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THE CONTRACT TO ARBRITRATE FUTURE DISPUTES: A COMPARISON OF THE NEW MEXICO ACT WITH THE NEW YORK AND FEDERAL ACTS

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HISTORICAL BACKGROUND

Arbitration, which is the binding resolution of civil disputes by an extra-judicial tribunal, pursuant to agreement, has been known and used probably from Roman times. The agreement to arbitrate future disputes was known to the common law prior to, and was enforced by the English courts until, the late 17th century. Since that time, and until 1920 in the United States, the treatment of the validity, interpretation and enforceability of agreements to arbitrate future disputes constitutes "one of the dark chapters in legal history."[1]

From 1687 until 1855, the English courts refused to enforce agreements to arbitrate future disputes, as opposed to agreements to arbitrate existing controversies. The courts would enter judgment upon an arbitrator's award. The agreement was not specifically enforceable in equity, and the common law courts held that only nominal damages were recoverable for breach of an agreement to arbitrate future disputes. The agreement, therefore, was revocable until there was an award. The attitude of the English courts was carried over to the American courts, and it was not until the New York statute of 1920 that agreements to arbitrate future disputes became specifically enforceable in this country.

The reasons given by the Courts for their hostility towards agreements to arbitrate varied. The one most frequently quoted is that such agreements "oust the jurisdiction" of the courts. As Judge Frank pointed out in his excellent discussion of the history of this judicial hostility,[2] the "ouster of jurisdiction" argument was at least in part based on economics. At the time the hostility arose, the remuneration of English judges was based on fees paid by the litigants. Arbitration deprived the courts of the fees.

In 1920, New York passed the first American statute which made

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1. Medina J., in Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402, 406 (2d Cir. 1959).

2. Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 982 (2d Cir. 1942).

agreements to arbitrate future disputes specifically enforceable.[3] The United States Congress followed with the United States Arbitration Act of 1925[4] which, as applied to arbitration provisions in maritime transactions and contracts evidencing a transaction in interstate commerce, "closely follows" the New York Act.[5] The Uniform Act Commissioners promulgated a similar act in the 1920's which was withdrawn soon after. In 1955, the Commissioners promulgated the present Uniform Arbitration Act, which is based on the New York and Federal Acts.[6] In 1971, the New Mexico Legislature adopted the Uniform Act in its entirety.[7] This act became effective July 1, 1971 and was applicable only to contracts entered into subsequent to that date.[8] As of early 1976, the Uniform Act had been adopted in twenty jurisdictions,[9] and ten other states had adopted some variant of one of the three statutes.[10]

The law of arbitration is developing rapidly. The function of the courts in this area is limited. The judicial decisions have tended to give effect to the intention of the arbitration statutes, which is to remove arbitrable disputes and arbitration awards from the courts. This has occurred despite the efforts of disappointed lawyers and their clients to convert arbitration into another form of trial, subject to all the rules governing trials and judicial review.

This article will deal with some—but not all—of the issues involving the function of the courts in arbitration disputes. The discussion will center on three major areas. The first area will be the enforcement of the contract to arbitrate, which includes questions of the construction and validity of the contracts. Secondly, the role of discovery in arbitrators' awards, which includes a consideration of the basic powers of arbitrators as well as the applicability of the rules of substantive law and evidence will be addressed. Essentially, this article is intended as an overview of some basic concepts involved in arbitration and not as an exhaustive study of all arbitration problems.

The New Mexico Supreme Court has decided only two cases under

3. N.Y. Civ. Prac. Law § § 7501-7514 (McKinney 1963).

4. 9 U.S.C. § § 1-14 (1947).

5. Reconstruction Fin. Corp. v. Harrisons & Crosfield, Ltd., 106 F. Supp. 358, 361 (S.D.N.Y. 1952), *aff'd* 204 F.2d 366 (2d Cir. 1953).

6. 7 Uniform Laws Annotated 1.

7. N.M. Stat. Ann. § § 44-7-1 to 22 (1978).

8. N.M. Stat. Ann. § 44-7-20 (1978).

9. Alaska, Arizona, Arkansas, Colorado, Delaware, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, North Carolina, South Dakota, Texas, Wyoming; 7 Uniform Laws Annotated 9.

10. California, Connecticut, Florida, Hawaii, Louisiana, New Hampshire, New Jersey, Rhode Island, Washington, and Wisconsin.

the Uniform Act.[11] Because of the substantially identical nature of the New Mexico Act with the New York and Federal Acts, decisions under the latter two are at least persuasive, if not authoritative, for the New Mexico Courts. Indeed, in its first case involving the Uniform Arbitration Act, the New Mexico Supreme Court relied on a decision under the New York Act in setting forth the limits of the Court's function in deciding threshold questions.[12] Thus, the New York and Federal decisions may well serve as a guide to the development of a body of arbitration law in New Mexico.

ENFORCEMENT OF THE CONTRACT TO ARBITRATE

All three of the statutes provide expressly for judicial enforcement of the contract to arbitrate. Most frequently, the issue arises on a motion to stay suit pending arbitration, a motion to compel arbitration, or a motion to stay arbitration. Less frequently, the issue arises on a motion to vacate an award of the arbitrators, where the party has properly preserved the issue of non-existence of a contract to arbitrate throughout the arbitration process.

