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COMMENTS: ARBITRATION-INCORPORATION OF ARBITRATION CLAUSE BY GENERAL REFERENCE IN CONTRACT TO TRADE ASSOCIATION RULE

COMMENTS

ARBITRATION—INCORPORATION OF ARBITRATION CLAUSE BY GENERAL REFERENCE IN CONTRACT TO TRADE ASSOCIATION RULES.—It is the right of the parties in New York to agree that any dispute between them shall be submitted to arbitration,[1] and that they shall have no recourse to the courts until after such an arbitration.[2] Since, however, contracts to arbitrate presuppose an agreement to forego the right to resort to the courts for redress, a contract to arbitrate, which is disputed, will be subjected to strict judicial construction, in order that the parties may not be deprived of their constitutional right to seek redress in the courts.[3]

"No one is under a duty to resort to arbitration unless by clear language he has so agreed."[4] If a party wishes to bind another to an agreement to arbitrate future disputes, such purpose should be accomplished in a way that each party to the arrangement will fully and clearly comprehend that the agreement to arbitrate exists and binds the parties thereto.[5]

Clearly expressing the intent to arbitrate disputes under a contract has been a problem in those cases involving the incorporation by reference into the primary contract of collateral instruments which contain rules or provision for arbitration of such disputes.[6] Generally, where a writing refers to another document or set of rules, that other instrument or so much of it as is referred to, is to be interpreted as part of the writing.[7] The signer of a deed or other instrument expressive of a jural act, is conclusively bound thereby; that his mind never gave assent to the terms expressed is not material,[8] and he is conclusively presumed to know its contents.[9] Nevertheless, in *Bachmann-Emmerich & Co., Inc.* v. *S. A. Wenger & Co., Inc.*,[10] a case involving a dispute over a contract for the sale of raw silk, the Appellate Division affirmed an order denying compulsory arbitration, holding that the clause, "All sales are governed by the raw silk rules adopted by the Silk Association of America", did not show the intent of the parties to be bound by an arbitration provision contained in those rules.

On the basis of the *Bachmann* case it would appear that the parties to

[1] N. Y. CIV. PRAC. ACT § 1448.

[2] Wallace v. German-American Insurance Co., 41 Fed. 742 (C. C. N. D. Iowa 1882).

[3] General Silk Importing Co., Inc. v. Gerseta Corp., 200 App. Div. 786, 194 N. Y. Supp. 2d 15 (1st Dep't 1922); *aff'd* 234 N. Y. 513, 138 N. E. 427 (1922).

[4] Lehman v. Ostrovsky, 264 N. Y. 130, 132, 190 N. E. 208, 209 (1934).

[5] Arthur Philip Export Corp. v. Leathertone, 275 App. Div. 102, 87 N. Y. Supp. 2d 665 (1st Dep't 1949). *See* Matter of Rosenshine, 199 Misc. 984, 102 N. Y. S. 2d 3 (Sup. Ct. N. Y. Co. 1950).

[6] See note 3 *supra*.

[7] 3 WILLISTON, CONTRACTS (Rev. Ed. § 628); Newburger v. American Surety Co., 242 N. Y. 134, 125 N. E. 155 (1926).

[8] Pimpinello v. Swift, 253 N. Y. 159, 170 N. E. 530 (1930).

[9] Metzger v. Aetna Insurance Co., 227 N. Y. 441, 125 N. E. 815 (1920).

