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*"My keenest interest is excited, not by what are called great questions and great cases, but by little decisions which the common run of selectors would pass by because they did not deal with the Constitution or a telephone company, yet which have in them the germ of some wider theory, and therefore of some profound interstitial change in the very tissue of the law."*—OLIVER WENDELL HOLMES, COLLECTED LEGAL PAPERS (1920) 269.

## Comments

### STATE ARBITRATION STATUTES APPLICABLE TO LABOR DISPUTES

Arbitration is not a new concept in the law. Some form of arbitration has been in use for centuries and quite probably precedes the law.<sup>1</sup> Cases on the subject have been reported as early as the thirteenth century.<sup>2</sup> By reason of a dictum by Lord Coke, *Vynior's Case* has become the leading case on common law arbitration.<sup>3</sup> His holding in that case that agreements to arbitrate are revocable at the will of either

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1. UPDEGRAFF AND MCCOY, *ARBITRATION OF LABOR DISPUTES* 4 (1946). Also, Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. of Pa. L. Rev. 132-146 (1934).

2. UPDEGRAFF AND MCCOY, *ARBITRATION OF LABOR DISPUTES* 5 (1946).

3. *Vynior's Case*, 4 Co. Rep. 302 (K.B. 1609).

party has been followed to the present day. An action at law could be maintained for the breach of the agreement but merely nominal damages would be awarded.<sup>4</sup> However, if an award was given, either an action at law or a suit in equity could be brought to enforce the award.<sup>5</sup> The reasons for the distinction have been the subject of much comment and speculation.<sup>6</sup> There is a great deal of case law on commercial arbitration,<sup>7</sup> and the rules formed constitute the major source of the law applied to labor arbitration today.

It is the purpose of this comment to determine what has been done in the way of arbitration statutes that may apply to the enforcement of grievance arbitration. There are many practical advantages to arbitration, and legislatures in almost every state have enacted some laws pertaining to enforcement of an agreement to arbitrate.<sup>8</sup> Statutes for a long time were confined to enforcement of agreements to submit existing disputes to arbitration. The next step forward was not taken until New York adopted the Draft Act of the American Arbitration Association in 1920, in which methods were provided for the enforcement of agreements to arbitrate matters which would arise in the future as well as existing disputes.<sup>9</sup> At this time the only concern of the drafters was in regard to commercial arbitration. This step forward was not followed four years later by the Commissioners of Uniform State Laws. Their pro-

4. 6 C.J.S. 180.

5. Dowell, *Judicial Enforcement of Arbitration Awards in Labor Disputes*, 3 *RUTGERS L. REV.* 65-93 (1944); *Arbitration of Labor Disputes*, 43 *ILL. L. REV.* 678 at 690 (1949).

6. Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 *U. OF CHI. L. REV.* 233 at 236 (1949); Sayre, *Development of Commercial Arbitration Law*, 37 *YALE L.J.* 595 (1928); Wolaver, *The Historical Background of Commercial Arbitration*, 83 *U. OF PA. L. REV.* 132-146 (1934).

7. See 6 C.J.S., *Arbitration and Award*, 148 to 292. A short summary of the common law principles is 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. Insofar as a State arbitration statute fails to state a correlative rule and is not in conflict with any of these common-law rules, it may be said that an arbitration proceeding under such statute is governed also by these rules." *U. S. DEPARTMENT OF LABOR, LABOR ARBITRATION UNDER STATE STATUTES* 3 (1943).

8. See summary, Gregory and Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 *U. OF CHI. L. REV.* 233 at 240 (1949).

9. *NEW YORK CIV. PRAC. ACT* §§ 1448-69 (Thompson, Part II, 1939).

posed statute provided only for enforcement of agreements to arbitrate existing disputes.<sup>10</sup> There are various reasons why enforcement of future disputes were disfavored. The major idea was that the stronger party at the time of making the contract would also be able to declare who could construe it.<sup>11</sup> Such clauses were thought by some to be prejudicial to the rights of citizens to resort to the courts for determination of their rights.<sup>12</sup>

Arbitration statutes are either specifically labor arbitration statutes or general arbitration statutes which may apply to either labor or commercial arbitration though perhaps intended solely for the latter. There are many general arbitration statutes, some of which expressly exclude labor contracts. Many of these general statutes apply only to existing disputes and are thus, as will be pointed out, of no value in grievance arbitration. Many have been limited to justiciable as opposed to non-justiciable disputes.<sup>13</sup>

Labor arbitration statutes are of varying types. "The majority of such statutes are either a part of, auxiliary to, or intended for use in connection with, state statutes providing for mediation and conciliation."<sup>14</sup> Some statutes are applicable to certain industries or and public utilities. Some of these statutes may be of the compulsory arbitration type. The statutes that are in conjunction with statutes providing for mediation and conciliation contemplate intervention on the part of the state, either as the state desires or when called in by the parties. There are many statutes merely of the "promotion" type where it is the duty of a state officer or agency to promote the voluntary mediation and conciliation of labor disputes and, if necessary, the arbitration of such disputes. They may be permanent or temporary arbitration tribunals or no specified tribunals at all. Frequently in connection with promotional efforts there

10. See discussion of Uniform Arbitration Act in REPORTS OF A.B.A. Vol. 1, p. 582 (1952) and a copy of the act at p. 591. Only four states adopted this act and it has been dropped by the Commissioner. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, p. 73 (1943).