The original New York Act, the Federal Act, and the New Mexico Act, are substantially identical in their respective provisions for enforceability of the contract to arbitrate future disputes. The New York Act provides that:

> A written agreement to submit any controversy thereafter arising . . . to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.[13]

The original New York Act provided that:

> [A] provision in a written contract to submit to arbitration any controversy thereafter arising . . . is valid, enforceable and irrevocable, save upon such grounds as exist at law or equity for the revocation of any contract.[14]

The change was made in 1963 as part of a general revision and recodification of New York's civil procedure statute. Apparently, the New York Legislature believed that the treatment of the arbitration agreement as any other contract, so far as revocation is concerned,

11. K. L. House Const. Co. v. City of Albuquerque, 91 N.M. 492, 576 P.2d 752 (1978); Southwestern Council of Indus. Workers v. Cancelosi, 17 N.M. Bar Bull. 2940 (Dec. 7, 1978).

12. Nationwide Gen. Ins. Co. v. Investors Ins. Co. of America, 37 N.Y.2d 91, 332 N.E.2d 333, 371 N.Y.S. 2d 463 (1975).

13. N.Y. Civ. Prac. Law § 7501 (McKinney 1963).

14. N.Y. Civ. Prac. Act § 1448.

was so firmly established by 1963 as to not require repetition. The court decisions interpreting the statute subsequent to the change in language have confirmed the accuracy of that belief.[15]

The Federal Act provides that:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[16]

The New Mexico Act similarly provides that:

> [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.[17]

Before there can be arbitration, there must be a contract to arbitrate. The statutes provide for raising the question of the existence of an enforceable contract to arbitrate on motion at the onset. The issues involved have been termed threshold issues. These issues generally fall into two groups. First, those issues which go to the question of whether or not a valid contract to arbitrate ever came into existence. This presents questions of writing, signature, fraud in the inducement and illegality. The second set of issues are the "confession and avoidance" types. Here it is assumed that a valid contract to arbitrate came into existence, but the claim is made that subsequent events made the contract unenforceable. These questions center on issues involving the statute of frauds, termination, cancellation and waiver. Finally, there are special jurisdictional problems connected with the Federal Act.

Existence of the Contract to Arbitrate

The contract to arbitrate future disputes is generally found as one of the "boiler plate" provisions of contracts dealing with substantive matters. The typical broad form of agreement to arbitrate reads, "All disputes arising out of or relating to this contract, or the performance, breach or interpretation thereof, shall be settled by arbitration."[18]

15. *See* Weinrott v. Carp, 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973).
16. 9 U.S.C. § 2 (1947).
17. N.M. Stat. Ann. § 44-7-1 (1978).
18. In the discussion which follows, it makes no difference whether the arbitration agreement is limited as to scope; this raises only a question of interpretation. Once that has been resolved, the law with respect to such a more limited agreement is the same.

On a threshold motion, the function of the Court is to:

> [P]erform the initial screening process designed to determine in general terms whether the parties have agreed that the subject matter under dispute should be submitted to arbitration. Once it appears that there is, or is not a reasonable relationship between the subject matter of the dispute and the general subject matter of the underlying contract, the court's inquiry is ended.[19]

A. Writing and Signature

"[A] contract to arbitrate future controversies must be in writing. . . ."[20] It is not at all clear, however, that the agreement to arbitrate need be signed. The New York Court of Appeals held, as long ago as 1954, that it did not have to be signed, "so long as there is other proof that the parties actually agreed on it."[21] The original New York statute made a clear distinction between agreements to arbitrate future disputes, and submissions to arbitration of existing disputes. While it required that a submission of an existing controversy to arbitration had to be "in writing . . . and subscribed by the party to be charged" the agreement to arbitrate future disputes was required only to be "in writing."[22] Consequently, in *Helen Whiting, Inc. v. Trojan Textile Corp.*, the New York Court of Appeals relied on this distinction and on section 2 of the Federal Act, for its holding that a signature was not required to validate a contract to arbitrate. The Court stated that "the writing required by . . . section 1449 has the same meaning as the words, 'A written provision' in section 2" of the Federal Act.[23]

The same question has arisen under section 2-207 of the Uniform Commercial Code. Frequently, a buyer or a seller sends a written confirmation of the expressly agreed-on terms. The confirmation also contains substantial amounts of boiler plate, including an arbitration provision which has not been discussed. The confirmation is retained

19. Nationwide Gen. Ins. Co. v. Investors Ins. Co., 37 N.Y.2d 91, 332 N.E.2d 333, 335, 371 N.Y.S.2d at 464, 466 (1975), cited with approval by the New Mexico Supreme Court in K. L. House Const. Co. Inc. v. City of Albuquerque, 91 N.M. 492, 576 P.2d 752 (1978); *accord* as to Federal Act, Medical Dev. Corp. v. Industrial Molding Corp., 479 F.2d 345 (10th Cir. 1973).

