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The Enforcement of Collective Bargaining Agreements by Arbitration in Louisiana

*Alvin B. Rubin**

Arbitration is not new to this century. In the fifteenth century, Rabelais wrote about arbitration of disputes in the streets of Paris.

Somewhere near the Seine, he wrote, near a shop where roast meat was being cooked, a hungry porter was eating his meal. A fat goose was being turned on a spit in the rotisserie, and the porter held his bread above the steaming goose to absorb into the dry bread the flavor and vapor of the fire and the goose. Suddenly the cook observed the porter, grabbed him by the collar, and demanded payment for the smoke emanating from his roast goose. The porter protested vehemently: he had taken nothing; the smoke was valueless; it would have gone uselessly up in the air anyhow; and besides it had never been seen or heard that roast meat smoke was sold upon the streets of Paris.

Along came Seyny John, who was known as the fool and citizen of Paris. Both parties agreed to submit the dispute to him for determination. After hearing their arguments Seyny John asked the porter for a silver coin. The porter handed over the coin and John flipped it upon the hearth two or three times, making it ring and tingle. Thereupon, drawing himself to full height, Seyny John pronounced his award: "The Court declareth, that the porter, who ate his bread at the smoke of the roast-meat, hath civilly paid the cook with the sound of his money; and the said court ordaineth that everyone return to his own home and attend his proper business, without cost and charges."¹

This tale should point no moral as to the custom of arbitrators in the decision of cases. But it does indicate the antiquity of the institution. Indeed, it is said by some authorities that arbitration to settle disputes antedated the courts of common law

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1. The author expresses his appreciation to Henry Mayer, Esq., of New York City, who related this tale in his bi-monthly labor service.

in England. In any event, the institution of arbitration is older even than the story of Seyny John. But the use of arbitration in the enforcement of collective bargaining agreements is much more recent.

Arbitration to enforce collective bargaining agreements was known in the nineteenth century in the United States, but it was used relatively infrequently. Even after the passage of the Wagner Act, when thousands of new collective bargaining agreements were made in the 1930's and 1940's, there appeared to be considerable reluctance on the part of both management and labor to entrust the enforcement of collective bargaining agreements to arbitration.

However, the National War Labor Board during World War II decided many cases involving disputes over the terms of collective bargaining agreements. It adopted a policy of requiring the use of clauses providing for the arbitration of future disputes concerning the interpretation or application of the agreement.²

Familiarity with arbitration of questions concerning the enforcement of collective bargaining agreements led to wider acceptability of the process. In 1944 the Bureau of Labor Statistics found that 73 percent of the contracts studied by it contained arbitration clauses. In 1949 83 percent of the contracts studied contained such clauses. In 1952 such clauses were contained in 89 percent of the 1,442 agreements studied.

The arbitration process varies of course in each collective bargaining agreement. A typical agreement provides that any grievances which arise shall be taken up with the other party pursuant to a specified procedure. This is usually a discussion with representatives of the other party on successively higher levels of authority. The final step of the grievance procedure is generally a conference between the local union president and the plant manager. If they are unable to reach a settlement of the grievance, arbitration may be demanded within a stated period of time.

Grievances are usually broadly defined. But the arbitration clause may restrict the scope of questions which are arbitrable

2. ELKOURI, HOW ARBITRATION WORKS 6 (1952); Freidin & Ulman, *Arbitration and the National War Labor Board*, 58 HARV. L. REV. 309 (1945).

to questions of interpretation or application of the collective bargaining agreement and of grievances arising under it. Thus new contract proposals, wage rates, and complaints outside the scope of the agreement may be excluded from arbitration.

The typical complaint for arbitration is that a party to the agreement has violated it in some fashion. Submission of such a grievance to arbitration is in effect enforcement of the collective bargaining agreement through the arbitration process.

Obviously, this process of grievance arbitration is a quasi judicial process. It is a method to settle disputes arising in the course of administration of collective bargaining agreements. As a method of dispute settlement it has been found to have certain major advantages over normal judicial procedures: it is quick and inexpensive, and it can normally be conducted in an informal manner, without detailed procedural and evidentiary rules.

But arbitration in this area is not merely a substitute for judicial decision. It is usually thought of by the parties primarily as a substitute for and a remedy for unilateral economic action. Most important of all of the factors leading management and labor to agree to arbitration is the belief that strikes can be avoided by providing a fair remedy to parties who are aggrieved by events occurring during the term of a collective bargaining agreement.

