

1957

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Recommended Citation

Robert L. Howard, *Proposed Uniform Arbitration Act: Yes Or No, The*, 22 Mo. L. REV. (1957)
Available at: <https://scholarship.law.missouri.edu/mlr/vol22/iss3/1>

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Missouri Law Review

Volume XXII

JUNE, 1957

Number 3

THE PROPOSED UNIFORM ARBITRATION ACT: YES OR NO*

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It is a reasonable assumption that all persons present at a meeting of The National Academy of Arbitrators have a friendly interest in Labor-Management Arbitration, and would like to see it improved, perfected and encouraged as an instrument for the promotion of industrial peace.

At the outset, I would like to make it clear that I have no particular interest in or concern with commercial arbitration, except to emphasize that it is wholly different in nature, that it grows out of different circumstances and proceeds from an entirely different type of contract, that it deals with entirely different types of relationships, that it is devised to serve wholly different purposes, and that measures suited for application to commercial arbitration have no necessary relevancy to labor-management arbitration.

One may assume that we are concerned today with the questions, first, whether we do or do not need legislation applicable to labor-management arbitration, and, if we accept an affirmative answer to that question, second, whether the present "Uniform Arbitration Act" is an appropriate instrument to meet that need.

In order that my position may be clear initially, I may say that I am convinced that in most areas of the United States we do not need such

*The original of this discussion, here slightly modified and enlarged, was presented as a part of the program before the annual meeting of the National Academy of Arbitrators on February 1, 1957 in Philadelphia, Pennsylvania. It is being published with the rest of that program by the Bureau of National Affairs, Inc., in the Proceedings of The Tenth Annual Meeting of the National Academy of Arbitrators under the title, "Critical Issues in Labor Arbitration."

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legislation; and that where legislation may be regarded as desirable, the present Uniform Act does not satisfactorily supply the need, for the reasons that it goes too far, that it contains many provisions that may possibly be appropriate enough when applied to commercial arbitration, but which have no proper place in a measure applicable to labor-management arbitration, that it injects the court into the picture where it was never the intention of the parties to an arbitration provision in a collective bargaining agreement to have it enter, by encroaching upon the function of the arbitrator, and that it has in it the very great danger of weakening, if not destroying, that expeditiously final and binding character of the arbitration determination which is the chief merit of this process of industrial dispute settlement, and that it may well weaken or destroy the completely voluntary character of labor-management arbitration as it exists today, to mention only some of the reasons.

In any consideration of this problem the first alleged justification for even talking in terms of a need for legislation regulating and controlling the arbitration process is uniformly asserted to be the common law rule by which a party to an agreement to arbitrate an existing or future dispute may repudiate that agreement and refuse to go to arbitration any time he may see fit to do so, and that he may withdraw from an arbitration proceeding any time before an award is made and repudiate his agreement to arbitrate.

If that statement accurately reflects the common law situation now existing in most jurisdictions, and if labor and management, as the parties to an arbitration provision in a collective bargaining agreement, commonly, or with any substantial frequency, assert their right to repudiate their obligation to arbitrate, then a strong case is made for some sort of legislation.

It is submitted, however, that where such a situation exists, and where some legislation as a remedy therefor is deemed desirable, the first sentence of the first Section of The Proposed Uniform Arbitration Act largely supplies the need, without all of the complex provisions that follow. When a statute provides that

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract,

the foundation has been provided upon the basis of which a court, in the exercise of its common law or equity authority, and without further statutory elaboration, can provide all the remedy that may be required.

But that is not the only answer to the alleged problem created by the asserted common law rule.

In the area of the country from which I come, the representatives of management and of labor habitually, traditionally and uniformly consider their agreements to arbitrate as binding obligations, and they conduct themselves accordingly. They do not repudiate those obligations. And I may say with some degree of confidence that my study of this problem has convinced me that what I have just said is equally true of the representatives of labor and of management throughout most of the rest of the country.

We do not need this legislation in the middle west where I am most intimately conversant with the arbitration process, not even the first sentence, because the problem does not arise. Furthermore, we do not want such legislation, and when I say we, I include both labor and management.

It is my earnest belief that those of us assembled here on this occasion should think of ourselves as participants in a process by which there is being builded and perfected an adequate machinery for the long range future settlement of industrial conflicts. Therefore, let us not lose sight of the significance and the purpose of that machinery and allow ourselves to be distracted by some surface aberation in its application.