11. 17 U. OF CHI. L. REV., *op. cit. supra*, 233 at 239.

12. *Cocalis v. Nazlides*, 308 Ill. 152, 139 N.E. 95 (1923).

13. Plock, *Methods Adopted by States for Settlement of Labor Disputes Without Original Recourse to Courts*, 34 IOWA L. REV. 430 (1949). See summary, pp. 433-36.

Missouri has a general arbitration statute that is limited to existing controversies and also provides that the existing controversy must be the "subject of an action." MO. REV. STAT. § 435.020 (1949). Therefore any arbitration for the provisions of a new contract is clearly excluded. Grievance arbitration may or may not be a subject of an action but would probably be excluded from the provisions of this chapter on the grounds that it was not an existing controversy where the agreement to arbitrate was made. However, stipulations to arbitrate a grievance after it arises may well come within the application of the statute.

For a Missouri case holding that the statute did not apply to a labor arbitration which could not be the subject of an action, see *Continental Bank Supply Co. v. International Brotherhood of Bookbinders, Local No. 243, Mexico, Mo.*, 239 Mo. App. 1247, 201 S.W. 2d 531 (1947). The case also held that common law arbitration is still possible in Missouri. See, also, Hensley, *Arbitration in Missouri*, 13 MO. L. REV. 170 (1948).

14. *Id.* at 437.

are provisions for publicity which may be of some influence on the parties. Almost all of the above statutes are "dead letters."<sup>15</sup>

Sixteen states and the federal government have enacted arbitration statutes patterned after the Draft Act.<sup>16</sup> Eight of these states and Congress have excluded labor-management contracts from the operation of their statutes.<sup>17</sup> There is a question as to the present status of the United States Act. The question is whether the exclusion provision in Section 1 applies through the act or merely applies to the definitions of "commerce" and "maritime transaction" which terms are not used in the later stay of proceedings section.<sup>18</sup> Seven other statutes should be mentioned briefly before proceeding to the discussion of the details of the statutes. The first of these is Delaware, which has the only arbitration statute that covers only collective labor agreements and makes future disputes clauses valid and enforceable.

"Arbitration: Parties to a labor dispute, or employers or associations of employer and unions, may voluntarily agree in writing to have an arbitrator or arbitrators named to arbitrate all or any part of such dispute or differences arising in the administration or interpretation of any such agreement, and on refusal of any party to proceed with the agreement, such agreement shall be enforceable in the Court of Chancery. The Court of Chancery shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in any such arbitration shall be as provided by the rules of arbitration adopted by the American Arbitration Society. The parties shall be bound by the award of the arbitrator, unless it is shown that the award was induced by or was the result of fraud on the part of any party or of the arbitrator or arbitrators. The Court of Chancery shall enforce the provisions of this Section."<sup>19</sup>

The statute is very short, and the many questions left unsettled may be answered perhaps by reference to the rules of the American Arbitration Society. The second statute is from Washington which in 1943 enacted a statute similar to the Draft Act but excluded labor contracts unless such agreement specifically provided it should be

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15. 17 CHI. L. REV., *op. cit. supra* at 245.

16. *Id.* at 241. ARIZ. CODE ANN. § 27-309 (1931); CAL. CODE CIV. PROC. Part 3, tit. x, § 1280 (Deering's 1953); COLO. STAT. ANN., Rules of Civil Procedure 109-10 (Michie, 1935); CONN. GEN. STAT. § 8151 (1949); LA. GEN. STAT. ANN. § 405 (1939); Mass. Ann. Laws 1933, c. 251, § 14; MICH. STAT. ANN. § 27.2483 (Henrosa, 1943); N. H. Rev. Laws 1942, c. 415; N. J. Session Law Serv. 1951, tit. 2A, c. 24; N. Y. CIV. PRAC. ACT. §§ 1448-69 (Thompson, Part II, 1939); OHIO CODE ANN. §§ 12148-1—12148-17 (Trockmorton, 1949); Ore. Comp. Laws Ann. 1940, §§ 11-601, 602; PA. STAT. ANN. tit. 5, § 161 (Purdon, 1930); R. I. Gen. Laws 1938, c. 475, § 1; Wash. Law 1943, c. 138; WIS. STAT. § 298.01 (Brossard, 1947).

17. *Ibid.* Arizona, Michigan, New Hampshire, Ohio, Oregon, Rhode Island and Wisconsin. Louisiana made a similar exclusion in 1948. La. Act. 377 of 1948, amending La. Act 262 of 1928 as amended by La. Act 218 of 1932. See 9 LA. L. REV. 18 (1948).

18. 9 U.S.C. 1. *The U.S. Arbitration Act and Collective Bargaining Agreements*, 4 ARB. J. (N.S.) 41 (1949); 17 CHI. L. REV. *op. cit., supra* n. 8, 259. Katz, Jaffe, *Enforcing Labor Arbitration Clauses by § 301, Taft-Hartley Act*, 8 ARB. J. (N.S.) 80 (1953).

