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COMMENTS

ARBITRATION—A VIABLE ALTERNATIVE?

I. Introduction

The common law judicial system has traditionally provided a forum for settling the many disputes which arise between individual members of society. To perform this function a great body of law has developed which regulates nearly every possible relationship between people, whether it be as tangible as a commercial contract, or as personal as a marriage bond. Today, however, the courts are finding it increasingly difficult to deal with the problems which may arise in a society where life styles are rapidly changing and where business dealings are becoming increasingly complex. The stress and congestion which characterizes urban America has spawned more law suits than the court structure can satisfactorily process.¹

Lawyers and laymen routinely decry the backlog in court calendars engendered by a judicial apparatus which has remained essentially unchanged since it was inherited from the British nearly two hundred years ago.² Private arbitration as an alternative to litigation has been viewed by many authorities as an important method of improving judicial administration. Mr. Chief Justice Burger has stated:

There are a great many problems that should not come to judges at all, and can be disposed of in other ways, better ways. I can suggest one basic way that must be developed more widely in this country, and that is the use of private arbitration.³

Arbitration is a voluntary agreement between the parties to a dispute to abide by the decision of a neutral third party.⁴ This procedure, being the creation of the parties, is generally more infor-

1. Fleming, *Court Survival in the Litigation Explosion*, 54 JUDICATURE 109 (1970).

2. Burger, *Deferred Maintenance*, 57 A.B.A.J. 425, 426 (1971).

3. FORBES, July 1, 1971, at 21.

4. "Broadly speaking, arbitration is a contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for

mal⁵ than court procedures and, as a result, disputes are usually resolved faster and with less expense.⁶

Arbitration as a form of conflict resolution can be traced to the English common law,⁷ and has been further developed in our own case law and modern statutes.⁸ The *sine qua non* of arbitration is

determination, in place of the tribunals provided by the ordinary processes of law." *Gates v. Arizona Brewing Co.*, 54 Ariz. 266, 269, 95 P.2d 49, 50 (1939). "An agreement to arbitrate is really an agreement between parties who are in a controversy, or look forward to the possibility of being in one, to substitute a tribunal other than the courts of the land to determine their rights." *Dworkin v. Caledonian Ins. Co.*, 285 Mo. 342, 356, 226 S.W. 846, 848 (1920). See generally 6A A. CORBIN, CONTRACTS §§ 1431-44B (1962) [hereinafter cited as CORBIN].

5. "Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities . . . They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery." *American Almond Prod. Co. v. Consolidated Pecan Sale Co.*, 144 F.2d 448, 451 (2d Cir. 1944) (Learned Hand, J.).

6. *Gates v. Arizona Brewing Co.*, 54 Ariz. 266, 269, 95 P.2d 49, 50 (1939); see Burger, *supra* note 2, at 426; "The principal purpose of arbitration is to reach a speedy and final result and to avoid protracted litigation." *Mole v. Queen Ins. Co. of America*, 14 App. Div. 2d 1, 3, 217 N.Y.S.2d 330, 332 (4th Dep't 1961).

7. *Vynior's Case*, 77 Eng. Rep. 597, 598-99 (K.B. 1708).

8. The modern statutes expand the common law notion by providing for the enforcement of agreements to arbitrate future as well as present controversies. See Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L. REV. 155, 161 (1970). On the subject of arbitration generally, see M. DOMKE, DOMKE ON COMMERCIAL ARBITRATION (1968) [hereinafter cited as DOMKE]. DOMKE lists six common features of the "modern" arbitration statutes: "1. irrevocability of any agreement to submit future disputes to arbitration; 2. power of a party, pursuant to a court direction, to compel a recalcitrant party to proceed to arbitration; 3. provision that any court action instituted in violation of an arbitration agreement may be stayed until arbitration in the agreed manner has taken place; 4. authority of the court to appoint arbitrators and fill vacancies when arbitrators withdraw or become unable to serve during the arbitration; 5. restrictions on the court's freedom to review the findings of facts by the arbitrator and his application of the law; 6. specification of the grounds on which awards may be attacked for procedural defects, and of time limits for such challenges." *Id.* § 4.01. In addition to the federal government there are now