In addition, arbitration serves as a safety valve. Even unfounded complaints may fester in the industrial air. Arbitration provides a neutral, in whom both parties may have confidence, who may hear the complaint, examine it, and pronounce upon its merits. The losing party may become convinced of the lack of merit of his claim. Even if he is not convinced, however, he is apt to be more satisfied with the fact that he has had a full hearing. And it has not been unknown to happen that a losing party could relieve some of his complaint by transferring his rancor to the arbitrator and his decision.

Thus arbitration can attempt to clear the air. It may prevent a series of relatively small complaints building up into an explosive situation. It is primarily a substitute for economic warfare between the parties. In this role, voluntary arbitration has been encouraged by both state and federal legislation. In discussing the enforcement of the arbitration clause, therefore, we

must not overlook the fact that, in the enforcement of collective bargaining agreements, arbitration is something more than a substitute for court decision. The vast majority of arbitration cases would never end up in court were there no arbitration. They would wind up either as unresolved problems potentially productive of future difficulty or as the provocation of strikes, work stoppages, slowdowns, lockouts, discharges and other punitive economic action.

ARBITRABILITY AND PROCEDURAL PROBLEMS

Even where both parties are willing to employ the arbitration process to settle their differences, various problems arise in the course of submission to arbitration. A recurring problem is whether the dispute is arbitrable. Is the matter in dispute a problem of the kind which the parties have agreed to submit to arbitration? The problem is jurisdictional, for the sole authority of the arbitrator is the delegation of jurisdiction to him either in the collective bargaining agreement or in a separate submission agreement by which a given dispute is submitted for his decision.

Where the parties cannot agree upon arbitrability of a dispute, it is not unusual for them to submit for the arbitrator's decision the question whether or not the dispute is arbitrable.³ The matter of the arbitrator's jurisdiction has been held to be ultimately a question for the courts, and some courts have issued injunctions to stay arbitration, pending their determination of the question of arbitrability.⁴

Another procedural problem is akin to the problem of joinder of issues: May either party insist upon arbitrating two or more disputes before the same arbitrator in the same hearing? Something more than the techniques for handling joined cases is involved, however. A common objection to the joinder of arbitration cases is that the arbitrator will be inclined to "split the decision," thus awarding a partial victory to each side. While this

3. See *Caledonia Mills, Inc.*, 15 Lab. Arb. 474 (1950); *Western Automatic*, 9 Lab. Arb. 606 (1948).

4. *Brampton Woolen Co. v. Local Union*, 11 Lab. Arb. 487 (Sup. Ct. N.H. 1948). See collection of the cases in Annot., 24 A.L.R.2d 752, 766 (1952). *But see United Textile Workers v. Goodall-Sanford, Inc.*, 27 Lab. Cas. 69,098 (D.C. Me. 1955); *Rogers Diesel & Aircraft Corp. v. Amalgamated Local*, 15 L.R.R.M. 848 (Sup. Ct. N.Y. 1945). The problem is thoroughly discussed in FREIDIN, *LABOR ARBITRATION AND THE COURTS* 6 (1952). Mr. Freidin concludes that jurisdiction to determine the arbitrability of a dispute should be vested in the arbitrator. *Id.* at 47.

suspicion is probably ill founded when focused on the competent and experienced arbitrator, there is no doubt that it is widely held. Balanced against this distrust, however, are factors of convenience and economy. The arrangements to hear four cases can be made almost as quickly as those on a single case, and the expense of the hearing is not appreciably greater. Therefore, the "per case" cost becomes considerably less. Given the issue to determine, most arbitrators have decided in favor of efficiency and against the suspicion of their own motives. In the absence of controlling language in the collective bargaining agreement, arbitrators generally decide that several cases can be submitted at a single hearing.⁵

Jurisdiction to arbitrate may be questioned on the basis that the answer to the question sought to be arbitrated is so clear that arbitration cannot be required. Courts in New Jersey and New York have held that, if the alleged dispute is without basis, arbitration is not required.⁶ This rule, commonly referred to as the "no-dispute" doctrine, may be based on a judicial distrust of arbitration procedures or it may be simply an effort to discourage irresponsible resort to arbitration. Yet, logically, in determining whether a dispute is arbitrable, it is immaterial whether the claim giving rise to it is well founded. The arbitration process has values both as a safety valve and as a means of convincing the grievant that his claim is not well founded.⁷ To permit a party to refuse to arbitrate because he believes his position clear is to deny those values at least in part. The lack of merit of a claim should not affect its arbitrability.⁸

JUDICIAL ENFORCEMENT OF ARBITRATION CLAUSES

If either party is unwilling to submit a dispute to arbitration, the other may seek court relief, either by what is in effect