19. Del. Laws 1947, c. 196, § 7.

subject to the provisions of the act.<sup>20</sup> An amendment in 1947 contained the exclusion but provided that as to these labor agreements "the parties thereto may provide for any method and procedure for the settlement of existing or future disputes and controversies, and such procedure shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement."<sup>21</sup> Query whether this means that labor controversies may *not* be arbitrated under the provisions of the act, or that the parties *may* designate arbitration under this act.<sup>22</sup>

Colorado's position is somewhat confused. The State Labor Relations Act provides that parties to a labor disputes may agree in writing to have the Commission act as arbitrators or to name arbitrators to arbitrate all or part of such dispute.<sup>23</sup> Procedure is to be governed by the rules of arbitration under Colorado Rules of Civil Procedure which seems to contemplate existing disputes. At least, it does provide that the controversy must be the subject of a civil action. Assuming that the Labor Relations Act contemplates future disputes and the Civil Procedure statute is to be looked to only for purposes of procedure, Colorado would seem to have sufficient statutory basis for purposes of grievance arbitration enforcement. The procedure rules are very short, providing for oath, powers and fees of the arbitrators, filing, judgment and execution on the award, and setting aside the award for fraud or other sufficient cause.<sup>24</sup>

New Hampshire rather clearly provides that "this chapter shall not apply to arbitration agreements between employers and employees, or between employers and associations of employees, unless such agreement specifically provides that it shall be subject to the provisions of this chapter."<sup>25</sup> The rest of the statute will be discussed below.

• Massachusetts adopted some of the provisions of the Draft Act in providing for enforcement of future disputes. Proceedings are to be governed by provisions of the older arbitration statute.<sup>26</sup>

The next two states are Pennsylvania and California, both of which adopted the Draft Act. Pennsylvania's statute begins "A provision in any written contract, except a contract for personal services. . . ."<sup>27</sup> California concludes its first section with ". . . provided, however, the provisions of this title shall not apply to contracts pertaining to labor."<sup>28</sup> The problem of whether or not the Pennsylvania statute will apply to the usual collective bargaining agreement is in some doubt. The impression

20. Wash. Laws 1943, c. 139.

21. Wash. Laws 1947, c. 209.

22. Braman, *The 1943 Washington Arbitration Act*, 4 ARB. J. (N.S.) 217 (1949).

23. Colo. Laws 1943, c. 131, § 10.

24. COLO. STAT. ANN., Rules of Civil Procedure, 109 (Michie, 1935).

25. N.H. Rev. Laws 1942, c. 415, § 1, as amended by Laws 1945, c. 191.

26. Mass. Ann. Laws 1933, c. 251. The statute of Massachusetts and New Hampshire are among those discussed in Cox, *Legal Aspects of Labor Arbitration in New England*, 8 ARB. J. (N.S.) 5 (1953).

27. PA. STAT. ANN. tit. 5, § 161 (Purdon, 1930).

28. CALIF. CODE CIV. PRAC. 1280 (Deering's 1953).

that it will apply is given in a recent law review article which also summarizes cases upon this section.<sup>29</sup> The California Supreme Court has held that the California provision is limited to individual contracts of hiring and that the statute does apply to collective union agreements.<sup>30</sup> Also to be discussed is the latest draft of a general arbitration act which was published by the American Arbitration Association in 1952 (hereafter referred to as the New Draft Act).<sup>31</sup> Thus, the only states that have arbitration statutes which provides for the court enforcement of agreements to arbitrate future disputes and may be applied to labor arbitration are these: California, Colorado, Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Washington.<sup>32</sup>

Before, proceeding to a discussion of these statutes, emphasis should again be placed on the fact that these statutes were designed originally for commercial arbitration. There are major differences between labor and commercial arbitration extending from the parties and their relationship, the purpose of the arbitration, the procedure, and the ultimate result. Commercial arbitration has been widely accepted but only in the sense that it is a substitute for litigation. Litigation between labor and management is quite unsatisfactory because the usual forms of relief are inadequate to redress any wrongs between the parties. These parties do not expect to terminate their relationship and do business elsewhere. Their aim ideally is a future harmonious relationship. This relationship is supposed to be expressed in a periodical contract between the union and employer. The overwhelming majority of the thousands of collective bargaining contracts today have arbitration clauses.<sup>33</sup> Arbitration in the future may deal with either of two types of controversies. The first is contract arbitration in which the terms of a new contract are to be arbitrated. This type is rather rarely provided for except in the transit industry. The second is grievance arbitration. The contract usually provides for a series of steps of grievance procedure. The grievance is frequently first expressed to the employee's foreman by the employee, or through the union steward. A system of appeals follow proceeding from the union through its grievance committee, to the manager of labor relations for the company with the last step involving the tax union authority with the highest authority in the company. The final step is arbitration where the grievance is presented to and argued before some third party who makes a final decision upon the issue. For grievance to go all the way to arbitration is quite rare as compared to the number of grievances.

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29. Ehrlich, *Labor Arbitration in Pennsylvania*, 24 TEMP. L. Q. 107 (1950), especially pp. 131-135 which summarize cases upon this section.

30. *Levy v. Superior Court in and for Los Angeles County*, 15 Cal. 2d 692, 104 P. 2d 770 (1940).

31. Draft of an Arbitration Act. As recommended by the Arbitration Law Committee of the American Arbitration Association. 7 ARB. J. (N.S.) 202 (1952).

32. Hawaii has adopted the Draft Act also. Hawaii Rev. Laws 1945, tit. 22, c. 165, § 8701.

33. *Arbitration Provisions in Union Agreements*, 70 MO. LABOR REV. 160 (1950), states that some type of arbitration was provided for in more than 80 per cent of collective bargaining agreements examined in a comprehensive study.