the agreement. No dispute can be settled by arbitration unless the parties have first agreed to submit to a private forum.⁹

thirty-two states which have modern arbitration statutes. See United States Arbitration Act, 9 U.S.C. §§ 1-14 (1970); ALASKA STAT. §§ 09.43.010-.180 (Cum. Supp. 1972); ARIZ. REV. STAT. ANN. §§ 12-1501 to -1517 (Cum. Supp. 1972) (Uniform Arbitration Act), 312-2101.01 (Supp. 1972) (Appeals from Arbitration Awards); ARK. STAT. ANN. §§ 34-511 to -532 (1971); CAL. CIV. PRO. CODE §§ 1280-89 (West 1967); CONN. GEN. STAT. REV. §§ 52-408 to -424 (1960), *as amended*, §§ 52-413, -416 (Supp. 1969); DEL. CODE ANN. tit. 10, §§ 5701-06 (1953); FLA. STAT. ANN. §§ 682.01-.22 (Supp. 1972); HAWAII REV. STAT. §§ 658-1 to -14 (1968); ILL. REV. STAT. ch. 10, §§ 101-23 (1972); IND. ANN. STAT. §§ 3-227 to -348 (Burns Cum. Supp. 1972); KAN. STAT. ANN. §§ 5-401 to -422 (Cum. Supp. 1973); LA. REV. STAT. §§ 9:4201-.4217 (1952); ME. REV. STAT. ANN. tit. 14, §§ 5927-49 (Supp. 1972); MD. CT. & JUDICIAL PROCEEDING §§ 3-201 to -234 (1974); MASS. GEN. LAWS ANN. ch. 251, §§ 1-19 (Supp. 1972); MICH. COMP. LAWS §§ 600.5001-.5035 (1968); MINN. STAT. ANN. §§ 572.08-.30 (Supp. 1973); NEV. REV. STAT. §§ 38.010-.205 (1971); N.H. REV. STAT. ANN. §§ 542:1-.10 (1964); N.J. STAT. ANN. §§ 2A:24-1 to -11 (1952); N.M. STAT. ANN. §§ 22-3-9 to -31 (Supp. 1971); N.Y. C.P.L.R. §§ 7501-14 (McKinney 1963); N.C. GEN. STAT. §§ 1-567.1 to .20 (Cum. Supp. 1973), OHIO REV. CODE ANN. §§ 2711.01-.15 (Page 1954), *as amended*, §§ 2711.01, .03, .08-.10, .16 (Page Supp. 1972); ORE. REV. STAT. §§ 33.210-.240 (1967); PA. STAT. ANN. tit. 5, §§ 161-81 (1963), *as amended*, § 175 (Cum. Supp. 1972); R.I. GEN. LAWS ANN. §§ 10-3-1 to -20 (1957); S.D. COMPILED LAWS ANN. §§ 21-25A-1 to -38 (Supp. 1972); TEX. REV. CIV. STAT. ANN. arts. 224 to 238-6 (Cum. Supp. 1972); VA. CODE ANN. §§ 8-503 to -507 (1950), *as amended*, § 8-503 (Interim Supp. 1972); WASH. REV. CODE ANN. §§ 7.04.010-.220 (1961); WIS. STAT. §§ 298.01-.18 (1969); WYO. STAT. ANN. §§ 1-1048.1-.21 (Cum. Supp. 1971). Colorado, by court ruling, enforces agreements to arbitrate future disputes. *Ezell v. Rocky Mountain Bean & Elevator Co.*, 76 Colo. 409, 232 P. 680 (1925).

9. "[I]t must clearly appear that the intention of the parties was to submit their differences to a tribunal and to be bound by the decision reached by that body on deliberation." *Scholler Bros. v. Otto A.C. Hagen Corp.*, 158 Pa. Super. 170, 173, 44 A.2d 321, 322 (1945). From this case the following "minimum legal requirements" of arbitration have been extracted: "(1) Mutual rights of hearing. Each party is entitled to reasonable notice of time and place of hearing to be had before the arbitrators sitting in due quorum, an opportunity to present evidence in his own behalf relating to the matter in issue and an opportunity to cross-examine opposing evidence. (2) Mutual rights that, after hearing, the arbitrators shall render such award on the issues submitted to them as they deem fair and

This Comment, in evaluating courts' attitudes toward arbitration, will analyze the standards used by courts in deciding whether issues are appropriate subjects for arbitration. Because arbitration can have no legal effect unless courts are willing to support the arbitrator's award, the standards used to determine whether an issue is arbitrable are critical to the future of arbitration.

