitutes an interpretation of the terms and meaning of the contract which the parties stipulated should be left to the arbitrator. The intent of the Uniform Act is to leave these questions to the decision of the arbitrator.

It should be observed that in all of these categories the court is dealing with the question whether the dispute shall be submitted to arbitration. Whether the position of the party seeking arbitration with respect to the merits of the claim sought to be arbitrated is a reasonable or permissible one is not the question presented. Nor is it whether the arbitrator's interpretation of the contract in the second and third categories may be so unreasonable as to go beyond the limits of his authority conferred by the agreement. That cannot be known until the award has been rendered. Here the only question is shall arbitration be directed. An order to that effect will not preclude a later objection to the award that it is so far removed from any reasonable interpretation of the agreement that the arbitrator went beyond his powers.

The incorporation of these principles into the uniform act necessitated consideration of another problem posed by some New York decisions, beginning with *International Ass'n of Machinists v. Cutler-Hammer, Inc.*⁴² In this case an agreement between employer and union provided that they were to meet in a given month "to discuss payment of a bonus for the first six months of 1946." Disputes as to the

42. 271 App. Div. 917, 67 N.Y.S.2d 317 (1st Dept.), *aff'd per curiam*, 297 N.Y. 519, 74 N.E.2d 464 (1947).

“meaning, performance, non-performance or application” of its terms were to be submitted to arbitration. The employer’s position was that he was only required “to discuss” whether a bonus should be paid. The union insisted that the contract meant that a bonus must be paid and that the only subject open for discussion was the amount to be paid. The union’s construction of the contract certainly involved the “meaning” of the terms of the contract and, therefore, came within the scope of the arbitration clause. In the usual case many additional facts would appear, such as discussions which led to adoption of the language in the contract. Those discussions might show that the union’s construction was an impossible one or that reasonable minds would conclude that it was an impossible one, or they might show the reverse. But the arbitration clause in the case required that these facts be presented to the arbitrator. Until he has made his award, it cannot be known whether he will adopt an impossible construction. Consideration of that question must, therefore, be deferred until the award has been rendered. Thus, the order requiring arbitration should have been granted without prejudice to that question. But the court held otherwise and introduced a new judicial requirement before arbitration would be ordered:

All the bonus provision meant was that the parties would discuss the payment of a bonus. It did not mean that they had to agree on a bonus or that failing to agree an arbitrator would agree for them. Nor did it mean that a bonus must be paid and only the amount was open for discussion. So clear is this and so untenable any other interpretation that we are obliged to hold that there is no dispute as to meaning of the bonus provision and no contract to arbitrate the issue tendered.⁴³

The next major case was *General Electric Co. v. United Elec. Workers, CIO*.⁴⁴ The agreement provided for arbitration of disputes over the application and interpretation of any of its provisions. It prohibited discrimination because of union activity. Another agreement between the parties provided for pay for up to eight hours per week for union activity, the union to pay for any additional hours. Thereafter, the company established a pension plan based on time paid for by the company. There was no collective agreement on pensions. In determining the amount of pensions payable under its plan, the company refused to include hours spent in union activity in excess of the eight hours per week. The union charged discrimination and demanded arbitration. Again arbitration was denied, the court stating:

If, under the unambiguous terms of an agreement calling for arbitration, there has been no default, the court may not make an order compelling a party to proceed to arbitration. [citing the *Cutler-Hammer* case]. . . .

43. 67 N.Y.S.2d at 318.

44. 300 N.Y. 262, 90 N.E.2d 181 (1949).

Whether or not a bona fide dispute exists is a question of law [Wenger & Co. v. Propper Silk Hosiery Mills, 239 N.Y. 199, 202-03]. . . . If there is no real ground of claim, the court may refuse to allow arbitration, although the alleged dispute may fall within the literal language of the arbitration agreement. Such is the situation here.⁴⁵

The same criticisms are applicable to this case which were made of the *Cutler-Hammer* decision.