The institution of voluntary labor-management arbitration has achieved so much greater and so much more nearly uniform success in recent years than any of us had reason to hope for on that day a little less than a dozen years ago when the President's Labor-Management Conference unanimously recommended that provision for arbitration as the final step in the grievance procedure be included in all collective bargaining agreements, that all who are interested in the continued success and the perfection of voluntary labor-management arbitration as an effective instrument for the achievement of industrial peace must be given pause before they sanction an arrangement by which the courts are authorized and directed to intrude upon this purely voluntary process.

There is also another angle to this first aspect of our problem that must not be overlooked in any long range consideration. And that goes back to the soundness of the common law doctrine in its application to labor-management arbitration.

We are all aware of the fact that that doctrine is commonly said to have had its origin primarily in the jealousy of the courts over the feeling that parties to a contract, alleged to have been violated, who agreed to by-pass the court and submit any dispute arising therefrom to final and binding arbitration, where improperly interfering with the jurisdiction of the court. In case of a controversy over a commercial contract and in the absence of the agreement to arbitrate, the dispute would have gone to the court for disposition. To say that the court was being deprived of jurisdiction seemed like a reasonably clear assertion, and while the courts did not long, if ever, insist that such an arrangement was illegal or unlawful, the doctrine that one may repudiate his agreement at any time has persisted in many, and perhaps most, jurisdictions, even though the court so holding may give lip service to the suggestion that such arrangements are to be encouraged. But however applicable this common law rule may be to commercial arbitration in which it had its origin, if there is any strength in the commonly asserted adage that when the reasons for the rule do not exist, the rule should not apply, then no reason could ever possibly have existed for the application of this rule to labor-management arbitration. By no stretch of the imagination could it ever be said that labor-management arbitration encroached upon, restricted, or took from what would otherwise be within the jurisdiction of the court. Labor-management arbitration is not a substitute for litigation, as is commercial arbitration, but rather a substitute for resort to economic force.

It should also be borne in mind that a provision for final and binding arbitration in a labor-management collective bargaining agreement is almost invariably joined with and dependent upon a no-strike, no-lockout provision which the parties and the courts do regard as legally binding and enforceable. Thus, whether we may prefer to rely on the old doctrine of *Kill v. Hollister*¹ that an agreement to arbitrate is against public policy because it ousts the judges of jurisdiction and is for that reason revocable, or on the century and a half earlier dictum of Lord Coke simply that such an agreement is "in its nature revocable,"² we stand on no stronger ground so far as labor-management arbitration is concerned.

1. 1 Wilson 129 (K.B. 1746).

2. *Vynior's Case*, 4 Coke's Reports 302, 305 (K.B. 1609).

The reason for the common law rule, therefore, if reason there ever was, clearly could not exist in the case of labor-management arbitration, as it was contended it did in the case of commercial arbitration, and it should never have been so applied. As a matter of fact, the vast majority of cases in which this rule has been applied have been cases involving commercial arbitration. Then with the uncritical practice of finding analogy where none exists, merely by the similarity of terminology—arbitration is arbitration, whether commercial or labor—it is occasionally assumed that the same rule should apply. But the cases in which this rule has been applied to labor-management arbitration are still relatively few.

This whole problem was recently pointed up by a decision in the Chancery Court of Monroe County, Mississippi, in the case of *Prairie Local Lodge, No. 1538, I.A.M. v. Machine Products Co., Inc.*,³ in which the Chancery Court granted a mandatory injunction directing the Company to arbitrate certain grievances in accordance with the provisions of the collective bargaining agreement between the parties.

The arbitration provisions of the agreement were coupled with a no-strike provision.

The Chancery Court called attention to the fact that the Supreme Court of the State had held that “a written agreement for submission to arbitration is revocable by either party before an award is made” in cases involving commercial arbitration, but pointed out that the “Court had never ruled on the question of whether an arbitration clause in a collective bargaining contract is enforceable,” an observation that would be equally applicable to the courts of most other jurisdictions.

The opinion then goes on to point out that since the decision in the *Yazoo*⁴ case in 1931, the State Supreme Court had put its stamp of approval on contracts made by Unions with employers for the benefit of the employees and for the benefit of the employer; that with the *Mississippi Theatres* case⁵ in 1936 the State Supreme Court had held that a court of equity had the power to enforce obedience to collective bargaining agreements by injunctive relief on the ground that such agreements advance the general public welfare by avoiding boycotts, strikes, lockouts and other evils.