5. See awards in *Armstrong Cork Co.*, 23 Lab. Arb. 13 (1954); *American Hardware Corp.*, 23 Lab. Arb. 588 (1954). Cf. FREIDIN, *LABOR ARBITRATION AND THE COURTS* 5 (1952): "It has many times been argued, however, that labor disputes are of such unique character, their proper settlement and mode of settlement so frequently unorthodox and improvised, that the question is best left to the presumed expertness of the arbitrator. It has been argued, too, and with much force, that arbitration clauses ought to be broadly enough construed to give to the arbitrator power to determine his own jurisdiction, in which case the role of the courts in the arbitration process would be considerably limited."

6. "The mere allegation of the existence of a dispute within the terms of the contract requiring arbitration does not require arbitration if the alleged dispute is without basis." *In re Gottfried Oppenheimer, Inc.*, 24 Lab. Arb. 154 (S. Ct. N.Y. 1955). The cases are summarized in Annot., 24 A.L.R.2d 752, 756 (1952).

7. See FREIDIN, *LABOR ARBITRATION AND THE COURTS* 10-11 (1952).

8. See Annot., 24 A.L.R.2d 752, 756 (1952).

a suit for breach of contract, or by asking specific performance of the arbitration agreement.⁹ At common law an agreement to arbitrate future disputes was not enforceable.¹⁰ The Louisiana Civil Code contains a title "Of Arbitration"¹¹ which deals with arbitration after a written¹² submission of "a lawsuit or difference."¹³ There were early intimations that Louisiana courts might be willing to recognize the validity of executory agreements to arbitrate,¹⁴ but the Louisiana Supreme Court took the view that such a contract is "dependent for its execution on the will of the parties." The court would not enforce agreements "whereby persons undertake, with regard to matters to arise in the future, to close the doors of the courts upon themselves."¹⁵

LOUISIANA LEGISLATION

Since provisions for the arbitration of future disputes were considered desirable in many types of commercial contracts, the utility of the arbitration agreement outweighed the judicial distrust of the arbitration forum, and many states, as well as the Congress of the United States, adopted statutes permitting the enforcement of executory arbitration agreements. In 1928, Louisiana adopted an arbitration law.¹⁶ This was eventually replaced by the Louisiana Arbitration Law of 1948¹⁷ which provided that "a provision in any written contract to settle by arbitration a controversy thereafter arising out of the contract" shall be "valid, irrevocable and enforceable."¹⁸ If a suit is "brought upon any issue referable to arbitration under an agreement in

9. Since this paper deals with the use of the arbitration process, the use of declaratory proceedings for an interpretation of the basic agreement has not been covered.

10. See UPDEGRAFF & MCCOY, *ARBITRATION OF LABOR DISPUTES* 55 (1946). It has been suggested that "while such hostility is historically explicable with respect to the arbitration of commercial disputes, it would not have played any part in the development of labor arbitration had it been understood that labor disputes were not the stuff of lawsuits, and had never been, but of strikes; that they had rarely been taken to court but to the picket line, and that the no-strike clause in the collective agreement and the willingness to continue working while new contract differences were being resolved were both principles that grew out of the arbitration procedure." FREIDIN, *LABOR ARBITRATION AND THE COURTS* 1 (1952).

11. Title XIX, art. 3099 *et seq.*

12. LA. CIVIL CODE art. 3100 (1870).

13. LA. CIVIL CODE art. 3099 (1870).

14. See *Alford v. Tiblier*, 1 McGloin 151 (La. 1880).

15. *Saint v. Martel*, 127 La. 73, 53 So. 432 (1910); see *State ex rel. Watkins v. North American Land & Timber Co.*, 106 La. 621, 31 So. 172 (1902).

16. La. Acts 1928, No. 262, p. 498.

17. La. Acts 1948, No. 377, p. 1013, incorporated as LA. R.S. 9:4201 *et seq.* (1950).

18. LA. R.S. 9:4201 (1950).

writing for arbitration, the court in which suit is pending, upon being satisfied that the issue involved . . . is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until an arbitration has been had. . . ."¹⁹ Thus, the Louisiana Arbitration Law permits both specific performance of an agreement to arbitrate and the stay of other proceedings pending arbitration.