In *Alpert v. Admiration Knitwear Co.*⁴⁶ the parties to a sales contract agreed that "any complaint, controversy or question which may arise with respect to this contract that cannot be settled by the parties thereto, shall be referred to arbitration in the following manner . . ."⁴⁷

The contract contained the provision that: ". . . if at any time, in the sole opinion of the Seller, the financial responsibility of the Purchaser shall become impaired or unsatisfactory to the Seller cash payments in advance of delivery may be required."⁴⁸ (Emphasis added by the court.)

The seller notified the buyer that "your financial responsibility is unsatisfactory under all the circumstances of this sale" and required that payment be made in advance of shipment. Arbitration again was denied, with this statement:

Concluding, as we do, that the seller's demand and notice to the purchaser, contained in its letter of June 8, 1950, was in accord with its right expressly provided by the contract, we think the case falls within the rule stated in *Matter of General Electric Co. v. United Elec. Radio & Mach. Workers.* . . .⁴⁹

The court then quotes the language reproduced above from the *General Electric Co.* case. With such a clear and unqualified statement in the contract of the right of the seller to withhold credit the buyer might have difficulty establishing any reasonable basis for avoiding its effect and an arbitrator's award relieving him of its application might be found to be capricious and arbitrary and an attempt to change the contract of the parties. Under the principles later to be discussed, such an award would be beyond the power of the arbitrator to make. But, under the principles discussed earlier, the buyer had the right to try to make such a showing since the agreement was that "any complaint, controversy or question which may arise with respect to this contract . . . shall be referred to arbitration." He might be able to show, for example, that the rigorous credit provision was agreed to by the parties only in the expectation that he could appeal to the sense of fairness and equity of the arbitrator which, under

45. 90 N.E.2d at 182.

46. 304 N.Y. 1, 105 N.E.2d 561 (1952).

47. 105 N.E.2d at 563.

48. 105 N.E.2d at 562.

49. 105 N.E.2d at 563.

recognized principles governing arbitration, the arbitrator could apply and that the credit provision was understood in this qualified sense. The opportunity to make such a showing was denied him by the decision.

In effect, this doctrine requires that a party seeking enforcement of an agreement to arbitrate must not only show that an agreement to arbitrate the dispute in question was made but must also satisfy the court that the claim made by him has some merit. The court thus interposes its judgment on the issue before it will permit the parties to submit the issue to the arbitrator. This places a serious restriction upon the contract of the parties not stipulated by them. They had agreed that the merits of the issue in dispute should be determined by the arbitrator, not the court. The doctrine has received widespread condemnation.⁵⁰

The more recent case of *Bohlinger v. National Cash Register Co.*⁵¹ raises considerable doubt as to the extent to which the doctrine will be adhered to in New York. In this case the contract provided for reference to an arbitrator of "any dispute between the parties hereto with reference to any matter not provided for in this Contract, or in reference to the terms, interpretations or application of this Contract."⁵² The union claimed that a discharge, allegedly for having worked for a competitor during off hours, was in fact for charges of disloyalty and without notice. The lower court denied arbitration because the agreement placed no restriction on the employer's right of discharge and hence was not subject to arbitration. This was reversed on the ground that the dispute was covered by the agreement to arbitrate "any matter not provided for in this Contract." The significance of the decision is that no reference was made to the *Cutler-Hammer* doctrine notwithstanding the dissenting opinion which insisted the employer had "an absolute, common-law right to discharge its employees, with or without cause" and this right not having been contracted away there was nothing to arbitrate.

The lower New York courts since the *Bohlinger* case are divided in their observance of the *Cutler-Hammer* doctrine.⁵³ That other states in which the question is an open one will repudiate the doctrine is indicated by the recent Washington decision of *Greyhound Corp. v. Division 1384, Amalgamated Ass'n of Street, Elec. Ry., and Motor Coach Employees*⁵⁴ in which the court stated:

50. See FREIDIN, LABOR ARBITRATION AND THE COURTS 7 (1952); Comment, 21 U. CHI. L. REV. 148 (1953).

51. 305 N.Y. 539, 114 N.E.2d 31 (1953).

52. 114 N.E.2d at 31.