3. 39 L.R.R.M. 2008, 56 A.L.C. 1515 (1956).

4. *Yazoo & M.V.R. Co. v. Sideboard*, 133 So. 669 (Miss.)

5. *Mississippi Theatres Corp. v. Hattiesburg Local Un. No. 515*, 174 Miss. 439, 164 So. 887.

Then, reasoned the court, "if such contracts are wholesome and promote the public welfare, . . . an arbitration clause in such a contract would likewise be in the interest of public welfare and should be enforceable as any other feature of the Contract."

After commenting on the recognized merits of arbitration as the most satisfactory method of settling disputes between labor and management, and emphasizing the no-strike provision of the arbitration clause as adding to its value to the company, to the union and to the public generally, the Chancery Court concluded that the "arbitration clause in a collective bargaining contract should be enforced in the same manner as any other lawful provision of the contract is enforced," and issued its mandatory injunction.

Unfortunately, this decision of the Chancery Court has been reversed by the Mississippi Supreme Court⁶ in strict reliance upon its understanding of the common law doctrine. The opinion quotes at length statements from *American Jurisprudence*⁷ and *Corpus Juris Secundum*,⁸ both of which assert expressly the doctrine of ousting the courts of jurisdiction,⁹ and gives no consideration to the merits of the problem as applied to provisions in collective bargaining agreements for labor-management arbitration. The cases cited and relied on are commercial arbitration cases.

Notwithstanding the decision in this case, it is believed that the approach of the Chancery Court to the problem, and its reasoning and decision, were eminently sound, and that they should commend themselves strongly to other courts wherever the question may arise.

Incidentally, the handling of this case below serves to give vital content to the suggestion of our good friend Alexander Hamilton Frey when, in his testimony before the Pennsylvania Governor's Commission in 1953, he called for the correction of some judicial errors in this field that would eliminate the need for legislation.

It is probably of considerable significance that the lower court was willing to take a stand against blind application of the common law doctrine to a case whose facts provide none of the reasons for adherence to the

6. 32 Labor Cases ¶ 70,642 (April 12, 1957).

7. 3 AM. JUR., *Arbitration and Award*, § 31.

8. 6 C.J.S., *Arbitration and Award*, § 33.

9. Reference is also made to RESTATEMENT, CONTRACTS § 550 (1932).

doctrine, if, indeed, legitimate reasons there ever were. It is not a little peculiar that the cases, even of commercial arbitration, in which the courts have analyzed the problem and attempted to give a rationalization of their action, running as far back as the pronouncement of Lord Campbell in *Scott v. Avery*¹⁰ in 1856, have been unable to find reasonable justification for application of the common law rule. Whether there is genuine prospect that the courts will, within a reasonable time and in substantial numbers, repudiate the common law doctrine in its application to labor-management arbitration and thus eliminate the most commonly asserted need for legislation, it is not possible to predict with assurance. But in view of the extreme infrequency with which the problem arises in most areas, we can well afford to withhold legislative intervention.

Such a suggestion is consistent with the plea I have repeatedly entered elsewhere, that we should exercise some degree of patience with a system that is yet in its experimental stage and give it the leeway in which to develop under the guidance of those who have thus far nurtured it and whose purposes it was devised to serve.

May we not find it wiser to let the processes involved in labor-management arbitration have a chance to mature unrestricted, instead of attempting to put them into a legislative straight jacket, or authorizing the court to barge in upon that sensitive development?

If I may now pass to the assumption being widely made that legislation is desirable, at least in some areas, and comment more directly on the "Proposed Uniform Arbitration Act," the desirability of which I have already questioned, I would suggest that the combination of commercial arbitration and labor-management arbitration under application of the same legislative measure is one of the major defects of the Uniform Act. I have yet to encounter any one, personally, or by way of the printed word, who has been willing to admit that the combination is otherwise than undesirable. And yet, those responsible for its formulation and adoption were wholly unwilling to entertain the suggestion that they be separated when that

10. 5 H.L. Cases 811 (1856), 25 L.J. (N.S.) Exch. 308. See also the statement of Judge Hough in *United States Asphalt Refining Co. v. Trinidad Lake Petroleum Co.*, 222 Fed. 1006, 1008 (D.C. N.Y. 1915), and of Judge Frank in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 984 (2d Cir. 1942).

suggestion was made in the deliberations of the National Conference of Commissioners on Uniform State Laws.