The issue of whether or not to uphold the arbitration agreement or the arbitrator's award comes before the court when a party to the agreement refuses to arbitrate or to abide by the award.¹⁰ Since arbitration provisions are not self-executing, a party seeking implementation must often petition the court for enforcement.¹¹ At first glance this dependence on the court's authority indicates that an arbitration provision is itself merely another transaction giving rise to civil litigation. A dispute over whether or not to arbitrate is, however, quite different from other contractual conflicts since the very essence of the arbitration provision is a promise to stay out of court.¹²

The Two Question Approach

When courts deal with an issue of arbitrability they expressly or impliedly consider two questions. The first is whether the parties have formed an agreement to arbitrate the present controversy. This is a matter of contract interpretation,¹³ and if the court finds that

just—whether or not according to law. To the award attach legal finality, conclusiveness and enforceability subject only to limited causes to defeat or vacate the award." Sturges, *Arbitration—What Is It?*, 35 N.Y.U.L. REV. 1031 (1960).

10. Essentially there are two occasions which bring the arbitrability issue before the courts: an action to compel arbitration and an action to confirm and enforce the award. See, e.g., N.Y. C.P.L.R. §§ 7503, 7514 (McKinney 1963).

11. *Id.* § 7514.

12. See Burger, *supra* note 2, at 426.

13. The contract interpretation problem is among the thorniest in arbitration. Judicial interpretation of the arbitration agreement directly determines the scope of arbitration. For an excellent example of the difficulties which may arise, compare *In re Wilaka Constr. Co.*, 17 N.Y.2d 195, 216 N.E.2d 696, 269 N.Y.S.2d 697 (1966) with *In re Raisler Corp.*, 32 N.Y.2d 274, 298 N.E.2d 91, 344 N.Y.S.2d 917 (1973). See also *In re Guilderland Cent. School Dist.*, 45 App. Div. 2d 85, 356 N.Y.S.2d 689 (3d Dep't 1974). This case involved interpretation of an agreement which contained a

the adversaries have agreed to submit their dispute to a private forum, it will ordinarily refuse to hear the merits.¹⁴ The second question is whether the parties have the ability to enter into this particular arbitration agreement. The ability concept is broad, incorporating both the normal contract requisite of competence and various judicial policy pronouncements designed to protect the interests of society. Frequently this second question is answered by implication. For example, when arbitration is ordered the implication is clear that the parties were competent to enter into the agreement and that there is no public policy prohibiting anyone in a similar situation from using the arbitral forum.

Recognition of a valid arbitration provision removes the merits of the controversy from the court's concern. Judges are reluctant to relinquish this power to decide the merits without first guaranteeing that only the parties to the agreement can be adversely affected, and that rights of third parties will not be unfairly jeopardized by a private agreement between the disputants. Courts have not recognized the right of individuals to submit every dispute to arbitration, because of the conviction that the public interest demands certain issues be decided only by a court.¹⁵

As pressure builds for the development of alternatives to the traditional litigation process, the scales seem to be tipping toward

condition precedent to arbitration. The question whether fulfillment of such conditions is a matter of substantive law which need not bind the arbitrator or whether it is a contractual provision expressly defining the scope of arbitrable controversies has, as the above case illustrates, divided the New York courts. Corbin has written, "If the contract provides for arbitration only on fulfillment of a specified condition precedent, the arbitrator has no power in the absence of such fulfillment. It is for a court and not for the arbitrator to determine whether there is such a condition precedent" CORBIN § 144A.

14. "In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute." N.Y. C.P.L.R. § 7501 (McKinney 1963).