53. See Kharas & Koretz, *Judicial Determination of the Arbitrable Issue*, 11 ARB. J. (n.s.) 135 (1956).

54. 44 Wash. 2d 808, 271 P.2d 689, 696 (1954).

When union and employer, in very clear language, have by agreement chosen an arbitration board as the ultimate forum for the resolution of disputes, there is a very real question as to whether the courts should impose upon the parties the burden of showing in court or in a judicial forum that a dispute is bona fide as a condition to the right of either party to submit the matter to arbitration. In deciding whether a dispute is bona fide, as was done in the *Cutler-Hammer* case, supra, there is the danger that a court, because of a very liberal or a mistaken impression of its function, may, for practical purposes, become the forum for the determination of the dispute. Anything less than a cautious application of the rule would permit a party to an arbitration agreement to choose between a judicial forum and an arbitration forum for the settlement of a controversy, notwithstanding his solemn agreement in writing to submit all disputes to arbitration.⁵⁵

It was the opinion of the committee that all doubt on this question should be removed by the uniform act and the doctrine of the New York cases nullified. Accordingly the act provides:

An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.⁵⁶

This provision covers any issue, whether one of fact or one of construction of the terms of the contract. It applies to the issues sought to be arbitrated in the three categories discussed above.

Appointment of Arbitrators

Under the uniform act the method of appointment of arbitrators specified in the agreement of the parties controls. But if the agreement is silent on the subject or the method agreed upon cannot be carried out, the arbitration does not fail, but the court may appoint the necessary arbitrators.⁵⁷ The suggestion was considered that the court be restricted in its appointments to lists provided by some agency such as the American Arbitration Association or the United States Mediation and Conciliation Service or some corresponding

55. Referring to the *Cutler-Hammer* decision, the court observed "The force of that decision has been weakened by the case of *Matter of Bohlinger*" 271 P.2d at 696.

Some relaxation of New Jersey's adherence to the *Cutler-Hammer* doctrine is indicated in *Standard Oil Development Co. Employees Union v. Esso Research & Engineering Co.*, 38 N.J. Super. 106, 118 A.2d 70, 75 (1955), the court stating: "It is not our intention to express the view that before the parties will be ordered to the forum of arbitration, the judicial mind must find merit in an asserted interpretation. The test being expounded is that arbitration will be directed when it appears to the mind of the ordinary layman that the particular language involved is reasonably open to the connotation contended for. If the contention proposed is such that no ordinary layman, acting in good faith, would seriously advance it, then our statutory power will not be exercised." These remarks were directed to a motion to compel arbitration. *But cf. Botany Mills v. Textile Workers Union*, 126 A.2d 389 (1956).

56. UNIFORM ARBITRATION ACT § 2(e).

57. *Id.* § 3.

state agency. This was felt to be unnecessary and undesirable. When application is made for the appointment of arbitrators in those cases where the agreement makes no provision for their appointment, the parties can and would be expected by the court to suggest appropriate names. Lists supplied by these agencies could be made available. But the parties ought not to be confined to or required to submit such lists, considering particularly the political fortunes of some of these agencies. Should the parties desire to be so confined, they can so provide in their contract.

Hearing

There are not many provisions in the act controlling the arbitration hearing. They are contained principally in section five, all of which is made subject to such stipulations as the parties may have made in their contract. The intent is primarily to provide for those safeguards and contingencies which the parties may not have thought about.

Unless waived by appearance at the hearing, notice of the arbitration hearing must be given by personal service or by registered mail. An award may be rendered against a party so notified even though he does not appear. The hearing may be adjourned from time to time, but not, without consent, beyond the time fixed by the agreement for the award. The importance of a fair hearing is emphasized in that "the parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing."⁵⁸ Since there is no provision to the contrary, a stenographic record of the testimony need not be made nor is any other record of the evidence received required. The act contemplates the informality of procedure and freedom from technical rules of evidence which the common law has always permitted.