20. Helen Whiting, Inc. v. Trojan Textile Corp., 307 N.Y. 360, 367; 121 N.E.2d 367, 371 (1954). *Cf.*, United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 582 (1960) (not requiring a writing but stating it must be clearly a contract to arbitrate future disputes.

21. Helen Whiting Inc. v. Trojan Textile Corp., 307 N.Y. at 367, 121 N.E.2d 367, 371 (1954). *Accord* as to Federal Act, Medical Dev. Corp. v. Industrial Molding Corp., 479 F.2d 345 (10th Cir. 1973).

22. N.Y. Civ. Prac. Act § 1449.

23. Helen Whiting, Inc. v. Trojan Textile Corp., 307 N.Y. at 367, 121 N.E.2d at 371 (1954).

but not signed or returned, although the goods are delivered and retained. In some cases, both parties may send confirmations, but only one contains an arbitration provision. To cover this situation, section 2-207 provides that between merchants the additional provisions become part of the contract if timely objection is not made, unless *inter alia* "they materially alter it." The question of whether or not the arbitration provision is a material alteration has occupied a number of courts and has become of increasing importance.

Starting in 1955, before the adoption of the Uniform Commercial Code, and continuing through 1978, the New York courts, including the New York Court of Appeals, held that the arbitration provision was binding, at least where such a provision was customary in dealings between the parties or in the industry involved.[24] However, the New York Court of Appeals has recently reversed itself and has held that the arbitration provision constitutes "a material alteration," as a matter of law, within the meaning of section 2-207.[25]

The federal courts' decisions in this area indicate that there is a split in opinion. The First and Fifth Circuits apparently would hold that receipt and retention of confirmation and goods create a kind of estoppel. As a matter of law, therefore, all the additional provisions become part of the contract.[26] The Sixth and Tenth Circuits hold that whether or not the arbitration provision constitutes a material alteration is a question of fact for the trial court.[27]

In this determination, what is or should be the role of course of dealing or usage of trade, as defined in Uniform Commercial Code?[28] In *Whiting,* which involved a dispute between two textile firms, the New York Court of Appeals stated, "From our own experience, we can almost take judicial notice that arbitration clauses are commonly used in the textile industry. . . ."[29] The recent New York Court of

24. *Id. See also* Loudon Mfg., Inc. v. American & Efird Mills, Inc., 46 A.D.2d 637, 360 N.Y.S.2d 250 (1974); Braten Apparel Corp. v. Rutgers Fabric Corp., 35 A.D.2d 921, 318 N.Y.S.2d 771 (1970). *But see,* Windsor Mills, Inc. v. Collins & Aikman Corp. 25 Cal. App.3d 987, 101 Cal. Rptr. 347 (1972).

25. Marlene Indus. Corp. v. Carnac Textiles Inc., 45 N.Y.2d 327, 380 N.E.2d 239 (1978). This case involved the classic "battle of the forms," where the buyer's confirmation did not contain an arbitration provision but the seller's confirmation did. The New York Supreme Court, however, following *Marlene Industries,* has held that even where the only confirmation form contained an arbitration provision it constituted a material alteration as a matter of law, since it had not been expressly agreed on. *See* Fashion Footwear Inc. v. Harwyn Inter'l, reported in N.Y.L.J., July 27, 1978.

26. Construction Aggregates Corp. v. Hewitt-Robins, Inc., 404 F.2d 505 (7th Cir. 1969); Roto-Lith, Ltd. v. F. P. Bartlett & Co., 297 F.2d 497 (1st Cir. 1962).

27. Medical Dev. Corp. v. Industrial Molding Corp., 479 F.2d 345 (10th Cir. 1973); Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972).

28. U.C.C. § § 1-205, 2-202, and 2-208.

29. Helen Whiting Inc. v. Trojan Textile Corp., 307 N.Y. at 366, 121 N.E.2d at 370.

Appeals case also involved two textile firms and crossing forms.[30] Incomprehensibly, the opinion in that case not only failed to mention *Whiting,* but also failed to mention sections 1-205, 2-202 or 2-208 of the Uniform Commercial Code. Surely, course of dealing and usage of trade, should be relevant on the question of "material alteration." That is, if either the course of dealing between the parties shows a history of contracts which contain arbitration provisions, or if the usage in the industry is to insert arbitration provisions in contracts, then the arbitration provision would appear not to be a "material alteration."

The decision in *Marlene Industries* may have been foreshadowed by the opinion of then Justice Breitel (Chief Judge of the New York Court of Appeals at the time of the *Marlene* decision) writing for the majority in the Appellate Division in *Doughboy Industries Inc. v. Pantasote Co.*[31] The case was a non-textile industry "battle of the forms" dispute which was decided after the adoption of the U.C.C. in New York but before its effective date. Chief Judge Breitel made clear his opinion that the arbitration provision constituted a material alteration under section 2-207.

In any event, it is clear that the contract to arbitrate must be in writing but, subject to the "battle of the forms," does not necessarily have to be signed.