This situation has appeared to me to be rather closely analogous in many respects to two United States Supreme Court decisions of a few years ago when the Court was still fond of talking in terms of a "business affected with a public interest." In 1927 the case of *Tyson & Brother v. Banton*,¹¹ involving an attempt by New York to control the margin of profit in the resale of theatre tickets reached the Court, and being unable to find that the position of a ticket broker fitted neatly into the groove marked by previous "business affected with a public interest" cases, Mr. Justice Sutherland, writing for the majority of the court, determined that the attempt must fail.

The next year the employment agency case of *Ribnik v. McBride*¹² reached the court, and Mr. Justice Sutherland found that "the business of securing employment for those seeking work and employees for those seeking workers was essentially that of a broker." Then, writing for a majority of the Court again and brushing aside the vast differences between the facts and circumstances, and the social and economic implications of the two cases, the Justice said, in effect, we determined last year that the business of a ticket broker was not a business affected with a public interest. A broker is a broker, therefore the same decision applies to the business of an employment broker. If ever a court opinion were written with a complete absence of consideration for the facts and circumstances that should control the result, this certainly provides a glaring illustration.

Are we in like manner to equate labor-management arbitration to commercial arbitration, merely because both are called arbitration, and conclude uncritically that because legislation appears to be reasonably appropriate for the one, it must be properly applicable to the other?

I have no purpose in this discussion actively to controvert the contention that many, or conceivably most, of the provisions of the Uniform Act may be desirable for commercial arbitration, just as they were so considered desirable by those who drafted the same or similar provisions included in earlier statutes, all of which were directed in their application solely to commercial arbitration.

11. 273 U.S. 418, 47 Sup. Ct. 426.

12. 277 U.S. 350, 48 Sup. Ct. 545.

But just because both processes are called "arbitration," does not necessarily mean that the same provisions are equally applicable to both.

The long time relationships between the parties to a collective bargaining agreement containing a provision for arbitration, coupled with a no-strike, no-lockout provision, bear almost no similarity to the relationships between the parties to an ordinary commercial contract. In consequence, the two types of arbitration are designed for very different purposes. While the one is a substitute for litigation, the other is a substitute for resort to economic force. Commercial arbitration concerns itself with business relationships for the breach of which a dollars and cents award ordinarily provides an adequate remedy.

Labor-management arbitration, in contrast, deals not with dollars and cents issues, but with the technical details of a wage incentive plan as applied to the various skills in a modern steel mill; with the application of a technical plan of job evaluation to the varying duties of employees engaged in the many and varying aspects of any of our many complicated industrial establishments; or even with the matter of promotions, lay-offs and rehires in the application of the something less than simple combinations of plant wide, departmental and unit or group seniority in any large scale production enterprise. All, and many more, are likely to be matters with which the average trial court is wholly unfamiliar, to the disposition of which the court process is ill adapted, which neither party to a collective bargaining agreement had any purpose to entrust to the disposition of a court, and which must be disposed of finally and without delay if the parties to a collective bargaining agreement are to go on living together and working together with any degree of harmony. The delay incident to court intervention in the arbitration process may produce small injury to the relationship of the parties to commercial arbitration, but such is not the case with labor-management arbitration. And one of the major objections to the many provisions of the Uniform Act that invite court intervention is the consequent inevitable delay.

While it is true that some concessions have been made by way of accepting amendments that delete a few of the most objectionable features of Section 12 of the Uniform Act, the basic offense of trying to apply a commercial act to the labor-management relationship still exists. The very nature and purpose of the labor-management arbitration process make highly inappropriate the application of most of the detailed provisions of the Uniform Act.

In the first place, the parties to a collective bargaining agreement, as a part of their own private agreement for handling their overall relationship over a continuing and indefinite period, have provided as the last step in their grievance procedure a method of disposition by an arbitrator or arbitration board of their own choice, which disposition they agree is to be final and binding, without the intervention of any outside authority, and they desire it to remain that way. The arrangement is one based solely on the voluntary agreement of the parties, and the element of complete voluntarism together with that of finality constitute the two most significant and essential aspects of the whole process. And the provisions of this statute do violence to both.