Thus, grievance arbitration does not supplant litigation as the grievance is rarely a litigable one. Also, at the time of making the initial contract the grievance is plainly a future dispute, not an existing one. While it may be the last step in collective bargaining, or not collective bargaining at all because a third party is making the decision, it does supplant much of the strife between the union and management which could only eventually result in a resort to economic weapons of either side, *e. g.*, strike, slowdown, and lockout. For that reason, labor arbitration has been much encouraged in the recent years, and there is a great deal of hopeful anticipation for its progress in the future. The statutes must be contrasted and compared with that idea of grievance arbitration in mind, and that the parties to a labor arbitration must live together in the future. It is somewhat difficult to see why statutes are necessary to overrule the common law rules which should not apply to grievance arbitration in the first place. This point of view was urged but not adopted in a recent Utah case.<sup>34</sup> No doubt the parties think of their agreement as binding as it is a rare instance in which one party to a collective bargaining agreement refuses to arbitrate an issue that is conceded to be arbitrable under the contract.

*Agreements to Arbitrate Disputes which may Arise in the Future*

IN GENERAL. The opening section of the typical Draft Statute reads as follows:

A provision in any written contract to settle by arbitration a controversy thereafter arising out of such contract, or out of the refusal to perform the whole or any part thereof, or an agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

This is the most important single section. The enactment of this section was necessary to give a practical binding effect to an agreement to arbitrate either existing or future controversies. The "out of the refusal to perform the whole or any part thereof" is common to all the statutes except New York and Washington.<sup>35</sup> The New Draft Act includes the clause and furthermore mentions that "Such agreement without regard to the justiciable character of the controversy, shall be valid. . . ."<sup>36</sup> The latter clause would serve to make grievance arbitration more clearly within the statute as the grievance is not always a justiciable one. The New Draft Act continues to say that the Act "shall apply to any arbitration agreement between employers and employees or between associations of employers and employees, including but not restricted to controversies dealing with rates of payment, wages, hours of employment, or other terms and conditions of employment unless such agreement specifically provides that it shall not be subject to the provisions of this Act."<sup>37</sup>

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34. *Latter v. Holsum Bread Co.*, 108 Utah 364, 160 P. 2d 421 (1945), which nevertheless upheld the common law rule. In *Shop 'N Save v. Retail Food Clerks Union*, 2 CCH Labor Cases (Cal. 1940), the court held that an injunction against peaceful picketing would be allowed where the union refused to arbitrate in accordance with an agreement in the contract.

35. Massachusetts also omits the clause in its shortened version of the Draft Act.

36. Draft Act § 1 (1952).

37. *Ibid.*



New York also clearly includes labor arbitration within the statute. It provides both of the quoted provisions of the New Draft Act.<sup>38</sup> It should be remembered that New York has amended its first section in recent years so as to include those provisions and has not changed its original statute to any appreciable extent. The original statute was designed for commercial arbitration. There would be a question under this section whether the parties could agree that the agreement may *not* be subject to the Act. The parties to a commercial arbitration agreement probably have in mind the judicially enforceable character of the agreement, but it is doubtful in the instance of a union and employer. Realizing organized labor's traditional abhorrence to entanglement in court proceedings, it might be better to specifically provide that the parties may agree not to come under the provisions of this Act if they so desire.

**REQUISITES OF THE CONTRACT OR SUBMISSION.** New York definitely requires a writing of the contract to arbitrate or a submission agreement.

A contract to arbitrate a controversy thereafter arising between the parties must be in writing. Every submission to arbitrate an existing controversy is void, unless it or some note or memorandum thereof be in writing, and subscribed by the party to be charged therewith, or by his lawful agent.<sup>39</sup>

No other statute is so explicit but all mention "a written contract to settle" or "a written agreement to submit." The oral agreement was as binding as a written one at common law.<sup>40</sup>

**PROCEDURE IN EVENT OF REFUSAL TO ARBITRATE.** What happens if one of the parties fails, neglects, or refuses to arbitrate? This might happen in the case of a submission agreement but would be more probable in regard to future disputes not foreseen at the time of contracting. In any event, the situation is quite exceptional in the field of labor relations. The question is almost always whether or not the issue is an arbitrable one under the contract. The procedure will be briefly dealt with although it is doubtful if these provisions are of any benefits to parties who are not using commercial arbitration, *i. e.*, arbitration as a substitute for litigation as opposed to labor arbitration.

*Application.* First, the aggrieved party applies to the local trial court for an order directing that arbitration proceed. The obvious question is which trial court?

*Jurisdiction.* As to the matter of selection of jurisdiction, New York's statute reads: "The making of a contract or submission for arbitration described in Section 1448 thereof, providing for arbitration in this state, shall be deemed a consent of the parties thereto to the jurisdiction of the supreme court of this state to enforce such contract or submission and to enter judgment on an award thereon."<sup>41</sup> No other statute reads in this manner. Further clarification is provided in a later section:

" . . . if none be specified, the supreme court for the county in which one

38. New York Civ. Prac. Act, § 1448.

39. *Id.* § 1449.