B. Fraud In The Inducement

Unlike the questions of writing and signature, which go to physical existence of the contract, fraud in the inducement assumes that all the elements of a contract exist but that nevertheless the contract never came into existence. The original New York Act made, and the Federal and New Mexico Acts, make the agreement to arbitrate "irrevocable . . . save upon such grounds as exist at law or in equity for the revocation of any contract."[32]

Obviously, fraud in the inducement is a ground for rescission of any contract. The courts, however, have treated this question as one of whether a valid contract ever came into existence. The question which has divided the courts is whether it is necessary to show fraud in the inducement of the arbitration provision itself, or whether it is sufficient to show fraud with respect to one or more of the substan-

30. Marlene Indus. Corp. v. Carnac Textiles Inc., 45 N.Y.2d 327, 380 N.E.2d 239 (1970).

31. 17 A.D.2d 216, 233 N.Y.S.2d 488 (1962).

32. 9 U.S.C. § 2 (1947); N.M. Stat. Ann. § 44-7-1 (1978). Although the language was dropped from the New York Act with the adoption in 1963 of the N.Y. Civ. Prac. Law, nevertheless the existing statute is interpreted as though the language were still there, since an agreement to arbitrate is placed on the same footing as other agreements. *See* Weinrott v. Carp., 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973).

tive provisions of the contract. A consequence of the choice is that under the latter, the court determines the issue as a threshold question, because conceptually, it goes to the existence of any contract. Under the view which requires a showing of fraud in the inducement of the arbitration provision itself, the question is for the arbitrators, on the theory that all issues after the making of the contract are for the arbitrators.

The Federal courts, relying in part on the language of section 2 of the Federal Act which requires a "written provision" for arbitration in a maritime or commerce contract, have held that fraud in the inducement of the arbitration provision itself is necessary. The doctrine was first enunciated in 1959 by the Second Circuit in *Robert Lawrence Company v. Devonshire Fabrics, Inc.*[33] It was adopted by the Supreme Court in 1967.[34]

Initially, the New York courts took a contrary view, holding that fraud is indivisible. Under this view, fraud as to any provision is fraud as to all, and, therefore, the arbitration provision would be vitiated by a showing that there had been fraud as to any provision of the contract.[35] However, in 1973, the New York Court of Appeals overruled a previous decision[36] and held that it was necessary to show fraud in the inducement of the arbitration provision itself.[37]

Underlying this dispute is the policy question, reminiscent of the judicial hostility to arbitration, whether or not the arbitrators themselves are to have the power to determine their own jurisdiction.[38] The bitter dissent of Mr. Justice Black in *Prima Paint Corporation v. Flood & Conklin Manufacturing Co.* makes clear that the crux of the issiue is judicial trust, or mistrust, of arbitration:

> The Court holds, what is to me fantastic, that the legal issue of a contract's voidness because of fraud is to be decided by persons . . . [who] need not even be lawyers, and in all probability will be non-lawyers, wholly unqualified to decide legal issues.
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> . . . .
>
> The only advantage of submitting the issue of fraud to arbitration is for the arbitrators. Their compensation corresponds to the volume of arbitration they perform. If they determine that a contract is void because of fraud, there is nothing further for them to arbitrate. I

33. 271 F.2d 402 (2d Cir. 1959).
34. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
35. Wrap-Vertiser Corp. v. Plotnick, 3 N.Y.2d 17, 143 N.E.2d 366, 163 N.Y.S.2d 639 (1957).
36. *Id.*
37. Weinrott v. Carp, 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973). *Contra* Atcas v. Credit Clearing Corp. of America, 212 Minn. 334, 197 N.W.2d 448 (1972).
38. Prima Paint v. Conklin & Flood Mfg. Co., 388 U.S. 395 (1967).

> think it raises questions of due process to submit to an arbitrator an issue which will determine his compensation.[39]

Shades of the "oust the courts of jurisdiction" argument! Justice Black also ignored, or was not aware, that in the vast majority of non-labor arbitrations held under the auspices of the American Arbitration Association, the arbitrators are unpaid volunteers. Furthermore, Justice Black's argument begs the question. In contracting to arbitrate their future disputes, the parties have shown clearly that they do not want the courts to decide them, but rather, arbitrators who are laymen and businessmen.

Another rationale for the *Prima Paint* decision, which was more clearly articulated in *Weinrott v. Carp,*[40] is that motions to stay arbitration for fraud in the inducement of the underlying contract, were becoming so frequent that "two of arbitration's primary virtues, speed and finality"[41] were being defeated. The *Weinrott* court left no doubt that "the avoidance of court litigation to save the time and resources of both the courts and the parties involved make this [the legislative policy to encourage arbitration] a worthwhile goal."[42]

Fraud in the inducement, therefore, is a question which involves not so much the language of the statute as whether or not the particular court accepts the legislative policy favoring arbitration. Where it does, the court will probably decide that fraud in the inducement of the arbitration provision itself is required. In the light of the continuing increase in crowded court dockets and the need to find alternatives to litigation for dispute resolution, it would appear that the courts should require fraud as to the arbitration provision itself. This would leave determination of that issue to the arbitrators and thereby keep the entire dispute, as well as the motion to stay arbitration, out of the courts. There is good reason to believe that the New Mexico Supreme Court will adopt this view, in light of its strong statement that:

> The announced policy of this State favors and encourages arbitration as a means of conserving the time and resources of the courts and the contracting parties . . . To this end the Legislature has assigned the courts a minimal role in supervising arbitration practice and procedures.[43]

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39. *Id.* at 407, 416.
40. 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973)'
41. *Id.* at 195, 295 N.E.2d at 47, 344 N.Y.S.2d at 853.
42. *Id.*
43. K. L. House Const. Co. v. City of Albuquerque, 91 N.M. 492, 493, 576 P.2d 752, 753 (1978).