15. While arbitration is favorably regarded as an expeditious way to resolve most commercial disputes, "the courts will continue to assert exclusive sovereignty over controversies the resolution of which is invested with a public interest transcending the concerns of the parties to the dispute." N.Y. C.P.L.R. § 7501, 1968 Practice Commentary (McKinney Supp. 1974).

greater use of private arbitration.¹⁶ However, courts' acceptance of an arbitration agreement varies with the subject matter in which the controversy arises. What influences courts to permit arbitration in certain areas and not others? The answer to that question will determine to what extent arbitration can be used as a practical substitute to litigation. This Comment will examine four areas of law that illustrate a variety of judicial attitudes toward arbitrability—labor-management relations, domestic relations, will probate and estate distribution, and consumer affairs.¹⁷

II. Labor-Management Relations

One of the major goals of the labor movement was the attainment of an equal bargaining position for employees vis-à-vis management. Legislation of the 1930s and 1940s¹⁸ specifically recognized the need for organization of labor and encouraged union growth. In most enterprises, the workers and owners, however bitter their differences, must continually cooperate if the business is to function. Maintaining such cooperation is one purpose of the collective bargaining agreement—the instrument of self-government which binds labor and management by describing the terms and conditions of employment.¹⁹ Because it seeks to regulate industrial harmony the collective bargaining agreement has been described by the United States Supreme Court as being “more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate.”²⁰

16. *But see id.*, 1969 Practice Commentary (McKinney Supp. 1974): “In the riptide between litigation and arbitration decisions denying the competence of arbitration ebb and flow.”

17. These four areas are examined to illustrate prevalent judicial attitudes towards arbitration. Arbitration agreements will, however, occur in many areas of the law, for example, commercial transactions, securities exchange contracts, medical malpractice claims, and insurance contracts. This Comment does not attempt a comprehensive study of all judicial attitudes; instead, several attitudes will be discussed to portray the variation in judicial responses to the enforcement of arbitration agreements.

18. Norris-La Guardia Act, 29 U.S.C. § 104 (1970); National Labor Relations Act, 29 U.S.C. § 157 (1970); Labor Management Relations Act, 29 U.S.C. §§ 173(d), 185(a) (1970).

19. R. SMITH, L. MERRIFIELD, & D. ROTHSCHILD, *COLLECTIVE BARGAINING AND LABOR ARBITRATION* 3-6 (1970).

20. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

When parties agree to an arbitration provision, it is written into the collective bargaining agreement and thus becomes a means of preserving the agreement as well as a means of conflict resolution when controversies contemplated by the provision arise.²¹ Without arbitration, resolution might take the form of strikes or lock-outs depending on the relative strength of the union and management.²²

There are sometimes differences of opinion as to what disputes are covered by an arbitration provision. Parties disagreeing over the scope of the arbitration provision will seek judicial interpretation to determine which controversies are to be arbitrated.²³ In this context courts are seeking to answer the first question of the arbitrability issue—is there an agreement to arbitrate this particular dispute?

Prior to 1960, the prevailing judicial attitude toward arbitration agreements followed the New York view announced in *International Association of Machinists v. Cutler-Hammer Inc.*²⁴ The *Cutler-*

21. *Id.* at 578, 581. Thus, if the parties agreed to arbitrate all disputes arising under the bargaining agreement, a grievance concerning working hours would be settled nonjudicially by arbitration.

22. *Id.* at 581. Since arbitration of a dispute rather than a strike is the preferred means of settlement, a vigorous judicial attitude encouraging parties to continue their own system of industrial self-government under the collective bargaining agreement is maintained.

23. *Cf. United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960).