[10] 204 App. Div. 282, 197 N. Y. Supp. 879 (1st Dep't 1922).

a contract would not be bound to arbitrate disputes arising therefrom when the contract did not provide for arbitration, but incorporated by reference a collateral instrument which contained provision for arbitration. Arbitration was obtained, however, in *Level Export Corp.* v. *Wolz, Aiken & Co.*,[11] which involved a dispute between the plaintiff-buyer and defendant-seller over a contract for the sale of fabric. The contract contained a clause that, ". . . this salesnote is subject to the provisions of the Standard Cotton Textile Salesnote which by this reference, is incorporated as a part of this agreement and together herewith constitutes the entire contract between buyer and seller." One of the rules in the Standard Cotton Textile Salesnote was a provision for arbitration. In denying plaintiff's motion for a stay of arbitration, the court distinguished the case before it from the *Bachmann* case, holding that the clause which incorporated the Standard Cotton Textile Salesnote could not more clearly express an agreement to the arbitration provision contained in the incorporated Salesnote. It would now appear that if a contract uses such nice language as, "by this reference we do hereby incorporate as part of this agreement" then the parties are put on notice as to the incorporated collateral instrument, and are bound by the provisions therein; whereas, if the parties merely state, "all sales are governed by", or "all sales are made subject to" a collateral instrument, the parties are not put on notice as to the collateral instrument and are not bound by a provision for arbitration contained therein. A strong dissent in the *Level* case[12] urges that the legal effect of the language in the contract involved in that case is identical with the legal effect of the language used in the *Bachmann* and *General Silk* cases.[13]

The seemingly untenable distinction between the contract involved in the *Level* case, and the contract involved in the *Bachmann* case, has been acknowledged in a recent case,[14] where the court suggested that if the incorporation clause of the *Level* contract[15] had been set forth in the contract of the case before it, then arbitration would undoubtedly have been the exclusive remedy.[16] The contract in question therein contained a clause that, "This contract is also subject to the Cotton Yarn Rules of 1938 as amended." One of these rules was a provision for arbitration. An order denying a stay of arbitration was reversed, because the language making the contract subject to the Cotton Yarn Rules failed to show with sufficient definiteness, that the minds of the parties agreed on the arbitration provision contained therein.

It would thus appear that the New York courts have made a strict but tenuous distinction between "words of incorporation" as set forth in

[11] 305 N. Y. 82, 111 N. E. 2d 218 (1953).

[12] *Id.* at 88, 111 N. E. 2d 218, 221.

[13] Bachmann-Emmerich & Co., Inc. v. S. A. Wenger & Co., Inc., *supra* note 10; General Silk Importing Co., Inc. v. Gerseta Corp., note 5 *supra*.

[14] Riverdale Fabrics Corp. v. Tillinghast-Stiles Co., 306 N. Y. 288, 118 N. E. 2d 104 (1954).

[15] See note 11 *supra*.

[16] See note 14 *supra*.

the contract in the *Level* case,[17] and "words of inclusion" as set forth in the contract involved in the *Bachmann* case.[18] The courts seem to feel that the latter merely states the connection of some instrument collateral to the primary contract, but does not show an agreement to the arbitration clause therein contained.[19] It is with no surprise that the order granting a stay of proceedings pending arbitration was reversed in the recent case of *Weiner* v. *Mercury Artists Corp.*[20]

There, defendant contracted to supply plaintiff with an orchestra which contract contained a clause providing that ". . . the rules of the American Federation of Musicians are made part of this contract". One of the AFM rules provides for arbitration of all disputes. Plaintiff began an action at law for breach of the contract, whereupon defendant moved to stay the legal proceedings pending arbitration, to which it claimed it was entitled. The trial court granted the motion, but on appeal, the Appellate Division reversed, vacating the order.

Since the Court of Appeals had already held in the *Level* case that the words, "we incorporate by reference", are sufficient words to show the intent of the parties to be bound by an arbitration provision contained in these rules, whereas the words "we agree to be governed by" or, "this contract is subject to", are not words sufficient to show the clear intent of the parties to be bound by arbitration provisions in a collateral instrument, the Appellate Division was consistent in holding that the words of incorporation in the *Weiner* case did not show the intent of the parties to be bound by an arbitration provision contained in the rules.