C. Illegality and Public Policy

Where the substantive contract is itself illegal, the arbitration clause is unenforceable.[44] Even where illegality is not involved, if the underlying contract involves a breach of a fundamental public policy, as for example usury,[45] the arbitration provision is not enforceable. Arbitration provisions are not enforceable if a serious anti-trust claim must be determined. "The evil is that, if the enforcement of antitrust policies is left in the hands of arbitrators, erroneous decisions will have adverse consequences for the public in general, and the guardians of the public interest, the courts, will have no say in the results reached."[46] The decisions indicate a belief that the public policy embodied in the federal and state anti-trust statutes is so important that only courts are qualified to make decisions. This is true even in the private suits where the decision of an arbitrator would have no precedential value.

Events Subsequent to the Making of the Contract

Certain events occuring subsequent to the making of the contract to arbitrate may affect its enforceability. These involve issues of the meritoriousness of the dispute, statutory limitations, cancellation, and waiver. The general rule is that "all acts of the parties subsequent to the making of the contract which raise issues of fact or law, lie exclusively within the jurisdiction of the arbitrators."[47] The New Mexico Supreme Court appears to have adopted this doctrine by its holding that "the courts only decide the threshold question of whether there is an agreement to arbitrate. If so, the court should order arbitration."[48] The question of whether or not the dispute is meritorious is not for the court, but for the arbitrators, to decide.[49]

44. *In re* Kramer and Uchitelle, 288 N.Y. 467, 43 N.E.2d 493 (1942), holding that where the contract price had been made unlawful by supervening federal price regulation, the arbitration clause was unenforceable.

45. Durst v. Abrash 22 A.D.2d 39, 253 N.Y.S.2d 351, *aff'd.*, 17 N.Y.2d 445, 213 N.E.2d 887 (1964).

46. Aimcee Wholesale Corp. v. Tomar Products Inc., 21 N.Y.2d 621, 237 N.E.2d 223 (1968); *accord,* American Safety Equipment Corp. v. J. P. Maguire Co., 391 F.2d 821 (2nd Cir. 1968); Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971).

47. Lipman v. Haueser Shellac Co., 289 N.Y. 76, 80, 43 N.E.2d 817, 819 (1942). *See also* Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 174 N.E.2d 463 214 N.Y.S.2d 353 (1961); School District v. Del Bianco, 68 Ill. App.2d 145, 215 N.E.2d 25 (1966). Cases discussing the Federal act include Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978 (2d Cir. 1942) and Reconstruction Fin. Corp. v. Harrisons & Crosfield, 204 F.2d 366 (2d Cir. 1953).

48. K. L. House Const. Co. v. City of Albuquerque, 91 N.M. 492, 494, 576 P.2d 752, 754 (1978).

49. N.M. Stat. Ann. § 44-7-3 (1978) bars the Court from considering whether "the claim in issue lacks merit or *bona fides* or . . . [whether] . . . fault or grounds for claim . . . have not been shown." *Cf* N.Y. Civ. Prac. Law § 7501 which is comparable. There is no similar provision in the Federal statute.

The arbitrators must also decide the question of whether or not the underlying contract had been cancelled or terminated or had expired before the dispute arose. In *House v. City of Albuquerque,* the New Mexico Supreme Court held expressly that "any disputes pertaining to the performance of the contract even if they arise after the warranty has expired, are disputes which arise out of the contract and are therefore subject to arbitration."[50]

There is a conflict over the question of whether the expiration of the statute of limitations for a suit on the same cause of action, is a threshold question for the court or is for the arbitrators. The New York statute permits the issue to be raised on a motion to stay arbitration or, if not raised on such a motion or before the arbitrators, then on a motion to vacate the award.[51] The same section also provides that if the issue is raised before the arbitrators they "may, in their sole discretion, apply or not apply the bar."[52] The New York law further provides that the arbitrators' decision is not subject to review by the court on an application to confirm, vacate or modify the award.[53] The Federal and Uniform Acts do not contain any similar provision. Under the Federal Act, the issue has been held to be one for the arbitrators to decide.[54]

The right to arbitrate can be waived by participation in a lawsuit.[55] In a recent case the New Mexico Supreme Court apparently recognized the possibility that if a party to a suit took a position inconsistent with an intent to arbitrate the controversy, a waiver of the arbitration right may have occurred.[56] In that case, however, the court held that the initiation of a suit did not constitute waiver, as a matter of law. The only pleadings that had been filed were the complaint, a motion to dismiss, a first amended complaint and a motion to compel arbitration. The court did not determine whether waiver of arbitration is to be determined by the courts or by the arbitrators because that question was not presented in the trial court below.