24. 297 N.Y. 519, 74 N.E.2d 464, *aff'g* 271 App. Div. 917, 67 N.Y.S.2d 317 (1st Dep't 1947); *see Note, "Arbitrability" of Labor Disputes*, 47 VA. L. REV. 1182, 1187-88 (1961). Six circuits favored the *Cutler-Hammer* approach. *See Sunnyvale Westinghouse Salaried Employees Ass'n v. Westinghouse Elec. Corp.*, 276 F.2d 927 (3d Cir. 1960); *No. 19322 Brass and Copper Workers v. American Brass Co.*, 272 F.2d 849 (7th Cir. 1959), *cert. denied*, 363 U.S. 845 (1960); *American Lava Corp. v. Local 222, UAW*, 250 F.2d 137 (6th Cir. 1958); *New Bedford Defense Prods. v. Local 1113, UAW*, 258 F.2d 522 (1st Cir. 1958); *Engineers Ass'n v. Sperry Gyroscope Co.*, 251 F.2d 133 (2d Cir. 1957), *cert. denied*, 356 U.S. 932 (1958); *Machinists Local 1912 v. United Potash Co.*, 270 F.2d 496 (10th Cir. 1959), *cert. denied*, 363 U.S. 845 (1960). Foreshadowing the Steelworkers decisions, three circuits adopted a more favorable attitude towards arbitration: *Anaconda Co. v. Butte Miners Union*, 267 F.2d 940 (9th Cir. 1959), *aff'g* 159 F. Supp. 431 (D.C. Mont. 1958); *Food Handlers Local 425 v. Puss Poultry, Inc.*, 260 F.2d 835 (8th Cir. 1958); *Machinists Lodge 12 v. Cameron Iron Works*, 257 F.2d 467 (5th Cir.), *cert. denied*, 358 U.S. 880 (1958).

Hammer doctrine required that a dispute meet a standard of judicial sufficiency—that it be meritorious—before courts would enforce an agreement to arbitrate. “If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration.”²⁵ The court is not interpreting the arbitration clause as failing to cover the dispute; it is deciding on the merits that no dispute exists, or that if one exists it is too insignificant to require arbitration. The result is to prohibit parties from resolving what the court considers trifling disputes in a non-judicial forum. Using this standard of arbitrability the courts effectively try the merits of a controversy under the guise of deciding arbitrability.

In 1960, the United States Supreme Court conceived a narrower test of arbitrability which discarded the *Cutler-Hammer* doctrine²⁶ and precluded judicial evaluation of the controversy when deciding the appropriateness of arbitration. Three decisions,²⁷ collectively referred to as the *Steelworkers Trilogy*, confined the courts to a strict contract interpretation standard of arbitrability.

The essential feature of the *Steelworkers Trilogy* test is what has come to be called the “presumption of arbitrability.”²⁸ In *United Steelworkers of America v. Warrior & Gulf Navigation Co.*,²⁹ the Court held:

An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in the favor of coverage.³⁰

Although a party cannot be required to submit a dispute to arbitration unless he has agreed to do so,³¹ the party seeking to avoid arbitration has a greater burden than his opponent. The latter need

25. 271 App. Div. at 918, 67 N.Y.S.2d at 318.

26. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567 (1960).

27. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

28. *Gateway Coal Co. v. United Mine Workers of America*, 94 S. Ct. 629, 637 (1974).

29. 363 U.S. 574.

30. *Id.* at 582-83.

31. *Id.* at 582.

only show that the agreement embraces the controversy.³² The former must present "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."³³

Other areas of the law do not enjoy this "presumption of arbitrability." In the labor-management area, arbitration is the substitute for industrial strife and the economic dislocation which frequently accompanies it.³⁴ By way of contrast, arbitration in the commercial area is an alternative to the ordered process of judicial resolution.³⁵ Because recourse for settlement in labor-management cases is not to the courts but to the disruptive tactics of industrial warfare, the Court favors the use of arbitration in the labor-management area to settle such disputes.³⁶

The *Steelworkers Trilogy* clarifies the two question approach in labor arbitration disputes. Once the arbitration agreement is found to cover the dispute, the parties ability to arbitrate is determined by the courts' strong public policy³⁷ favoring arbitration of conflicts

32. *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 567-68 (1960); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960).

33. 363 U.S. at 582-83. The Court also stated: "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail" *Id.* at 584-85.

34. *Id.* at 578.