A party has a right to be represented by counsel which cannot be waived prior to the hearing.⁵⁹ The purpose is to enable a party to determine the need for counsel after and in the light of the controversy when it has arisen and is to be submitted to arbitration.⁶⁰ He is, however, expected to make up his mind when he enters upon the hearing; and, if he then fails to have counsel and proceeds without one, he cannot thereafter disrupt the proceedings by refusing to participate further and insisting on employment of counsel.

58. *Id.* § 5(b).

59. *Id.* § 6.

60. Compare N.Y. CIV. PRAC. ACT. § 1454(1): "No waiver of the right to be represented by an attorney in any proceeding or at any hearing before an arbitrator shall be effective unless evidenced by a writing expressly so providing in connection with an existing controversy signed by the party sought to be charged therewith." The portion in italics was added in 1955. See N.Y. Sess. Laws 1955, c. 261.

To assure that unwilling witnesses will be available, the arbitrator is empowered to issue subpoenas or, if the witness is not subject to subpoena, to authorize the taking of a deposition for use as evidence.⁶¹ This does not authorize a deposition for purposes of discovery. Possibly due to the failure to distinguish these two purposes of depositions, the committee met with some objection that the use of subpoenas and depositions was not appropriate to arbitration hearings and should not be permitted. However, with full discretion and control of their use in the hands of the arbitrators, it was felt that they would not be abused and would serve a useful and important purpose in the occasional case where they are needed. Many states empower arbitrators to issue subpoenas,⁶² and a considerable number authorize the taking of depositions.⁶³

If there is but a single arbitrator conducting the hearing and he dies or for some other reason ceases to act during the course of the hearing, the hearing, of course, terminates and a new arbitrator must be appointed and the presentation of the case begun anew. If there is a board of arbitrators, however, and one of them ceases to act, it is possible under some circumstances to save the proceedings and permit the remaining arbitrators to continue. The parties can, of course, provide for this contingency in their agreement. If they have not done so, it was felt that some provision should be made in the uniform act which would permit the hearing to go on in appropriate cases. Accordingly, the act provides that the remaining arbitrators *appointed to act as neutrals* may continue with the hearing.⁶⁴ If all are neutrals, those remaining will be able to carry on the hearing without difficulty. The principal impact of the provision will be in those cases where tri-partite boards are used consisting of representatives of the parties and of one or more neutral arbitrators. Different considerations come into play in this situation. While the party representatives are named as arbitrators, their important function is to bring to the consideration and deliberations of the board the interests and points of view of the parties represented. All recognize that the controlling voice and ultimate decision will be that of the neutral arbitrators. If the neutral members should cease to act, it would be changing the purposes of the board drastically if the arbitration were to continue with only the representatives of the parties acting as the arbitrators. In that event the arbitration hearing must fail, and this will be the effect of the uniform act. Similarly, if the repre-

61. UNIFORM ARBITRATION ACT § 7.

62. N.Y. CIV. PRAC. ACT. § 1456; CAL. CODE CIV. PROC. § 1286 (Deering 1953); LA. REV. STAT. § 9:4206 (1950); MICH. COMP. LAWS § 645.6 (1948).

63. CAL. CODE CIV. PRAC. § 1286 (Deering 1953); LA. REV. STAT. § 9:4207 (1950).

64. UNIFORM ARBITRATION ACT § 5(c).

sentative of one of the parties should cease to act in the course of the hearing, it would be improper to permit the representative of the opposing party to continue and participate in the decision. Only the neutral arbitrators should proceed and render the award.

Awards

The only requirements of the uniform act as to the form of the award are that it must be in writing and signed by the arbitrators joining in it. A copy must be delivered to each party personally or by registered mail or by the method provided in the arbitration agreement.⁶⁵ There is no requirement that there be findings of fact or a supporting opinion. A statement by the arbitrator in the form of an opinion giving his reasons for the award is desirable. A competent arbitrator will accompany his award with such an opinion. To insist on it in the act, however, would invite controversy as to the legal sufficiency of its form and its compliance in one respect or another with the requirements of the act. Arbitration legislation generally does not contain such requirement.