There appear to be many problems, therefore, which confront the legal draftsman in this area. However, the attorney who seeks to provide for arbitration, by incorporating by reference into the contract some collateral instrument which contains an arbitration provision, may be guided by the majority opinion of the Court of Appeals as set forth by Judge Van Voorhis in *Riverdale Fabrics* v. *Tillinghast-Stiles Co.:*

"If part of the care exhibited in drafting the [trade] rules had been used in mentioning arbitration in the contract, there would be no difficulty. . . . Instead, the form of words favored appears to have been designed to avoid any resistance that might arise if arbitration were brought to the attention of the contracting parties as the exclusive remedy in case of disputes."[21]

[17] See note 11 *supra.*

[18] Bachmann-Emmerich & Co., Inc. v. S. A. Wenger & Co., Inc., *supra* note 12; General Silk Importing Co., Inc. v. Gerseta Corp., *supra* note 5. In both of the above cases, the contract stated, "All sales are governed by the raw silk rules. . . ."

[19] *See* Matter of Hub Industries, 183 Misc. 767, 769, 54 N. Y. Supp. 2d 106, 108 (Sup. Court 1944): "No particular form of words is necessary to the making of a valid agreement for arbitration. It is true that if the word arbitration had been used, probably no controversy would have arisen, the use of that word, however, is unnecessary if the court is able to determine from the agreement that it was the intention of the parties that the controversy would be settled by arbitration."

[20] 284 App. Div. 108, 130 N. Y. S. 2d 570 (1st Dep't 1954).

[21] Riverdale Fabrics v. Tillinghast-Stiles Co., *supra* note 14 at 292, 118 N. E. 2d 104, 106.

FEDERAL-STATE RELATIONS IN LABOR LAW: RECENT DEVELOPMENTS.—The Supreme Court of the United States, in *Weber* v. *Anheuser-Busch, Inc.*,[1] has further dealt with the conflict between the states and the federal government over jurisdiction in regulating labor union activity. The court held that where a union's conduct had been the subject of an unfair labor practice complaint before the National Labor Relations Board, a state court was subsequently without power to regulate the conduct, despite the fact that the Board had previously dismissed the complaint for failure to state a federal unfair labor practice, and notwithstanding that the conduct violated a state statute.

The controversy grew out of a work-assignment dispute between the International Association of Machinists and the United Brotherhood of Carpenters, both craft unions representing different groups of employees in the same large St. Louis brewery.[2] Each of the unions claimed that certain millwright work should be awarded to its members, and when the machinists' claim was refused, it called a strike to enforce its demands. At the time, the only millwright work at the plant was being done by a contractor using machinists' labor.

The day after the strike began, Anheuser-Busch filed a charge of an unfair labor practice against the machinists, under § 8(b)(4)(D) of the Taft-Hartley Act.[3] That subsection provides in pertinent part that it shall be an "unfair labor practice for a labor organization . . . to engage in, or to induce or encourage the employees of any employer to engage in a strike . . . where the object thereof is . . . forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . rather than to employees in another labor organization . . . ."

The NLRB quashed the notice of hearing in this case, reasoning that the machinists could not have been demanding the assignment of "particular work" within the meaning of this subsection, inasmuch as no millwright work was being performed by other than machinists' labor at the time, and that the union was not demanding that the contractors give their work to its members.[4]

After the employer had filed its charge, but before the NLRB had dismissed it, the employer brought suit in the state court for an injunction. Alleging that the union's picketing prevented the movement of railroad cars into and out of the brewery premises, the employer maintained that

[1] 348 U. S. 468, 75 S. Ct. 480, 99 L. Ed. 386 (1955).

[2] The work-assignment dispute between these two unions is of many years' standing, and gave rise to criminal prosecution which culminated in United States v. Hutcheson, 312 U. S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941), a landmark decision which in effect made the Sherman Act inapplicable to concerted union activity carried on for union objectives. See Teller, *Federal Intervention in Labor Disputes and Collective Bargaining—The Hutcheson Case,* 40 MICH. L. REV. 24 (1941).