35. "In the commercial case, arbitration is the substitute for litigation." *Id.*

36. *Id.* at 577-83. Maintaining this reasoning, what is the effect of *Boys Markets, Inc. v. Retail Clerks Local 770*, 398 U.S. 235 (1970), on the "presumption of arbitrability?" *Boys Markets* narrows the application of the Norris-LaGuardia Act and allows employers to obtain injunctive relief against unions striking in violation of "no-strike" clauses. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962), implies that there need not be a "no-strike" clause—that a strike can violate an arbitration agreement. If injunctive relief is available to the employer then arbitration is no longer an alternative to "industrial strife," but, like the commercial area, a "substitute for litigation." Therefore, after *Boys Markets*, should not the "presumption of arbitrability" be discarded? The Supreme Court, in *Gateway Coal Co. v. United Mine Workers of America*, 94 S. Ct. 629 (1974), apparently thought not.

37. See note 17 *supra* and text accompanying note 16 *supra*.

that arise under the collective bargaining agreement.³⁸

III. Domestic Relations

When a husband and wife decide they no longer wish to live together, they often formalize the terms of their separation in a written agreement.³⁹ This agreement normally provides for the support of the wife and children, the amount of alimony, custody of the children, visitation rights, and terms governing the modification of the agreement. The parties may also include an arbitration clause.⁴⁰ Thereafter, if a dispute arises over the interpretation or performance of any provision of the separation agreement, the parties will submit the matter to an arbitrator, instead of immediately commencing litigation.

If a party attacks the arbitration clause, the court may decide whether the issue in controversy is properly arbitrable. That decision depends upon the court's interpretation of the arbitration clause, *i. e.*, whether the court believes that the parties intended that the issues be settled by arbitration. The court must also decide whether it will permit parties to settle their disagreement in a non-judicial forum.⁴¹ It is this second step which has caused the courts some difficulty.

38. This result permits the arbitrator, not the court, to determine the merits. See note 21 *supra* and accompanying text.

39. See H. CLARK, *THE LAW OF DOMESTIC RELATIONS* (1968); A LINDEY, *SEPARATION AGREEMENTS AND ANTE-NUPTIAL CONTRACTS* (1961).

40. Couples have not always had this option. Prior to the adoption of modern arbitration statutes, courts would refuse to enforce an arbitration clause which provided for the settlement of future disputes. Comment, *Arbitration Clauses in Separation Agreements*, 19 WASH. & LEE L. REV. 286 (1962). In states having a modern arbitration law along the lines of the Uniform Arbitration Act, there seems to be no reason why an arbitration clause cannot be inserted into a separation agreement to provide a private and informal method for resolving the uniquely personal controversies that occur between previously married couples. Coulson, *Family Arbitration—An Exercise in Sensitivity*, 3 FAMILY L.Q. 22, 28 (1969).

41. See *Agur v. Agur*, 32 App. Div. 2d 16, 298 N.Y.S.2d 772 (2d Dep't 1969); *Sheets v. Sheets*, 22 App. Div. 2d 176, 254 N.Y.S.2d 320 (1st Dep't 1964); *Fence v. Fence*, 64 Misc. 2d 480, 314 N.Y.S.2d 1016 (Family Ct. 1970); *Banks v. Banks*, 54 Misc. 2d 186, 282 N.Y.S.2d 298 (Family Ct. 1967).

Courts have generally recognized the right of individuals to arbitrate conflicts in which only monetary aspects of the divorce are involved.⁴² Private arbitration has been used to settle the division of property between husband and wife, as well as the amount to be paid in alimony and support. This has long been true with child support payments, even though these awards clearly affect the child's well-being.⁴³ However, the courts have not taken the same attitude toward the arbitration of disputes over custody or visitation rights. It is only since 1964 that questions of child custody have been recognized as arbitrable, and currently there is a split of authority as to whether private forums should be given legal sanction in this area.

Prior to 1964 the leading cases held that an arbitrator could not render a binding award when the parents' dispute centered on the child.⁴⁴ This view was based on the judiciary's belief that its role of *parens patriae* demanded that it retain the responsibility for deciding what was best for the child. Growing acceptance of arbitration, however, brought doubts about the wisdom of this absolute ban.⁴⁵

In *Sheets v. Sheets*,⁴⁶ the Appellate Division for the First Department of New York permitted a limited right to arbitration in child disputes. The agreement in *Sheets* provided that the mother should have custody of the children and supervision of their upbringing subject to specified visitation rights of the father. The agreement also provided that should a dispute arise, it would be settled by arbitration.⁴⁷ The father alleged violations of the separation agreement with respect to his visitation rights and the children's education. He demanded arbitration, desiring that any award be set off against his alimony payments. Although the court denied this re-