The statute thus constitutes a means to enforce arbitration compacts judicially. But a limitation contained in its final section must be considered before the act can be applied to arbitration clauses in collective bargaining agreements: "Nothing contained in this Chapter shall apply to contracts of employment of labor or to contracts for arbitration which are controlled by valid legislation of the United States. . . ."²⁰

It is arguable that a collective bargaining agreement is a "contract of employment of labor," and a court which viewed arbitration proceedings with distrust might adopt this interpretation. Yet there are significant differences between the words "contracts of employment of labor" and collective bargaining agreements, just as there are important legal distinctions between a contract of employment and a collective bargaining agreement.²¹ Collective bargaining agreements are far broader in scope than "contracts of employment of labor," and there is doubt whether they are truly in any sense contracts of *employment*, for normally such agreements give employment to no one. They merely fix the terms and conditions of collective bargaining and of such employment as may exist. The collective bargaining agreement is more nearly a labor code than a contract of employment. Other methods of distinguishing the collective bargaining agreement and the employment contract will occur to counsel interested in finding coverage by the statute, just as points of identity will occur to those seeking to limit coverage of the Louisiana Arbitration Act. No decisions interpreting the clause have been found, and the merit of any argument will rest upon its ultimate judicial acceptability.

19. LA. R.S. 9:4202 (1950).

20. LA. R.S. 9:4216 (1950).

21. See opinion of Mr. Justice Jackson in *J. I. Case Co. v. NLRB*, 321 U.S. 332, 334-35 (1955): "Collective bargaining between employer and the representatives of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone."

My own view is that the Louisiana Arbitration Act should be held to apply to collective bargaining agreements.²² There is a slight but significant difference in language from the earlier act which said that "nothing herein contained shall apply to contracts of [sic] disputes between employees, or employers of labor"²³ (Emphasis added.) The Legislature has declared it the public policy of the state that "the settlement of issues between employers and employees . . . may be advanced by making available full and adequate state governmental facilities for . . . voluntary arbitration to aid and encourage employers and the representatives of their employees . . . to make all reasonable efforts to settle their differences by mutual agreement . . . or by such methods as may be provided for in any applicable agreement for the settlement of disputes."²⁴ (Emphasis added.) The Louisiana Labor Mediation Board is to "do all in its power to promote" voluntary arbitration, as well as mediation and conciliation,²⁵ although "the failure or refusal of either party to agree to any procedure suggested by the board shall not be deemed a violation of any duty or obligation imposed by this Part."²⁶ The act which created the Mediation Board recognized that "rights" might be available for arbitration under other Louisiana laws.²⁷ This act might itself be considered to recognize the validity of arbitration clauses in collective bargaining agreements.²⁸ And finally we come back to the words of the arbitration act itself: it is difficult to see that the code of industrial

22. A contrary view was assumed in a summary of *Louisiana Legislation of 1948*, 9 LOUISIANA LAW REVIEW 19 (1948). But in FREIDIN, LABOR ARBITRATION AND THE COURTS 2, n. 10 (1952), Louisiana is cited as enforcing future disputes clauses contained in collective labor agreements.

23. La. Acts 1928, No. 262, § 16, p. 503, as amended by La. Acts 1932, No. 218, p. 706. Section 2 of the 1932 act provided expressly for arbitration of disputes between an employer of not less than fifty employees and "between an association, union or other protective employer's [sic] organization, numbering not less than fifty of its membership, as such employees"

24. LA. R.S. 23:861 (1950). Considerable editorial license has been exercised in expunging materials not relevant to arbitration from the quotation but I believe the net result is an accurate resumé of the provisions of the statutory section relative to arbitration.

25. LA. R.S. 23:868 (1950).

26. *Ibid.* These words imply that the statute does, or at least may, impose duties and obligations on employers and employees.

27. LA. R.S. 23:872 (1950).

28: See *ibid.*: "If the collective bargaining agreement between the parties contains provisions for arbitration, these provisions shall prevail in the arbitration of the controversy." If there is no collective bargaining agreement containing provisions for arbitration, the act specifies a procedure to be followed, but the parties must agree in writing to arbitration and must state specifically the question to be submitted. LA. R.S. 23:873 (1950).

relations which is the usual collective bargaining agreement can be considered a contract of employment of labor.