Jurisdictional Matters Peculiar to the Federal Act

Two questions arise under the Federal Act. The first is whether federal jurisdiction exists; the second is whether the Federal Act has

50. K. L. House Const. Co. v. City of Albuquerque, 91 N.M. 492, 493, 576 P.2d 752, 753 (1978).

51. N.Y. Civ. Pract Law § 7502(b) (McKinney 1963).

52. *Id.*

53. *Id.*

54. Reconstruction Fin. Corp. v. Harrisons & Crosfield Ltd., 204 F.2d 366 (2d Cir. 1953). *Contra,* Har-Mar Inc. v. Thorsen and Thorshov, 300 Minn. 149, 215 N.W.2d 751 (1974), holding issue is for the Court.

55. Zimmerman v. Cohen, 236 N.Y. 15, 139 N.E. 764 (1923).

56. Southwestern Council of Indus. Workers v. Cancelosi, 17 N.M. Bar Bull. 2940 (Dec. 7, 1978).

created a national body of substantive law, or whether a district court under *Erie Railroad Co. v. Tompkins,*[57] must follow the arbitration law of the state in which it sits.

The Federal Act's jurisdiction is expressly limited to the reach of federal power. The Act applies to arbitration provisions in a "maritime transaction" or "a contract evidencing a transaction involving commerce."[58] In addition, section 4 of the Act provides that a motion to compel arbitration may be brought in "any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of the suit arising out of the controversy between the parties."[59] The Second Circuit has interpreted this provision to mean that one of the requisites for Federal jurisdiction, in addition to a maritime contract or one evidencing a transaction involving interstate commerce, is an independent basis of Federal jurisdiction, which means either diversity jurisdiction or other subject matter jurisdiction.[60] The jurisdictional issue is a threshold question for the court under the Federal Act.

What law–state or federal– does the District Court apply in determining the validity of a contract to arbitrate? At the time of passage of the Federal Act in 1925, the Supreme Court's decision in *Erie*[61] was still thirteen years away. Congress still believed that it had power to prescribe general rules of substantive law in diversity cases, a power outlawed by *Erie.*

In *Bernhardt v. Polygraphic Co.,*[62] the Supreme Court held that a contract involving commerce was necessary for a stay under section 3 of the Federal Act, although not expressly required. In so doing, it was enabled to hold that the Act did not apply to the contract in question. It held also that in a diversity case, absent a contract involving commerce, *Erie* compelled the district court to apply state substantive law on the question of validity and enforceability of the contract to arbitrate, because arbitration was outcome-determinative and therefore "substantive," within the meaning of *Erie.*

Judge Medina, in *Robert Lawrence Co. v. Devonshire Fabrics Inc.,*[63] held that where the contract involves commerce, the Federal Arbitration Act "is a declaration of national law equally applicable in State or Federal courts" and that "new substantive Federal rights

57. 304 U.S. 64 (1938).
58. 9 U.S.C. § 2 (1947).
59. 9 U.S.C. § 4 (1947).
60. Robert Lawrence Co. v. Devonshire Fabrics, 271 F.2d 402, 408-9 (2d Cir. 1959).
61. 304 U.S. 64 (1938).
62. 350 U.S. 198 (1956).
63. 271 F.2d 402 (1959).

were created."[64] Therefore, federal substantive law, not state law, governs, so long as there is also diversity or another independent basis for federal subject matter jurisdiction. This decision was based on a finding that the legislative history demonstrated that Congress based the Act on its power over maritime transactions and commerce. The Supreme Court in effect adopted this view in *Prima Paint.*[65] In that case, the Court held the Act to be a constitutional exercise of the power of Congress to "prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate."[66] Since the federal courts must follow the federal statute, then new substantive federal rights were created. That decision has important consequences. For example, given the jurisdictional requisites of commerce and diversity, the Federal court will enforce the contract to arbitrate even though it sits in a state which refuses still to enforce such contracts.

An intriguing question is presented when the motion to compel arbitration or to stay suit is brought in a state court, but where all the requirements for federal jurisdiction exist. If the Federal Act declares "national law equally applicable in State or Federal courts,"[67] is the state court bound to apply the Federal Act and the rules developed under it? The New York Court of Appeals has considered the question and has held that it is bound to apply the Federal Act because to do otherwise would "undermine the need for nationwide uniformity in the interpretation and application of arbitration clauses in foreign and interstate transactions."[68] Given the premise of a statute designed to create a uniform body of national law, this holding would appear to be correct.

Aside from questions of federal jurisdiction, then, the courts have followed the rule that, given a valid contract to arbitrate, all issues subsequent to the making of the contract are for the arbitrators. The New Mexico Supreme Court, in *House v. City of Albuquerque*[69] has indicated that it intends to follow that rule.