42. See *Storch v. Storch*, 38 App. Div. 2d 904 (1st Dep't 1972).

43. See *Schneider v. Schneider*, 17 N.Y.2d 123, 216 N.E.2d 318, 269 N.Y.S.2d 106 (1966), *aff'g* 24 App. Div. 2d 768, 264 N.Y.S.2d 9 (2d Dep't 1965); *In re Robinson*, 296 N.Y. 778, 71 N.E.2d 214 (1947).

44. See *Michelman v. Michelman*, 5 Misc. 2d 570, 135 N.Y.S.2d 608 (Sup. Ct. 1954); *Hill v. Hill*, 199 Misc. 1035, 104 N.Y.S.2d 755 (Sup. Ct. 1951).

45. See generally Comment, *Committee Decisions of Child Custody Disputes and the Judicial Tests of Best Interests*, 73 YALE L.J. 1201 (1964).

46. 22 App. Div. 2d 176, 254 N.Y.S.2d 320 (1st Dep't 1964).

47. *Id.* at 177, 254 N.Y.S.2d at 321.

quest because the parties had not agreed to arbitrate this matter, the court added:

There should be some clarification and restatement of the proper position to be taken by courts as to arbitration provisions in separation agreements which affect matters of custody and visitation of children.⁴⁸

The court saw no reason why individuals should not be allowed to arbitrate matters which directly concern the child:

[T]here seems to be no clear and valid reason why the arbitration process should not be made available in the area of custody and the incidents thereto, *i. e.*, choice of schools, summer camps, medical and surgical expenses, trips, and vacations The inherent power of the courts to safeguard the welfare of children would not, however, be dissipated by a separation agreement that provided for settlement of custody disputes and related matters by some arbitration tribunal.⁴⁹

Instead of finding a private forum inappropriate when the award directly concerns a minor, the court reasoned that parties should be encouraged to use arbitration as a means of settling their conflicts.⁵⁰ The court was careful to point out that it was not abdicating its role of *parens patriae*. If a parent, interested relative, or the child (through a friend) could show that the award adversely affected the child's welfare or best interests,⁵¹ the merits of the arbitrator's award would be subject to court review. In formulating this view, the court distinguished issues which are of central importance to the child's development from those which are of lesser concern.⁵² Presumably, if the award were not of central importance to the child's development, the normal rules for enforcing an arbitration award would be applicable.

Thus *Sheets* substantially increases the ability of parties to enter into arbitration agreements. Adhering to the reasoning of this case, courts should approach arbitration of custody matters as they would any other contract term, and look merely for the existence of the

48. *Id.* at 177-78, 254 N.Y.S.2d at 323.

49. *Id.*

50. *Id.* at 180, 254 N.Y.S.2d at 324.

51. *Id.*

52. The court indicated, for example, that while the child's religious upbringing would have a fundamental impact on his development, a decision concerning which day of the week his father could visit would probably be of rather minor importance. *Id.*

agreement to arbitrate. Public policy should not prevent arbitration since the award in a private forum would not be judicially recognized if there were a showing of a substantially harmful effect on the child's development.

Subsequent cases⁵³ reaffirmed the reasoning of *Sheets* and seemed to signal a liberalized view on the arbitrability of custody matters. The trend ended with *Agur v. Agur*.⁵⁴ The separation agreement in *Agur* contained a broad arbitration provision. Less than a month before the child was to begin living with his father pursuant to the agreement, the mother commenced litigation to obtain permanent custody. The husband moved to stay the proceedings and sought to compel arbitration. The lower court, citing *Sheets*, directed that arbitration begin; the mother appealed.⁵⁵

The court set out three main objections to arbitration:⁵⁶ first, uncertainty as to the arbitrator's qualifications to judge a complex matter such as custody; second, the duplication of time and effort involved whenever the court decides to review the merits of the award; third, a fear that the scope of judicial supervision will be severely narrowed⁵⁷ by recognizing the competence of parties to employ a private forum.