LEGISLATION OF THE UNITED STATES

To determine the meaning of the limitation in the Louisiana Arbitration Act excluding its applicability to "contracts for arbitration . . . controlled by valid legislation of the United States," it is necessary to look to federal legislation. In matters involving state law, the federal courts are of course obliged to follow state law on the validity of executory arbitration agreements.²⁹ Congress may however provide the rules of decision for cases involving federal questions, as well as the rules of procedure in federal courts. Two federal acts relate to our problem. The United States Arbitration Act³⁰ provides that agreements to arbitrate in "a . . . contract evidencing a transaction involving commerce" are "valid, irrevocable, and enforceable."³¹ The court may order specific performance of the arbitration agreement,³² and may stay proceedings upon any issue referable to arbitration under an agreement in writing for arbitration.³³ The act contains provisions for compelling the attendance of witnesses, and for enforcement of the award of the arbitrators. However, the first section of the act defines commerce and states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."³⁴

The clause quoted raises two questions: (1) Is a collective bargaining agreement a "contract of employment"?; (2) Are the employees covered by the agreement a "class of workers engaged in foreign or interstate commerce"? The structure of the act raises yet another question: Does the exception relating to "contracts of employment" apply to the entire act or only to those parts of the act which expressly deal with transactions involving commerce?³⁵ Section 1 defines "commerce" and, as noted above, states that "nothing herein contained shall apply to con-

29. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

30. 9 U.S.C. §§ 1-14 (1947).

31. *Id.* § 2.

32. *Id.* § 4.

33. *Id.* § 3.

34. *Id.* § 1.

35. All three questions are suggested by Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591, 593 (1954); and the first two are quoted from his text.

tracts of employment." Section 2 of the act provides that a written provision "in . . . a contract evidencing a transaction involving commerce" shall be valid, irrevocable and enforceable, but section 3 provides for the issuance of a stay pending arbitration in "any suit or proceeding . . . brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration." Because somewhat broader terms are used in section 3, and because the term "commerce" (defined in section 1) is not used in that section, it was held in one case that the limitation upon coverage of contracts of employment is applicable in determining the coverage of section 2 but not in fixing the coverage of section 3.³⁶ This decision by the Court of Appeals for the Third Circuit was later reconsidered, and that court concluded that the act applies in equal terms to applications for specific performance of arbitration agreements and to motions to stay suits pending arbitration.³⁷

However, the Courts of Appeals which have considered the question are at complete odds with regard to whether a collective bargaining agreement is a contract of employment. The Courts of Appeals for the Fourth³⁸ and Fifth³⁹ Circuits hold collective bargaining agreements to be contracts of employment within the meaning of the United States Arbitration Act and a statement in a decision by the Tenth Circuit Court⁴⁰ indicates that it shares that view. The First⁴¹ and Sixth⁴² Circuits hold that only individual contracts of employment are excluded from coverage

36. *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3d Cir. 1943).

37. *Amalgamated Association v. Pennsylvania Greyhound Lines*, 192 F.2d 310 (3d Cir. 1951); see *Pennsylvania Greyhound Lines v. Amalgamated Ass'n*, 193 F.2d 327 (3d Cir. 1952).

38. *International Union United Furniture Workers v. Colonial Hardwood Flooring Co.*, 168 F.2d 33 (4th Cir. 1948); *United Electrical Workers v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954).

39. *Lincoln Mills v. Textile Workers*, 230 F.2d 81 (5th Cir. 1956).

40. See *dicta* in *Mercury Oil Refining Co. v. Oil Workers International Union*, 187 F.2d 980 (10th Cir. 1951).

41. *Local 205, United Electrical, Radio and Machine Workers of America v. General Electric Co.*, 233 F.2d 85 (1st Cir. 1956); *Newspaper Guild of Boston v. Boston Herald-Traveler Corp.*, 233 F.2d 102 (1st Cir. 1956); *Goodall-Sanford, Inc. v. United Textile Workers of America, AFL, Local 1802*, 233 F.2d 104 (1st Cir. 1956).

42. *Hoover Motor Express Co. v. Teamsters Union*, 217 F.2d 49 (6th Cir. 1954). The court distinguished *Gatliff Coal Co. v. Cox*, 142 F.2d 876 (6th Cir. 1944), stating that the earlier case was authority only for the proposition that section 1 of the Arbitration Act is applicable to the whole act and is not authority for the proposition that a collective bargaining agreement is a contract of employment, mentioning that the suit in the *Gatliff Coal Co.* case was for individual wages. However, the court did deny a stay order in the *Hoover* case because the collective bargaining agreement did not provide for arbitration of the controversy involved.

by the act, and apply it to collective bargaining agreements. The Eighth Circuit has held the act inapplicable to a suit for damages for breach of a collective bargaining agreement because a stay of proceedings was not expressly sought, and therefore apparently considered that the act might be applicable although it did not specifically discuss this issue.⁴³

Other federal courts have held that collective bargaining agreements are not "contracts of employment."⁴⁴ Several state courts have concluded that similar phrases in state legislation do not apply to collective bargaining agreements.⁴⁵

That a collective bargaining agreement is a contract of employment is a logically doubtful proposition. Certainly it is not literally a contract of employment, for no particular person is employed by virtue of it. But it is apparent that the sharp conflict in the views adopted by the various circuits should lead soon to a Supreme Court interpretation of the act and the meaning of its terms.