Time limits fixed by the agreement for making the award must be observed, but, under the act, a party must raise his objection before delivery of the award to him.⁶⁶ He cannot wait until he has seen it, find it not to his satisfaction and then use the lapse of time as an excuse for avoiding it.

A new provision, largely original with this act, substantially limits the common law doctrine that once the award has been rendered the powers of the arbitrators cease and they can do nothing to add to or subtract from or modify or correct it in any way.⁶⁷ The arbitrators may "modify or correct the award" on several grounds.⁶⁸ One is for "evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award." Another is that "the award is imperfect in a matter of form, not affecting the merits of the controversy."⁶⁹ Still a third is "for the purpose of clarifying the award." The authority of the arbitrators to modify or correct their awards is thus rather carefully circumscribed. The purpose is to permit the arbitrators to correct a mistake or to

65. *Id.* § 8(a).

66. *Id.* § 8(b).

67. See STURGES, COMMERCIAL ARBITRATIONS AND AWARDS § 220 (1930).

68. UNIFORM ARBITRATION ACT § 9.

69. Section 9 incorporates these two grounds by reference to § 13. The latter section authorizes the court on application to correct the award on these grounds. A further ground on such application is that the arbitrators have acted on a matter not submitted to them and the award may be corrected by eliminating this portion of the award if it can be done without affecting the merits of the balance of the award properly made. This ground was not included in § 9 since it was felt to be a matter properly for the courts rather than the arbitrator. The three grounds for correction or modification are the traditional ones found in arbitration statutes.

use more definite and precise language in expressing their award which is otherwise so unclear or incomplete or stated in such inconsistent terms that the performance intended cannot be ascertained. Arbitrators commonly are not lawyers and frequently do not express their decisions with the clarity and precision needed to render a definite, complete and understandable award. At the same time, it was not the intention to permit the arbitrators to re-examine their award and render a different one. A re-hearing of the case is not to be undertaken.⁷⁰ Finality of decision is as important in arbitration as it is in judicial proceedings.

The procedure provided for securing action from the arbitrators under this provision is quite simple. If there is no application pending to confirm, vacate or modify the award, an application to the arbitrators may be made by a party within twenty days after the award is delivered to him. Notice of the application must be served upon the opposing party who must serve his objections to the proposed changes in the award within ten days. If the award is before the court on a motion of the character indicated, the court in its discretion may return the award to the arbitrators to make such changes as the act permits and under such conditions as the court specifies.⁷¹

A valid award may be reduced to judgment by obtaining an order, by way of motion, confirming the award. Judgment is entered on this order and is enforced like any other judgment.⁷² This is the simple procedure established by legislation since early times. The uniform act merely represents clarification and further simplification.

There is no time limit on motions to confirm an award. Statutes authorizing such motions customarily impose a one year limitation. Since either party may make a motion to confirm, or, if he is objecting to it, to vacate or modify the award, it is difficult to discover any purpose in a time limitation.

On a motion for an order to confirm, all grounds for vacating or modifying the award must be asserted by the opposing party. Otherwise, the order of confirmation will bar all further attack on the award. If a motion to vacate the award is made and is denied, an order of confirmation automatically follows. Similarly, a motion to modify or correct the award results in an order of confirmation of the award either as modified or in its original form.⁷³ The objective of these provisions is to permit the court to settle all questions as to the validity of the award in a single hearing without the complexity of multiple motions and counter-motions.

70. A re-hearing may be had only when directed by the court in appropriate cases on the vacation of an award. See *Id.* § 12(c).

71. *Id.* § 9.

72. *Id.* §§ 11, 14.

73. *Id.* §§ 11, 12(d), 13(c).

Vacating the Award

The grounds for vacating an award, traditionally recognized in statutes going back to the 1829 New York act, are incorporated into the act. They are found in most state statutes on arbitration. The New York act in turn merely undertook to codify the existing common law on the subject.⁷⁴ The provisions of the uniform act are relatively short and appear in the following subdivisions:⁷⁵

(1) *The award was procured by corruption, fraud or other undue means.*

This refers to the conduct of the opposing party or, possibly, of some persons other than the arbitrators. No other phrase than "undue means" was discovered to cover more adequately the miscellaneous types of conduct which fall short of fraud or corruption but still give grounds for setting aside the award. The phrase goes back at least to the English statute of 1689. The subdivision, incorporating as it does terminology of long standing, will have the benefit of many years of judicial construction with which little fault has been found.