[3] Labor Management Relations Act, 61 STAT. 140 (1947), 29 U. S. C. § 158(b)(4)(D) (1952).

[4] District No. 9, International Association of Machinists, 101 N. L. R. B. 346 (1952).

the picketing constituted an unlawful secondary boycott under the common law of Missouri, and also an illegal conspiracy in restraint of trade under a state statute.[5]

The trial court granted a permanent injunction on the authority of the state statute. The Missouri Supreme Court affirmed,[6] after the Board's dismissal of the unfair labor practice charge, referring to the Board's ruling as a determination that "no labor dispute existed between these parties and that no unfair labor practices were there involved."[7] The state Supreme Court reasoned that inasmuch as no federal unfair labor practices were involved, the state court retained power to enforce its restraint-of-trade statute, and its jurisdiction was not pre-empted by federal legislation.

On certiorari to the Supreme Court of the United States, the judgment of the Missouri Court was reversed, upon the ground that the state court was without jurisdiction to entertain the injunction suit. The high court proceeded on the theory that the nature of the controversy brought it within that area over which Congress had given the NLRB exclusive jurisdiction.

The *Weber* case is the latest in a chain of decisions in which the Supreme Court has sought to establish a dividing line between state and federal jurisdictions, which Congress has suggested in general terms only. On one side of the line are those situations involving violence or other clear illegality which are concededly within the police power of the state to regulate.[8] On the other side of the line are those acts and practices expressly protected or forbidden by federal legislation, which the state courts, under the doctrine of pre-emption, are powerless to adjudicate.[9] In two recent cases, however, the Court has taken seemingly opposite positions in reviewing state court actions in situations where, as here, there were allegedly present violations of the Taft-Hartley Act.

In 1954, the Court decided in *Garner v. Teamsters Union*,[10] that Pennsylvania could not enjoin under its own labor statute conduct which had been made an unfair labor practice under the federal statute. It is to be noted that although this was the ultimate issue as presented to the Supreme Court by the briefs and arguments, it was not the issue in the trial court, and did not reflect the actual facts in the case.

The alleged wrongful conduct consisted of organizational picketing of Garner's premises by a union representing some, but less than a majority,

[5] R. S. Mo., § 416.010, V. A. M. S. The complaint also charged that the union conduct violated certain sections of the Taft-Hartley Act, but the decision in the case did not turn upon that fact.

[6] 364 Mo. 573, 265 S. W. 2d 325 (1954).

[7] *Id.* at 584, 265 S. W. 2d at 332.

[8] Allen-Bradley Local v. Wisconsin Employment Relations Board, 315 U. S. 740, 62 S. Ct. 820, 86 L. Ed. 1154 (1942); International Union v. Wisconsin Employment Relations Board, 336 U. S. 245, 69 S. Ct. 516, 93 L. Ed. 651 (1949).

[9] Hill v. Florida, 325 U. S. 538, 65 S. Ct. 1373, 89 L. Ed. 1782 (1945); International Union v. O'Brien, 339 U. S. 454, 70 S. Ct. 781, 94 L. Ed. 978 (1950).

[10] 346 U. S. 485, 74 S. Ct. 161, 98 L. Ed. 228 (1954).

of his employees. The union contended in the trial court that the picketing, if wrongful at all, constituted an unfair labor practice under § 8(b)(1)(A) of the Taft-Hartley Act, and therefore the state court was without jurisdiction to issue an injunction sought by the employer. The trial court held, on the authority of two cases in point decided by the NLRB,[11] that the conduct did not constitute an unfair labor practice within the meaning of the Act. The trial court then found that the picketing was an unjustified act, and quoting the oft-repeated language of *Dorchy* v. *Kansas*,[12] granted the injunction.[13] No reliance on the Pennsylvania Labor Relations Act[14] appears in the trial court decision.