DISCOVERY

Under all three of the acts, discovery is extremely limited. The only statutory provision is contained in the Uniform Act which

64. *Id.* at 407-8.
65. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967).
66. *Id.* at 405.
67. 271 F.2d 402, 407 (1959).
68. Rederi v. Dow Chemical Co., 25 N.Y.2d 576, 580, 255 N.E.2d 775, 776, 307 N.Y.S.2d 660, 662 (1970).
69. K. L. House Const. Co. v. City of Albuquerque, 91 N.M. 492, 576 P.2d 752 (1978).

permits deposition only "of a witness who cannot be subpoenaed or is unable to attend the hearing."[70]

There are no provisions for discovery in either the New York or the Federal Act. Discovery under the Federal Act will not be permitted "as to the merits of a controversy . . . except, perhaps, upon a showing of true necessity because of an exceptional situation."[71] As one court put it:

> By voluntarily becoming a party to a contract in which arbitration is the agreed mode for settling disputes thereunder respondent chose to avail itself of procedures peculiar to the arbitral process rather than those used in judicial determinations. 'A main object of a voluntary submission to arbitration is the avoidance of formal and technical preparation of a case for the usual procedure of a judicial trial' . . . [A] party having chosen to arbitrate cannot . . . urge a preference for a unique combination of litigation and arbitration.[72]

The Report of the House Committee recommending the bill which became the Federal Act, stated that:

> It is particularly appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.[73]

In 50 years, we seem to have made little progress in eliminating the costliness and delays of litigation.

In the light of the crisis in litigation, due at least in part to the abuse of discovery procedures and to the proliferation of litigation, and in light of the renewed interest in arbitration as a means of avoiding the delays of litigation, the limitation on discovery in arbitration can help substantially to avoid the delays which plague litigation.

REVIEW OF ARBITRATORS' AWARDS

Once an award has been made, judicial review is extremely limited. Each of the statutes sets forth the grounds for vacating an award and all three are substantially identical.[74] The grounds for vacating an

70. N.M. Stat. Ann. § 44-7-7B (1978).

71. Penn Tanker Co. v. C.H.Z. Rolimpex, 199 F. Supp. 716 (S.D.N.Y. 1961). *Accord,* Lummus Co. v. Commonwealth Oil Ref. Co., 273 F.2d 613 (1st Cir. 1959); Katz v. Burkin, 3 A.D.2d 238, 160 N.Y.S.2d 159 (1957).

72. Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 361 (S.D.N.Y. 1957).

73. H.R. Rep. No. 96, 68th Cong., 1st Sess., quoted by the second circuit in Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942).

74. 9 U.S.C. § 10 (1947); N.M. Stat. Ann. § 44-7-12 (1978); N.Y. Civ. Prac. Law § 7511 (McKinney 1963).

award include that the award was procured by corruption, fraud or other undue means, that there was evident partiality by an arbitrator appointed as a neutral, or that there was corruption in any of the arbitrators or misconduct prejudicing the rights of a party. Vacating an award can also be based on a finding that the arbitrators exceeded their powers, that the arbitrators refused to postpone a hearing on good cause shown or refused to hear material evidence, or otherwise so conducted the hearing as to prejudice substantially the rights of a party. The final group of grounds to vacate include findings that there was no agreement to arbitrate, that the issue was not determined on motion, and that the party raising it did not participate in the arbitration hearing without raising the objection. "Upon judicial review of an arbitrator's award 'the court's function in . . . vacating an arbitration award is severely limited' . . . being confined to determining whether or not one of the grounds specified by 9 U.S.C. § 10 for vacation of an award exists."[75]

The arbitrators are the sole judges of law, fact and evidence, and their award may not be set aside for errors of law, failure to apply the rules of evidence, or giving inappropriate weight to the evidence. "Whether the arbitrator has misconstrued a contract is not open to judicial review . . . questions of fault or neglect are solely for the arbitrator's consideration . . . arbitrators are not bound by the rules of evidence . . ."[76] Although the New Mexico Supreme Court did not address this issue in *House v. City of Albuquerque,*[77] it appears likely that it will adopt the same rule when the issue is presented, in view of the universal acceptance of the doctrine. The doctrine seems to be embodied in the New Mexico Act which provides that, "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."[78]

Both the United States Supreme Court and the New York Court of Appeals appear to have developed an exception to the rule that the statutory grounds for vacating are exclusive. The Supreme Court

75. Office of Supply v. New York Navigation Co., 469 F.2d 377, 379 (2d Cir. 1972). *Accord* I/S Stavborg v. National Metal Converters Inc., 500 F.2d 424 (2d Cir. 1974); National R.R. Passenger Corp. v. Chesapeake and Ohio Ry., 551 F.2d 136 (7th Cir. 1977) *Accord* as to New York Act, Granite Worsted Mills Inc. v. Aaronson Cowen Ltd., 25 N.Y.2d 451, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969).

76. 350 U.S. 198, 203 n. 4 (1956). *Accord,* New York Act: Wilkins v. Allen, 169 N.Y. 494, 62 N.E. 575 (1902); Lentine v. Fundaro, 29 N.Y.2d 382, 385, 278 N.E.2d 633, 635, 328 N.Y.S.2d 418, 421 (1972); Weinrott v. Carp, 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973); Uniform Act: Ramonas v. Kerelis, 102 Ill. App.2d 262, 243 N.E.2d 711 (App. Ct. 1968); Fischer v. Guaranteed Concrete Co. 276 Minn. 510, 151 N.W.2d 266 (1967).