The second salient of the problem is whether a distinction should be drawn between workers "engaged" in commerce and those who merely produce for commerce. The Court of Appeals for the Third Circuit developed another approach to the entire coverage question by holding that the restriction of coverage in the first section of the act applies only to workers actually *engaged* in foreign or interstate commerce. The court held that the act does not exclude coverage for workers engaged in the production of goods for subsequent sale in interstate commerce and hence its provisions are available in connection with arbitration

43. *United Electrical, Radio & Machine Workers of America v. Oliver Corp.*, 205 F.2d 376 (8th Cir. 1953).

44. *Lewittes & Sons v. United Furniture Workers*, 95 F. Supp. 851 (S.D.N.Y. 1951); *United Office and Professional Workers v. Monumental Life Insurance Co.*, 88 F. Supp. 602 (E.D. Pa. 1950); *Brady Transfer and Storage Co. v. International Brotherhood of Teamsters*, 22 CCH Lab. Cas. 67,121 (N.D. Ill. 1952).

45. See Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 595, n. 15 (1954), citing *Levy v. Superior Court*, 15 Cal.2d 692, 104 P.2d 770, 773-74 (1940) (a collective bargaining agreement held not to be a contract "pertaining to labor" because "the considerations which would except [personal] contracts to perform labor from such proceedings do not exclude collective bargaining agreements"); *Kaplan v. Bagrier*, 12 Pa. D. & C. 693 (C.P. 1929) (collective bargaining agreement not a "contract for personal services"). *Contra*, *Retail Cigar, Drug & Luncheonette Employees Local 1034 v. Sun Ray Drug Co.*, 67 Pa. D. & C. 512 (C.P. 1949) (collective bargaining agreement not a "contract for personal services").

In Pennsylvania, the cases are in conflict as to whether the statutory exception of contracts "for personal services" applies to collective bargaining agreements. See FREDIN, *LABOR ARBITRATION AND THE COURTS*, n. 13 (1952).

clauses in collective bargaining agreements affecting such employees.⁴⁶ In this interpretation, the Court of Appeals for the Second Circuit has joined.⁴⁷ The issues involved here have been referred to by Professor Archibald Cox of the Harvard Law School as "too nicely balanced to advocate either conclusion with great conviction." However, Professor Cox urges that deciding the meaning of the phrase "engaged in interstate commerce" poses the same problem as deciding the meaning of the phrase "contract of employment."⁴⁸ Because no conclusive weight can be given to any interpretation of either clause, the decision should be predicated upon whether national policy is to encourage or discourage arbitration procedures in cases arising out of collective bargaining agreements.⁴⁹

Another possible avenue for the enforcement of collective bargaining provisions for arbitration was opened by the Labor Management Relations Act.⁵⁰ Section 301 of the act⁵¹ permits suits for violation of contracts between employers and labor organizations representing employees in industries affecting commerce to be brought in the district courts of the United States. This section has been relied upon by several courts in granting specific performance of agreements to arbitrate.⁵²

46. *Tenney Engineering, Inc. v. United Electrical Workers*, 207 F.2d 450 (3d Cir. 1953). The employer had brought suit for damages for breach of a no-strike clause under section 301 of the Labor Management Relations Act. The union sought a stay of proceedings pending arbitration. The stay was granted. The decision is thoroughly examined and its result questioned in Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591 (1954). A contrary opinion was indicated in *United Electrical Workers v. Miller Metal Products, Inc.*, 215 F.2d 221 (4th Cir. 1954).

47. *Signal-Stat Corp. v. Local 475, United Electrical, Radio and Machine Workers of America*, 235 F.2d 298 (2d Cir. 1956).

48. Cox, *Grievance Arbitration in the Federal Courts*, 67 HARV. L. REV. 591 (1954). Professor Cox urges that "one may assert dogmatically that the course followed by the Third Circuit is clearly wrong. One should not rely on one policy in interpreting the phrases relating to commerce and an opposite conception in reading 'contract of employment.'"

49. *Bernhardt v. Polygraphic Co.*, 122 F. Supp. 733 (D. Vt. 1954).

50. 61 STAT. § 201, p. 152, 29 U.S.C. § 171 *et seq.* (1947).