(2) *There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party.*

To the extent that this excludes partiality of an arbitrator appointed to represent a party as a ground for vacation, this is new. It recognizes the frequent modern practice, pursuant to agreement, of parties appointing their representatives to a board of arbitrators to represent and protect their interests. The remaining members, appointed usually by some other method, are expected to be neutral and to act with impartiality. Most, if not all, current arbitration statutes fail to make the distinction.⁷⁶ In other respects, the subdivision uses familiar language.

74. The revisors stated, "The preceding section is chiefly an enumeration of the cases in which awards may be vacated, with some extension. . . . Concealment of material facts, by either party, is mentioned in some cases, 17 J. R. 405, as a ground for vacating an award; but it is conceived that such a proposition would be too broad, and that the general expressions in the first subdivision, are preferable."

75. The subdivisions are to § 12(a), as amended in 1956. The uniform act, as originally approved in 1955, contained three additional grounds for vacating an award. These were (1) "The arbitrators . . . rendered an award contrary to public policy," (2) "The award is so grossly erroneous as to imply bad faith on the part of the arbitrators," and (3) "The award is so indefinite or incomplete that it cannot be performed."

The first two grounds were considered merely to incorporate existing decisional law. But so much misunderstanding and confusion resulted from their presence that they were eliminated from the act in 1956. The decisional law, of course, still continues in effect.

The third ground was removed as a result of suggestions to that effect and in recognition of the fact that it was no longer needed in view of § 9 which permits the court to refer the award to the arbitrators who rendered it for the purpose of clarifying it. See notes 68-71 and related text *supra*.

76. For a general discussion of such boards, see Note, *The Use of Tripartite Boards in Labor, Commercial, and International Arbitration*, 68 HARV. L. REV. 293 (1954).

(3) *The arbitrators exceeded their powers.*

This again recognizes a familiar and necessary ground for vacating an award. It is discussed below in connection with subdivision (5).

(4) *The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party.*

This again incorporates commonly recognized grounds for setting aside an award. Section (5), to which reference is made, spells out more explicitly than do existing statutes the fundamental requirements of a fair hearing; but in this respect it merely incorporates principles which have been developed by judicial decision.

(5) *There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection.*

Subdivisions (3) and (5) are corollaries of each other. If there has been no arbitration agreement, the arbitrators, of course, have no power to render an award. But even if there has been such agreement, the arbitrators may have gone outside of it in their award or beyond the dispute submitted to them. They would again have exceeded their powers.

The earlier part of this discussion considered the function of the court on the related questions raised on an application to compel or to stay arbitration. It was noted that, under the act, the sole question for the court to consider at that time was whether there existed an agreement to arbitrate. To the extent that that question was then settled, it cannot be renewed again after the award has been rendered.

Several other procedural possibilities are presented by the act. The party demanding arbitration may proceed without seeking an order to compel it. The opposing party then has several alternatives. He may move to stay arbitration,⁷⁷ or he may ignore the attempted arbitration and oppose the award rendered on a motion to confirm or by his own motion to vacate. If he loses on these motions, he will have suffered a default and lost the opportunity to present his contentions on the merits of the claim in dispute at the arbitration hearing. Under subdivision (5), he may also appear at the arbitration proceedings, state his objections and, if the arbitrator nevertheless proceeds, participate in the proceedings without losing his right to object to any adverse award rendered. The risk of finding himself in default is thus avoided.