77. 91 N.M. 492, 576 P.2d 752 (1978).

78. N.M. Stat. Ann. § 44-7-12A(5) (1978).

has stated that: "In unrestricted submissions . . . the interpretations of the law by the arbitrators in contrast to *manifest disregard* are not subject, in the Federal courts, to judicial review for error of interpretation."[79] However, "this judicially created addition to the proscriptions of 9 U.S.C. § 10 is 'severely limited' "[80] and a "clearly erroneous interpretation" of the contract is not grounds for vacating.[81] The New York Court of Appeals has held that where the award is "completely irrational," it may be vacated.[82] But errors of law, fact, evidence, or contract interpretation do not constitute complete irrationality.[83] Both the United States Supreme Court and the New York Court of Appeals apparently proceed on the theory that "manifest disregard," or a "completely irrational" award, is one which exceeds the power of the arbitrators or otherwise evidences misconduct.[84]

It is not clear whether or not the "manifest disregard" and "completely irrational" tests are the same, although one Second Circuit Judge has indicated that they may be.[85] As yet, neither court has indicated what constitutes "manifest disregard" or "complete irrationality" although both the Second Circuit and New York Court of Appeals have indicated what is not included.[86]

In any event, subject to the "manifest disregard" or "completely irrational" tests, it is clear that judicial review of an arbitrator's award is limited to the statutory grounds and that errors of construction, of law, of admissibility of evidence, and of fact, are not grounds for vacating an award.

The reasons for this judicial restraint in reviewing arbitrators' awards go to a congruence of the convenience of the court, public policy, and intention of the parties. So far as the courts are concerned, the more disputes which are arbitrated, the clearer the court docket can remain. Public policy favoring speedy and less expensive

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79. Wilko v. Swan, 346 U.S. 427, 436-37 (1953) (emphasis added).

80. Office of Supply v. New York Navigation Co. Inc., 469 F.2d 377, 380 (2d Cir. 1972).

81. I/S Stavborg v. National Metal Converters Inc., 500 F.2d 424, 432 (2d Cir. 1974).

82. Lentine v. Fundaro, 29 N.Y.2d 382, 385, 278 N.E.2d 633, 635, 328 N.Y.S.2d 418, 422 (1972); Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 336, 174 N.E.2d 463, 466, 214 N.Y.S.2d 353, 357; National Cash Register Co. v. Wilson, 8 N.Y.2d 377, 383, 171 N.E.2d 302, 305, 208 N.Y.S.2d 951, 955 (1960).

83. Lentine v. Fundaro, 29 N.Y.2d 382, 385, 278 N.E.2d 633, 635, 328 N.Y.S.2d 418, 42 (1972) and cases cited therein.

84. *Id.*

85. *See* Marcy Lee Mfg. Co. v. Cortley Fabrics Co., 354 F.2d 42 (2d Cir. 1965). *See also* I/S Stavborg v. National Metal Converters Inc., 500 F.2d 424, 431 (2d Cir. 1974) which contains a discussion of this question.

86. *See* notes 80 to 85, *supra.*

determination of disputes is satisfied. So far as the intention of the parties is concerned, it is clear that a businessman who has agreed to arbitrate has expressed a preference for having businessmen decide disputes, so as to avoid the "formal and technical . . . procedure of a judicial trial,"[87] and this preference should be respected.

CONCLUSION

The New York and Federal Acts resulted from the needs of the large commercial and shipping interests, for a method of quick, speedy, less expensive non-judicial resolution of commercial disputes. The maritime and textile industries in particular have, for almost 50 years, utilized arbitration as the almost-exclusive method of dispute resolution. It is not surprising, therefore, that the overwhelming majority of decisions have arisen from the large commercial and maritime centers. In recent years, however, there has been a marked trend throughout the country toward the use of arbitration. It has become the preferred method of dispute resolution in the textile and construction industries and in collective bargaining contracts.

Why, then, is the arbitration provision not a standard part of the "boiler plate" in all commercial contracts? And when it is, why do both parties to the contract ignore it, and litigate?

One answer which has been suggested is to blame it on the lawyers. The charge is that most lawyers are afraid to use arbitration because they are unfamiliar with the law and the practice. Whether or not this charge be true, there would seem to be a duty on the profession to familiarize itself with both the law and the practice of arbitration and to recommend it to clients. Arbitration can hardly be said to be an experiment. The fact that large industries continue to utilize it should be proof enough that it can be a satisfactory method. The need to keep most commercial disputes out of the courts and to obtain a speedy, economical and fair alternative method of dispute resolution, makes it imperative that lawyers strongly recommend its use to clients.

After 50 years, it is time that the profession gave heed to the "much agitation against the costliness and delays of litigation . . . [which] . . . can be largely eliminated by agreements for arbitration."[88]

87. 1 Wigmore, Evidence, § 4(e) (3d ed, 1940), quoted with approval in Commercial Solvents Corp. v. Louisiana Liquid Fertilizer Co., 20 F.R.D. 359, 361 (S.D.N.Y. 1957).

88. H.R. Rep. No. 96, 68th Cong. 1st Sess.