40. *Supra*, n. 7.

of the parties resides or is doing business, or in which the arbitration was held, shall have jurisdiction.<sup>42</sup>

Pennsylvania merely provides that the aggrieved party may petition "the court of common pleas of the county having jurisdiction,"<sup>43</sup> but complete provisions as to jurisdiction prior or subsequent to the award are in a later section.<sup>44</sup> California provides "where either party resides."<sup>45</sup>

*Notice.* The next step is for the petitioning party to notify the other party. The usual state enacting the Draft Act provides for five days notice but New York and Washington provide for eight days.<sup>46</sup> Two statutes omit any reference to notice.<sup>47</sup>

*Service of notice.* The most frequent provision is for service in the manner provided by law. One statute merely reads "served personally"<sup>48</sup> while New York again is more complete.<sup>49</sup>

*Procedure in court.* The court upon hearing the parties either determines there is or is not a substantial issue as to the making of the agreement or failure to comply therewith.

1. If there is no issue, the court makes an order "directing the parties to proceed to arbitration in accordance with the terms of the contract or submission."<sup>50</sup> This is the typical Draft Act provision but there are some variations. Connecticut simply provides that the court shall hear the matter "in order to dispose of the case with the least possible delay, and shall either grant the order or deny the same, according to the rights of the parties."<sup>51</sup>

2. If a substantial issue is raised, there is provision for an immediate trial. A trial by jury may be had if demanded, otherwise the issue is heard and determined by the court or judge. Connecticut in the provision quoted in the preceding paragraph seems to permit the court to determine the matter in any event<sup>52</sup> while New Jersey speaks merely of an issue and makes no qualifications as to the issue being substantial

41. New York Civ. Prac. Act, § 1450.

42. *Id.* § 1459.

43. PA. STAT. ANN., tit. 5, § 161.

44. *Ibid.*, § 178.

45. CAL. CODE CIV. PROC., § 1281.

46. New York Civ. Prac. Act, § 1450; Wash. Laws 1943, c. 138, § 4.

47. New Jersey and New Hampshire. The New Draft Act leaves the number of days blank.

48. CAL. CODE CIV. PROC., § 1281.

49. New York Civ. Prac. Act, § 1450: "Service thereof shall be made in the manner specified in the contract or submission, and if no manner be specified therein, then in the manner provided by law for personal service of a summons, within or without the state, or substituted service of a summons, or upon satisfactory proof that the party aggrieved has been or will be unable with due diligence to make service in any of the foregoing manners, then such notice shall be served in such manner as the court or judge may direct."

50. *Ibid.*

51. CONN. GEN. STAT. § 8153.

52. *Ibid.*

before a jury trial may be had.<sup>53</sup> The jury considers the issues as if it were an equity action in some states,<sup>54</sup> as if a law action in one,<sup>55</sup> or just a jury trial in most.<sup>56</sup> All provide for the arbitration to proceed if the issue is found in favor of the aggrieved party.

*Applications in General.* Most of the statutes treat any application to the court in reference to arbitration as motions and subject to a like summary procedure.<sup>57</sup>

*Conclusion.* All the above discussion has little bearing on the success of labor arbitration and its general adoption and acceptance by labor and management. Court proceedings are neither contemplated nor desired by the parties. The common grievance arbitration issue has no place in the courtroom. The Delaware statute quote *supra* referred to the rules of the American Arbitration Society [Association]. These rules are simple and far more applicable to labor arbitration as a practical matter. Rule 7 provides that a party may commence an arbitration in the following manner:

(a) By such party giving written notice to the other party of intention to arbitrate (Demand) which notice shall contain a statement setting forth the nature of the dispute, and the remedy sought; and

(b) By filing with the Administrator at any of its offices two copies of said notice, together with two copies of the collective bargaining agreement, or

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53. N.J. STAT. ANN. 2A:24-3 (1952).

54. New York Civ. Prac. Act, § 1450; United States, 9 U.S.C. § 4.

55. CAL. CODE CIV. PROC., 1281.

56. Hawaii Rev. Law 1945, § 8703; N.J. STAT. ANN. 2A:24-3 (1952); PA. STAT. ANN., tit. 5, § 163; Wash. Laws 1943, c. 138, § 43; Draft Act 1952, § 4.

57. Connecticut has no specific provision but makes three references to the nature of the proceedings. First, the initial application to the court alleging an agreement to arbitrate is to be heard "either at a short calendar session, or as a privileged case, or otherwise, in order to dispose of the case with the least possible delay." (8151) This procedure is also to be followed in the case of an appointment of an arbitrator or umpire. (8154) The second reference is in the occasion of arbitrators asking advice of the courts which is to be "heard in the manner provided by law for the hearing of written motions at a short calendar session or otherwise as the court or judge may direct." (8153) Third, any application either to confirm, vacate, or correct an award "shall be heard in the manner provided by law for hearing written motions at a short calendar session, or otherwise as the court or judge may direct, in order to dispose of the case with the least possible delay." (8163) Thus, in Connecticut, the procedure seems consistent within itself and substantially like that of the statutes mentioned above. Although no one provision is made, all possible motions seem to have been covered separately.

New Jersey seems to make no reference to motions or applications or proceedings thereafter. The statutes say that the "court may" or the "court shall" and only speaks of an applicant in the instance of a stay of proceeding. Under such provisions, it would seem that court could independently modify or correct an award, i.e., without an application of a party. Pennsylvania has no definite provision but does provide that the respective courts "shall have the power to make and adopt rules concerning procedure and practice under this act, as shall seem to them proper, except that no rule shall make any provision contrary to the express provisions of this act." (165) No specific mention of procedure to be followed is made in the New Hampshire Act.

such parts thereof as relate to the dispute, including the arbitration provisions.<sup>58</sup>

**STAY OF PROCEEDINGS.** Each statute has a provision that if any suit or proceeding be brought on an issue that is referable to arbitration under the arbitration agreement, then a party may apply to that court to stay the action until arbitration is had. The Draft Acts mention that the applicant must not be in default in proceeding with such arbitration, but three statutes omit such provision.<sup>59</sup>

The New Draft Act and Washington have an addition to a Stay of Proceedings section a provision that could possibly be of some importance to a labor arbitration.