These alternatives apply to the question of whether there was an

77. UNIFORM ARBITRATION ACT § 2(b).

agreement to arbitrate. In the first of the three categories discussed earlier,⁷⁸ this was the only question. In the other two, on the other hand, the primary issue was the permissible scope of the arbitrator's award under an authorization which extended to the interpretation of a specific term in the second category and of all terms, express and implied, in the third. It is the purpose of the uniform act to defer consideration of the latter question until after the award has been rendered. It is a new and different question from that arising on an application to compel arbitration, and it arises in a different context. The award is now before the court with such explanation as the arbitrator may have given. It is the duty of the court under subdivision (3) to measure the award against the powers of the arbitrator conferred by the agreement. The issue then becomes whether the arbitrator exceeded his authority in rendering the award. Another way of expressing the issue is: Did the arbitrator's award exceed the limits of the arbitration agreement? The question is not whether the award is one which the court would have made had it passed on the question. The court is not to substitute its judgment for that of the arbitrator.

In passing upon the question thus before the court it must be assumed that, absent an express provision in the contract to the contrary, the parties intended that the arbitrator should not be enabled to make an irresponsible award at variance with any possible construction of the contract, and that the court and not the arbitrator should pass on that question. If the parties intend otherwise, it is a simple matter so to provide in their contract. This being assumed, the question for the court is whether the construction of the contract made by the arbitrator is a reasonably possible one that can seriously be made in the context in which the contract was made. Stated affirmatively, if all fair and reasonable minds would agree that the construction of the contract made by the arbitrator was not possible under a fair interpretation of the contract, then the court would be bound to vacate or refuse to confirm the award.

It must be recognized that, in fulfilling this judicial function, the court is called upon to draw a line that is not precise and that where it is drawn can be influenced by the court's attitude toward the arbitration process. To deny this function, however, would leave the parties without a remedy against arbitrary and capricious awards, which, one must assume, the parties did not intend to make possible by their contract. If the courts will perform their tasks under the act with the traditional impartiality expected on any subject, one may be assured that the purposes of the act will be fully realized.

It should be evident that all the specific details involved in the

78. See p. 693 *supra*.

subject of arbitrability cannot be spelled out in the act itself. It is believed that the conclusions drawn in this discussion are required by the wording and inherent structure of the act. The fundamental aim is always to give effect to the intention of the parties expressed or reasonably to be inferred from the agreement. The powers given to the arbitrator by the arbitration agreement should be recognized and left unimpaired by any judicial action. On the other hand, the parties should not be subjected to arbitration on issues never intended to be left to arbitration. The purpose of the act is not to favor either party or to give or to neutralize any strategic advantage of one party over the other. The act is believed to be the best that can be drawn which will give effect to the contract of arbitration.

One further word should be said about motions to vacate awards. It applies also to motions to modify or correct an award. This has to do with the time limits fixed by the act for making such motions. Different considerations apply to these motions than apply to motions to confirm an award. It is important to the effectiveness of the arbitration process that the award be promptly performed. Hence, attacks on the award should be promptly made. The customary statutory limit is ninety days. The uniform act adopts this limit but extends it also to the assertion of grounds for resisting confirmation of the award.⁷⁹ Hence, if a motion to confirm is made after the ninety days in which to move to vacate an award have expired, these grounds cannot be asserted as defenses to the motion to confirm. This results in no hardship to the opposing party since he, himself, can move to vacate or modify the award and need not wait until a motion to confirm has been made. The period of limitation begins with the delivery of a copy of the award to the party objecting, except that a motion to vacate "predicated upon corruption, fraud or other undue means . . . shall be made within ninety days after such grounds are known or should have been known."⁸⁰

The foregoing discussion covers the main features of the uniform arbitration act. The consideration, experience and deliberate judgment of many minds and organizations are reflected in the provisions of the act. It does not propose a new and radically different approach to arbitration. For the most part, it has adopted recognized and tested principles, procedures and practices, some of them having been in existence in this country for over 150 years—others being of more recent origin, and molded them into a simple, consistent and understandable act. Its adoption would constitute a decisive improvement in the law of all states on the subject.

79. Section 11 provides: "Upon application of a party, the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13." Sections 12 and 13 deal with motions to vacate and to correct or modify an award.

80. UNIFORM ARBITRATION ACT § 12(b).