51. 61 STAT. § 301, p. 156, 29 U.S.C. § 185 (1947).

52. In *Wilson Brothers v. Textile Workers*, 27 CCH Lab. Cas. 69,026 (S.D.N.Y. 1954), in which the court deliberated applicability of the Arbitration Act, but stated that question need not be decided for "Section 301(a) of the Labor Management Relations Act has generated of its own force the remedy of compelling arbitration." *Textile Workers v. Aleo Manufacturing Co.*, 94 F. Supp. 626 (D.N.C. 1950); *Textile Workers v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953). See Katz & Jaffe, *Enforcing Labor Arbitration Clauses by Section 301, Taft-Hartley Act*, 8 ABB. J.(N.S.) 80 (1953); *Evening Star Newspaper Co. v. Columbia Typographical Union*, 22 Lab. Arb. 262 (D.C.D.C. 1954); *Insurance Agents International Union v. Prudential Insurance Co.*, 24 Lab. Arb. 110 (E.D. Pa. 1954).

Professor Cox, in *Grievance Arbitration in the Federal Courts*, 67 HARV. L.

However, the full scope of section 301 still awaits definition.⁵³ In *Association of Westinghouse Salaried Employees v. Westinghouse*⁵⁴ the Supreme Court denied jurisdiction of a wage claim brought by a union. The basis stated in the opinion by Justice Frankfurter was that Congress did not intend to burden the federal courts with suits of this type,⁵⁵ but the opinion indicated in dictum that the section is procedural and that state law is the applicable substantive law.⁵⁶ If this is true, then suits to enforce arbitration clauses in collective bargaining agreements would be governed by state law even if federal jurisdiction to entertain such suits is granted by section 301. But whether this is the Supreme Court's view is not yet clear, because of the differences in opinion on the court. One federal court, subsequent to the decision, ordered arbitration, but stated it would not decide whether or not it had jurisdiction to decide the actual controversy which was the subject of arbitration.⁵⁷ Another federal district court has taken the view that the *Westinghouse* decision had the effect of denying the court authority to order arbitration.⁵⁸ The circuit courts are having difficulty with the problem, too. The Court of Appeals for the Fifth Circuit believes that

REV. 591, 598 (1954), suggests that, in compelling specific performance of an arbitration clause under the LMRA, it is necessary for the plaintiff to invoke sections 2 and 4 of the Arbitration Act. He further suggests that the plaintiff then moves into a dilemma: He must show that the collective agreement is a contract "evidencing a transaction involving commerce" (under section 2 of the Arbitration Act) but that it is not a "contract of employment" (under section 1 of the act) or else that the workers covered thereby are not "seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce." However, most of the courts which have granted relief under authority of section 301 of the LMRA have not felt it necessary to rely in any fashion on the Arbitration Act. Professor Cox notes that this is a "distinct but parallel question."

The cases also raise the question of whether state law should control in an action under section 301. Judge Wyzanski, in *Textile Workers v. American Thread Co.*, *supra*, felt that Congress "would have preferred that remedies should be determined without reference to state law, and should include specific enforcement of arbitration clauses in labor contracts." Professor Cox likewise considers the question of specific performance of the arbitration compact a question of remedy.

53. See Wollett & Wellington, *Federalism and Breach of the Labor Agreement*, 7 STAN. L. REV. 445 (1955).

54. 348 U.S. 437 (1955).

55. Justice Reed concurred in a separate opinion on another basis, and Chief Justice Warren and Justice Clark concurred in another separate opinion.

56. Justice Reed concurred in the result but would not agree on this score, and the dissenting Justices Douglas and Black also apparently differed with Justice Frankfurter.

57. *United Textile Workers v. Goodall-Sanford, Inc.*, 28 Lab. Cas. 69,259 (D. Me. 1955).

58. *Newspaper Guild of Pawtucket v. Times Publishing Co.*, 28 Lab. Cas. 69,442 (D.R.I. 1955). See also *Industrial Trades Union v. Dunn Worsted Mills*, 131 F. Supp. 945 (D.R.I. 1955).

section 301 grants jurisdiction to the federal courts but that the right to enforce submission to arbitration must be sought from other "State or Federal sources."⁵⁹ "Finding nothing of Federal origin or in the [State] laws" which required or permitted the enforcement of arbitration, it dismissed a suit to compel arbitration. The Court of Appeals for the First Circuit held that specific performance of an arbitration agreement is a remedial matter, governed by federal law alone. It did not believe that section 301 alone should be held to justify awarding this remedy, but it held that it had authority to do so under the United States Arbitration Act.⁶⁰