"At any time before final determination of the arbitration the court may upon application of a party to the agreement to arbitrate make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award."<sup>60</sup>

**REQUISITES CONCERNING ARBITRATORS.** *Number and selection.* All allow the number of arbitrators and the method of selection to be made in the contract or submission itself. All but one provide that a party may apply to a court which will appoint the arbitrator (s) in any of four instances: 1) where no method is provided, 2) where a method is provided but a party refuses to avail himself of such method, 3) or there is a lapse in naming the arbitrator, 4) or in filling a vacancy.<sup>61</sup> All but three statutes provide that there should be only a single arbitrator appointed unless otherwise provided.<sup>62</sup> All provide that the court appointed arbitrator shall have the same powers as though appointed under the agreement to arbitrate.

*Qualifications.* No qualifications are prescribed in any of the statutes. Massachusetts does have a provision that certain sections of its statutes<sup>63</sup> shall not apply if "a party to the contract be named arbitrator, or the agent or agents or employee or employees of any one party to the contract" be the sole or are a majority of the arbitrators.<sup>64</sup>

**PROCEDURE LEADING TO THE ARBITRATION HEARING.** *Time and Place.* About one-half of the statutes provide that the arbitrators shall appoint the time and place for the hearing and may adjourn the hearing.<sup>65</sup> As a practical matter, the parties to a labor arbitration usually arrange the arbitration date to suit the convenience of the arbitrator. The arbitrator would usually leave the place up to the parties. It is quite

58. Labor Arbitration Rules of the American Arbitration Association. Neither Massachusetts nor Colorado seem to have any provisions similar to those of the states mentioned above.

59. New York Civ. Prac. Act, § 1451; Wash. Laws 1943, c. 138, § 3; Draft Act 1952, § 3.

60. Wash. Laws 1943, c. 138, § 13; Draft Act 1952, § 14.

61. New Hampshire mentions neither 2) nor 4). N.H. Rev. Laws, c. 415, § 4.

62. Wash. Laws 1943, c. 138, § 5 provides for three.

63. Mass. Ann. Laws, c. 251, § 14-22. Those sections that comprise the provisions of the Draft Act Massachusetts adopted.

64. *Id.* § 16.

65. CONN. GEN. STAT. § 8156; New York Civ. Prac. Act, § 1454; Wash. Laws 1943, c. 138, § 6; Draft Act 1952, § 7.

common for the arbitration to be held in a neutral place or, at least, outside the company's plant. Rule 10 of the Labor Arbitration Rules permits the Administrator to set the time and place of hearing only if the parties cannot agree.<sup>66</sup>

*Witnesses.* The statutes uniformly provide that the arbitrator may require attendance of persons as witnesses and upon refusal, the court upon a petition submitted to it will compel attendance. If books or papers are required, they may be summoned.<sup>67</sup> New York provides that the arbitrator (s) has "the same powers with respect to all the proceedings before them which are conferred upon a board or a member of a board authorized by law to hear testimony."<sup>68</sup> If there is more than one arbitrator, the subpoena may be issued by a majority of them and signed in their name and served in the customary manner of that state. Witness fees are made equivalent to the fees in the trial court of the state.

*Depositions.* About one-half of the statutes provide for depositions of witnesses.<sup>69</sup>

*PROCEEDINGS AT THE ARBITRATION HEARING. Quorum of Arbitrators.* At common law if there was more than one arbitrator, all must be present throughout the arbitration or the arbitration will be considered void in absence of contrary agreement.<sup>70</sup> A few statutes make this requirement.<sup>71</sup>

*Proceeding in Absence of a Party.* The states enacting the Draft Act make no provision for ex parte proceedings. The New Draft Act, Washington, and Massachusetts do make such a provision.<sup>72</sup>

*Oaths.* A requirement that either witnesses or the arbitrator be sworn would seem only to formalize the proceeding. Two statutes provide that the arbitrator must be sworn unless waived.<sup>73</sup> Pennsylvania requires all testimony to be taken under oath or affirmation.<sup>74</sup>

*Rules governing the admissibility of evidence.* Under the usual Draft Statute it is cause to vacate an award if the arbitrator should refuse to "hear evidence pertinent and material to the controversy." Thus, the court will review the question of pertinency and materiality on a motion to vacate the award.<sup>75</sup> At common law, the

66. Labor Arbitration Rules of the AM. ARB. ASSOC.

67. This latter point is not covered in New Hampshire. Massachusetts mentions neither witnesses nor books and papers.

68. New York Civ. Prac. Act, § 1456.

69. CONN. GEN. STAT., § 8155; N.H. Rev. Laws, c. 415, § 6; PA. STAT. ANN., tit. 5, § 167; Wash. Laws 1943, c. 138, § 12; Draft Act 1952, § 12.

70. *Supra*, n. 7.