The essence of labor-management arbitration as provided for in most modern collective bargaining agreements lies in the fact that it is coupled with, as its necessary counterpart, a no-strike, no-lockout agreement. The parties have voluntarily agreed to give up these remedies of self-help, but only for a price and only on terms which they, themselves, have determined to substitute therefor. Their agreement determines how their relationship is to be governed. They have determined the scope and application of their arbitration provision. They have determined the jurisdiction of the arbitrator. And they have, by their own voluntary agreement, created the machinery by which they expect to guide and control their continuing relationship for years to come, and for final and binding disposition of their differences as they arise, machinery which the late Herbert Syme characterized as "the dispute resolving mechanism in a continuing relationship." They have not agreed to subject their relationship to the application of some statute or to the intervention of a court. What they have agreed to do is to forego their right to resort to the strike or the lockout, in exchange for an arbitration process under which the determination of the arbitrator or the arbitration board selected by the parties is to be final and binding, and they do mean final and binding.

A highly important part of this whole arrangement is that the parties select their own arbitrator, and when a statute provides for court appointment of an arbitrator, even under the restricted language of the Uniform Act, something is taken away from the essential characteristic of voluntarism, to say nothing of the fact that the average trial judge is not well equipped to make an effective appointment. As a matter of fact, the consent or agreement of the parties to submit a dispute to arbitration must be regarded as contingent upon its submission to the arbitrator of their

choice or one chosen by the process they have provided. Failing such a selection, there is nothing to indicate they have any intention to have their controversies decided by one in whose selection they have had no part, and their agreement contains no authorization for the arbitration to proceed.

When we further provide for a species of judicial review by the various provisions set forth in Sections 12 and 13 for vacating or correcting an award, and when we add the multiplicity of opportunities for appeal provided by Section 19, those basic and essential elements of voluntarism and finality bear small resemblance to the original intention and desires of the parties.

Upon what basis of justification or demonstrated need, may one ask, do we step in and superimpose upon the machinery provided by the parties something most of them do not want, and in my humble judgment, do not need?

If New York, and New Jersey, and Connecticut, and California, to name the most conspicuous states involved, find that their representatives of labor and management in their collective bargaining agreements have such small regard for their agreements that they must have the statutory authorization of a court to enforce their obligations to go to arbitration or to abide by an award, I certainly do not object to them having such a statute, which, of course, they already have. No one is going to barge into New York, for example, and try to persuade its legislature to repeal its long standing statute, or to repeal the amendment making it applicable to labor-management arbitration.

But what I do object to is the National Conference of Commissioners on Uniform State Laws, of which I have had the honor to be a member for more than a decade, or the American Arbitration Association, urging this legislation upon those who do not want it and who are convinced that they do not need it.

The provisions of the Uniform Act with its many open invitations to a party to call upon a court to intervene in the arbitration process is, in my judgment, fundamentally inconsistent with the basic major features of voluntary labor-management arbitration, intended to be the terminal point in every dispute, and not the signal for the beginning of court intervention, review, and a process of appeals.

This is peculiarly a field in which legislation should not enter unless the necessity therefor to save the usefulness of the institution has been

demonstrated beyond all rational doubt. No such urgent necessity has yet been discerned in the part of the country with whose arbitration practices and needs I am most intimately familiar.

Any adversely critical discussion of legislation may quite appropriately include proposals for amendment by means of which the objectionable features may be eliminated. It is submitted that a single very simple amendment to the last sentence of the first section of the Proposed Uniform Arbitration Act would eliminate the most vital objection voiced by those whose principal concern is labor-management arbitration,¹³ and would provide an act that would be much fairer to those who enter into collective bargaining agreements containing provisions for arbitration, but who are not familiar with the Uniform Act.

That amendment would change only four words in the sentence. At present it reads: "This Act *also* applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement.]"

As amended the sentence would read: "This Act *shall not* apply to agreements between employers and employees, or between their respective representatives, *unless* so provided in the agreement."

The obvious purpose of such an amendment would be to make sure that those who enter into such agreements are not caught unawares. A large percentage of such agreements are entered into without legal advice on either side. The possibility of either or both parties being unaware of the existence of such legislation would be great in many cases.

If the sponsors of this legislation are genuinely concerned about protecting the interests of those who become parties to collective bargaining agreements containing provisions for arbitration, they should be willing to accept such an amendment which would provide assurance that legislative and judicial intervention is to be made applicable only where calculated to coincide with the desires and fit the needs of those to whose relationships it is to be applied.

If labor-management arbitration is to continue to operate on its intended voluntary basis, I would strongly commend this amendment to your careful consideration.

13. At no time in this discussion is there any purpose to speak for the adherents of commercial arbitration.