Another issue sometimes urged is that the provisions of the Norris-LaGuardia Act restricting the power of federal courts to issue injunctions in labor disputes prevents the ordering of specific performance of arbitration agreements or the stay of judicial proceedings pending arbitration. Literally, the Norris-LaGuardia Act might be so read. However, the purpose and history of the Norris-LaGuardia Act indicate that it has no application to the situation where specific performance of agreements voluntarily made is sought.⁶¹

It has been suggested that enforcement of collective bargaining agreements may also be achieved on the basis that refusal to arbitrate is an unfair labor practice within the meaning of the Labor Management Relations Act. The decisions of the National Labor Relations Board indicate that the board will not support this view.⁶²

In the Fifth Circuit it appears reasonably certain that enforcement of collective bargaining agreements may not be had in federal court either under the provisions of the Labor Management Relations Act of 1947 or under the provisions of the United States Arbitration Act. This leaves only one other approach available in federal courts in this circuit: a suit in which federal jurisdiction is predicated on diversity of citizenship and

59. *Lincoln Mills v. Textile Workers*, 230 F.2d 81 (5th Cir. 1956).

60. *Local 205, United Electrical, Radio & Machine Workers of America v. General Electric Co.*, 233 F.2d 85 (1st Cir. 1956).

61. See *Local 205, United Electrical, Radio & Machine Workers of America v. General Electric Co.*, 233 F.2d 85 (1st Cir. 1956); *Lincoln Mills v. Textile Workers*, 230 F.2d 81 (5th Cir. 1956); *Milk & Ice Cream Drivers v. Gillespie Milk Products Corp.*, 203 F.2d 650 (6th Cir. 1954); *Textile Workers v. American Thread Co.*, 113 F. Supp. 137 (D. Mass. 1953).

62. See Comment, *Enforcement of Labor Arbitration Agreements: Is Refusal to Arbitrate an Unfair Labor Practice?*, 14 LOUISIANA LAW REVIEW 596 (1954).

in which the right to relief is found in state law. We come then full circle back to the Louisiana Arbitration Act.

That act provides that it shall not apply to "contracts for arbitration which are controlled by valid legislation of the United States." Under the federal decisions controlling in this circuit, specific performance of an agreement to arbitrate is not available. The exception in the Louisiana statute should not apply and there should be a right to relief in state courts. State courts presumably are denied the power to enforce the arbitration clause only in situations where valid federal legislation controls the contract for arbitration.

CONCLUSION

The acceptability of arbitration as a means for resolving disputes arising under collective bargaining agreements rests upon the fundamental premise that an arbitration award will receive the respect both of employers and employees. Should the arbitration forum cease to be generally acceptable, the arbitration provision is likely to disappear from the collective bargaining agreement.

Most disputes will probably be resolved by voluntary arbitration, without resort to the courts for enforcement. However, even where the general institution of arbitration is contractually accepted, cases will arise in which one party or the other feels it imperative to resist arbitration either by refusing to arbitrate or by filing a lawsuit without resort to arbitration. In such instances, where the industry is one affecting commerce, arbitration can be had in some federal jurisdictions by suit for specific performance in reliance on the Labor Management Relations Act of 1947. Where reliance is on the United States Arbitration Act, it is necessary to look to the decisions in the particular circuit in which suit is brought. To the author, the weight of logic is with the minority of cases, respectable in number and authority, which grant enforcement.

Executory arbitration clauses in collective bargaining agreements in intrastate industry have not yet been considered by Louisiana courts. Nevertheless, sound reasons exist to find such a remedy available in Louisiana. The strongest argument against enforcement by Louisiana courts of executory agreements to arbitrate is the fact that a number of the federal courts have

not applied the United States Arbitration Act in similar circumstances.

It is difficult to resist the logic that state policy should encourage voluntary arbitration as a substitute for economic warfare. The acceptability of the no-strike clause has paralleled the development of a forum in which grievances can be heard and resolved. The erection of judicial barriers to the entrance to this forum or, indeed, the extended litigation of whether or not the door to arbitration is open, would invite abandonment of peaceful corridors and recourse again to economic warfare. Such a result would be harmful both to employers and employees and damaging to state and national interest. Until a better forum is found, voluntary arbitration agreements deserve support and enforcement. An arbitration proceeding is neither a lawsuit nor a substitute for a lawsuit. It is a procedure designed to meet the need for a substitute for economic warfare. Only when treated in this context can enforcement questions be properly weighed.