71. Mass. Ann. Laws, c. 251, § 14; PA. STAT. ANN., tit. 5, § 166.

72. Mass. Ann. Laws, c. 251, § 6; Wash. Laws 1943, c. 138, § 8; Draft Act 1952, § 8.

73. CONN. GEN. STAT., § 8151; New York Civ. Prac. Act, § 1455. Colorado requires an arbitrator's oath, COLO. STAT. ANN., Rules of Civil Procedure, 109 (c).

74. PA. STAT. ANN., tit. 5, § 166. CONN. GEN. STAT. § 8157 provides that the arbitrator shall have power to do so. Rule 24, Labor Arbitration Rules, leaves it to the arbitrator's discretion unless required by law or demanded by either party.

75. New Hampshire and Massachusetts have no such provision. The matter might be covered in New Hampshire under "misconduct by the arbitrators." N.H. Rev. Laws, c. 415, § 8.

arbitrators were the sole judges of the admissibility and weight of the evidence.<sup>76</sup> Delaware would seem to provide that the arbitrator is the sole judge of the admissibility and that he may demand the parties to "produce such additional evidence as the Arbitrator may deem necessary to an understanding and determination of the dispute."<sup>77</sup>

*Disposition of Questions of Law.* Pennsylvania provides that there may be an application to the court "for the determination of any legal question in accordance with the terms of the Uniform Declaratory Judgments Act," and that it should not operate as a stay of the arbitration unless the arbitrators consent.<sup>78</sup> Massachusetts and Connecticut also permit a referral of questions of substantive law to the court.<sup>79</sup> No other statute makes such provision.

*Stenographic record.* A record of the proceedings may be very desirable from the arbitrator's viewpoint especially in a case involving a good many issues. One statute provides that all testimony shall be taken stenographically and made a part of the record at the request of either party or the arbitrators.<sup>80</sup> The Labor Arbitration Rules make a similar provision and further provides that the requesting party or parties shall pay the cost.<sup>81</sup> Apparently the arbitrator may not demand such a record be made.

*Representation by counsel.* New York provides that the right to be represented by an attorney may be waived only by a writing or failure to assert such right.<sup>82</sup> Two other statutes also provide for representation by attorneys.<sup>83</sup> The more realistic approach to a labor arbitration is found in the Labor Arbitration Rules which uses the term "counsel."<sup>84</sup> The business agent of the union and the director of labor relations for the company may as effectively present the argument of the parties as the average attorney and would probably be included in the term "counsel."

*RULES GOVERNING AWARDS. Time rendered.* About one-half of the statutes recognize the power of the parties to agree to limit the time in which the award may be rendered.<sup>85</sup> In the event of no previous agreement, then Washington limits the time to thirty days,<sup>86</sup> and Connecticut limits to sixty days.<sup>87</sup> The New Draft Act leaves the days blank but plainly infers that there should be a time limitation.<sup>88</sup>

76. *Supra*, n. 7. See detailed discussion in Abelow, *Standards of Evidence in Arbitration Proceedings*, 4 *ARB. J.* (N.S.) 252-259 (1949).

77. Labor Arbitration Rules of the Am. Arb. Assoc., Rule 28.

78. PA. STAT. ANN., tit. 5, § 177.

79. CONN. GEN. STAT., § 8158; Mass. Ann. Laws, c. 251, § 20.

80. PA. STAT. ANN., tit. 5, § 166.

81. Labor Arbitration Rules of the Am. Arb. Assoc., Rule 21.

82. New York Civ. Prac. Act, § 1454, as amended Laws 1953, c. 556.

83. Wash. Laws 1943, c. 138, § 10; Draft Act 1952, § 10.

84. Labor Arbitration Rules of the Am. Arb. Assoc., Rule 20.

85. CONN. GEN. STAT., § 8159; Mass. Ann. Laws, c. 251, § 5; New York Civ. Prac. Act, § 1460; Wash. Laws 1943, c. 138, § 9; Draft Act 1952, § 9.

86. Wash. Laws 1943, c. 138, § 9.

87. CONN. GEN. STAT. § 8159.

88. Draft Act 1952, § 9.

All provide that the parties may agree to extend the time. There is the possibility that if the time was clearly unreasonable the award could be vacated on the ground of "misconduct of arbitrators." It should be noted that a single labor arbitration may involve dozens of issues that take a good deal of time to decide upon. The Labor Arbitration Rules provide for thirty days if the parties have not otherwise agreed.<sup>89</sup>

*Form.* The statutes uniformly provide that the award shall be in writing and signed by the arbitrators or by a majority of them. A copy is to be delivered to the parties.<sup>90</sup> Some provide that the written award must be acknowledged like a deed conveying real estate.<sup>91</sup>

*PROCEDURE TO ENFORCE AWARDS. Confirmation.* Here, the usual provision is that within a limited time after the award is made<sup>92</sup> any party may apply to the court for an order confirming the award. Notice of the application is to be served upon the adverse party within a certain time before the hearing.<sup>93</sup> The court shall grant such order unless the award is vacated, modified, or corrected. The award is, of course, valid without confirmation.

*Vacation.* The statutes uniformly provide that a party may apply to the court within three months after the award is made to have the award vacated upon certain grounds.<sup>94</sup> The grounds are as follows:

1. Where the award was procured by corruption, fraud, or other undue means.
2. Where there was evident partiality or corruption in the arbitrators of either of them.
3. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
4. Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made.