On appeal, the Pennsylvania Supreme Court reversed,[15] holding that the power of the NLRB to adjudicate unfair labor practices was paramount, hence the state courts lacked jurisdiction to hear the controversy. This rationale overlooked the basis of decision in the trial court, that the NLRB, the tribunal charged with interpreting and enforcing the federal Act, had already twice held identical conduct not to constitute an unfair labor practice.[16] This rationale nevertheless formed the basis of decision in the United States Supreme Court, which affirmed the state Supreme Court's ruling.[17]

Several months later, the Supreme Court decided *United Construction Workers* v. *Laburnum Construction Corp.*[18] In that case, the employer brought a tort action for money damages in a state court against a union. The wrongful conduct alleged was the coercive and intimidating demands upon the plaintiff's employees that they join the union, in violation of their rights under § 7 of the Taft-Hartley Act. When the employees refused to join, the union retaliated with threats and intimidations so violent that the employer was forced to abandon work in the area. Upon a showing of substantial loss, the plaintiff employer was awarded a money judgment, which was affirmed on appeal.[19]

When the *Laburnum* case came to the Supreme Court, the Court assumed in its decision that this conduct, like the conduct involved in the *Garner* case, violated § 8(b)(1)(A). Nevertheless, it sustained the state court action on the ground that regardless of the status of the conduct as a federal unfair labor practice, the State was not prohibited from protecting the private interests of the parties by use of the common law tort action, a remedy

[11] Watson's Specialty Store, 80 N. L. R. B. 91 (1948); *aff'd sub nom.* Carpenters Union v. N. L. R. B., 341 U. S. 707, 71 S. Ct. 966, 95 L. Ed. 1309 (1951); Ryan Construction Corp., 85 N. L. R. B. 76 (1952).

[12] 272 U. S. 306, 311, 47 S. Ct. 86, 89, 71 L. Ed. 248, 269 (1926). "The right to carry on business be it called liberty or property has value and to interfere with this right without just cause is unlawful."

[13] 62 Dauph. Co. (Pa.) Rep. 339 (1952).

[14] Pa. Laws 1937, 1172; Purdons Pa. Stat. Ann., 1952, Tit. 43, § 211.6.

[15] 373 Pa. 19, 94 A. 2d 893 (1952).

[16] See note 11, *supra*.

[17] See note 10, *supra*.

[18] 347 U. S. 656, 74 S. Ct. 833, 98 L. Ed. 1025 (1954).

[19] 194 Va. 872, 75 S. E. 2d 694 (1953).

for which the Taft-Hartley Act made no provision. This decision seemed to represent a modification of the rule of the *Garner* case, in that in the *Laburnum* case the Court allowed the redress of a private wrong in the state court, although the wrong coincidentally constituted an unfair labor practice. In affirming the state court's judgment, the Supreme Court appeared to be reaffirming its position taken in earlier cases, that Congress designedly left open an area for state control,[20] and that consequently the state's own determination of its public policy should be allowed to govern the adjudication of private rights,[21] especially when the wrongs involved were governable by the state or entirely ungoverned.[22]

The decision in the *Weber* case seems to re-commit the Court to the principles of the *Garner* case and its predecessors,[23] by holding that even where the NLRB has inferentially decided that no unfair labor practices have been committed,[24] the investiture of that tribunal by Congress with exclusive jurisdiction to determine such controversies bars state intervention unless violence or other wrongful conduct clearly warrants the exercise of its police powers.[25]

[20] See note 8, *supra.*

[21] Teamsters Union v. Hanke, 339 U. S. 470, 70 S. Ct. 773, 94 L. Ed. 995 (1950).

[22] International Union v. Wisconsin Employment Relations Board, see note 8, *supra.*

[23] Hill v. Florida, *supra* note 9; Amalgamated Ass'n v. Wisconsin Employment Relations Board, 340 U. S. 383, 71 S. Ct. 359, 95 L. Ed. 364 (1951).

[24] See note 3, *supra.*

[25] See note 8, *supra.*