New York adds that the award may be vacated if there was no valid submission or contract and the objection has been raised properly.<sup>95</sup> New Draft Act and Washington add that ground but in addition provide that the court must be

89. Labor Arbitration Rules of the Am. Arb. Assoc., Rule 37.

90. New Hampshire omits such provision. Massachusetts provides that the award is to be returned into court. Mass. Ann Laws, c. 251, § 8.

91. Hawaii Rev. Laws 1945, § 8707; N.J. STAT. ANN. 2A:24-7; New York Civ. Prac. Act, § 1460.

92. One year is the usual provision but New Jersey allows only three months. N.J. STAT. ANN. 2A:24-7.

93. Five days is the usual provision. New York provides "as prescribed by law for service of notice of a motion upon an attorney in an action in the court." New York Civ. Prac. Act, § 1461.

94. New Hampshire provides for one year, N.H. Rev. Laws, c. 415, § 8. Connecticut limits to thirty days. CONN. GEN. STAT. § 8163. Massachusetts has no specific provision for vacation, modification, or correction of the award.

95. New York Civ. Prac. Act, § 1462.

"satisfied that substantial rights of the parties were prejudiced thereby."<sup>96</sup>

A rehearing may still be desirable, and the court may direct one if the time has not expired.<sup>97</sup>

The second ground mentioned above is subject to serious question in a labor arbitration where under a tripartite board, one member is admittedly a representative of management and the other of the union.<sup>98</sup> Here it is only to be expected that two of the members of the board are biased and partial though probably not "corrupt."

*Modification or correction.* The grounds are as follows:

1. Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award.
2. Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matter submitted.
3. Where the award is imperfect in a matter of form not affecting the merits of the controversy.

Pennsylvania provides in addition "where the award is against the law, and is such that had it been a verdict of the jury the court would have entered different or other judgment notwithstanding the verdict."<sup>99</sup> The above section is usually concluded with the sentence that "the order may modify and correct the award so as to effect the intent thereof and promote justice between the parties."<sup>100</sup> The most recent statutes neglect to include the purpose of promotion of justice.<sup>101</sup>

Neither vacation, modification, or correction of the award is effective if the other party was allowed to enforce the award in the meantime. Therefore, provisions are made in the section providing for notice of the motion for the stay of proceedings that would enforce the award.<sup>102</sup> This is to be distinguished from the stay of proceedings before arbitration is begun.

*Entry of Judgment.* After the award has been either confirmed, vacated, modified, or corrected, judgment may be entered in conformity with the order. Costs are provided for in three statutes.<sup>103</sup> Most statutes provide for certain papers to be filed by the clerk to constitute the judgment roll.<sup>104</sup>

96. Wash. Laws 1943, c. 138, § 16; Draft Act 1952, § 17.

97. All statutes.

98. Lesser, *Tripartite Boards or Single Arbitration in Voluntary Labor Arbitration?*, 5 *ARB. J. (N.S.)* 276-282 (1950).

99. PA. STAT. ANN. tit. 5, § 171.

100. New Hampshire uses the same grounds for vacation, modification, or correction. N.H. Rev. Laws, c. 415, § 8. Pennsylvania reads "modify and correct the award or resubmit the matter to the arbitrators." PA. STAT. ANN., tit. 5, § 171.

101. Wash. Laws 1943, c. 138, § 17; Draft Act 1952, § 18.

102. New Hampshire, New Jersey, and Massachusetts have no provision.

103. New York Civ. Prac. Act, § 1464; Wash. Laws 1943, c. 138, § 20; Draft Act 1952, § 20.

104. Judgment-roll. Immediately after entering judgment, the clerk must attach together and file the following papers, which constitute the judgment-roll:



*Effect of judgment and enforcement.* All but two states have substantially the same provision:

"The judgment so entered has the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered."<sup>105</sup>

*Appeal.* A typical statement is that of Connecticut:

"An appeal may be taken from an order confirming, vacating, modifying or correcting an award, or from a judgment or decree upon an award, as in ordinary civil actions."<sup>106</sup>

Pennsylvania follows a similar provision with a paragraph that would allow appeal "from an order either staying or refusing to stay the trial of a suit or proceeding pending arbitration, or from an order either directing or refusing to direct the parties to proceed to arbitration."<sup>107</sup> Massachusetts simply provides that if the award is made and reported to the court within a certain time, "the judgment thereon shall be final."<sup>108</sup> New Jersey makes no express provision but appeals are probably provided for in the section making any judgment on the award "subject to all the provisions of law relating to, a judgment in any other action. . . ."<sup>109</sup>

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1. The submission or contract; the selection or appointment, if any, or an additional arbitrator, or umpire; and each written extension of the time, if any, within which to make the award.

2. The award.

3. Each notice, affidavit or other paper used upon an application to confirm, modify or correct the award, and a copy of each order of the court upon such an application.

4. A copy of the judgment.

The judgment may be docketed as if it was rendered in an action. New Hampshire, New Jersey, and Massachusetts omit such provision. There are, of course, no such provisions in the Labor Arbitration Rules that would apply in the case of Delaware. PA. STAT. ANN., tit. 5, § 174 includes the testimony, if taken.

105. The section copied is that of New York Civ. Prac. Act, § 1466.

106. CONN. GEN. STAT., § 8166.

107. PA. STAT. ANN., tit. 5, § 175.

108. Mass. Ann. Laws, c. 251, § 19.

109. N. J. STAT. ANN., 2A:24-10.