53. *Schneider v. Schneider*, 17 N.Y.2d 123, 216 N.E.2d 318, 269 N.Y.S.2d 107 (1966), *aff'g* 24 App. Div. 2d 768, 264 N.Y.S.2d 9 (2d Dep't 1965); *Banks v. Banks*, 54 Misc. 2d 186, 282 N.Y.S.2d 298 (Family Ct. 1967).

54. 32 App. Div. 2d 16, 298 N.Y.S.2d 772 (2d Dep't 1969).

55. *Id.* at 19, 298 N.Y.S.2d at 776.

56. The appellate division could have directed the family court to hear the merits of the case and decide the issue regardless of the arbitration provision, and on the facts of the case such a ruling would have actually been consistent with the standards of review suggested in *Sheets*. In her petition for custody the mother alleged that the father intended to remove the child to Israel. She further asserted that their child's welfare would be best served by raising and educating him in the United States. Under the judicial standard of "best interests" applied in *Sheets*, this situation would seem to present the type of fundamental impact to the child's development which would justify a decision that this issue was not arbitrable. Instead, the court took the opportunity to set forth several reasons why custody matters should generally be considered non-arbitrable. *Id.* at 20, 298 N.Y.S.2d at 777.

57. *Id.*

The judicial attitude developed in *Agur* indicates a reaction against private forums in domestic relations. However, the court's reasoning misconstrues the real value of arbitration. If an award adversely affects the child's welfare, the court is free to make its own decision on the merits. Thus courts retain control of the most important issues.

Preservation of the option to arbitrate will not invariably lead to repetition. Most people, when they include a provision for arbitration, intend to abide by the arbitrator's decision.⁵⁸ It is only when one party refuses to obey an adverse award that a court order becomes necessary. In cases where a child's fundamental welfare is not an issue, argument over the merits would not be permitted and only questions of the arbitrator's behavior or the existence of the agreement could be raised.⁵⁹

The objection that an arbitrator may not be qualified to judge a matter as complex and sensitive as a child's welfare is not persuasive in light of the availability of competent and specialized arbitrators.⁶⁰ The American Arbitration Association can arbitrate family matters by offering a panel composed of doctors, psychologists, educators, and sociologists.⁶¹ Conceding that most family courts have facilities for receiving similar expert testimony and advice, there seems to be no compelling reason why a panel of disinterested third party experts should not be able to make as enlightened a decision as the court.

58. The use of an arbitration clause depends on the attitude of the parties, their animosity to each other, intelligence, and ability to adjust to problems. Where either party has to be beaten into submission it is unlikely that the lawyers involved will urge arbitration. Arbitration is a way to make it easier to be conciliatory. It is most useful between people of intelligence who really want to work something out but find a gap between them. Where the lawyer knows that his client or the other party is apt to be difficult or litigious, arbitration is not likely to be used. See Bittenweiser, Foster, Kubie, Moloshok & Reinach, *Arbitration and Protection of the Child: A Conversation on Implications of Sheets v. Sheets*, 21 *ARB. J.* (n.s.) 215 (1966).

59. 22 *App. Div. 2d* at 178, 254 *N.Y.S.2d* at 324.

60. *Id.* at 177, 254 *N.Y.S.2d* at 323.

61. Coulson, *Family Arbitration—An Exercise in Sensitivity*, 3 *FAMILY L.Q.* 22, 29 (1969).

IV. Will Probation and Estate Distribution

Arbitration in will probation and estate distribution⁶² is initiated in several ways. One method is where a testator provides for binding resolution by an interested⁶³ or disinterested⁶⁴ third party of disputes arising under his will.

At English common law, a testamentary provision for arbitration was invalid.⁶⁵ The current majority view,⁶⁶ represented by *American Board of Commissioners of Foreign Missions v. Ferry*,⁶⁷ shows more concern for the testator's intent.

In *American Board of Commissioners*, the testator conferred upon his son, a residuary legatee, the power to render binding determinations in all disputes arising out of the will. A beneficiary challenged the son's appointment, contending that his position as an interested party with sole discretion was invalid. The court rejected this challenge, holding that since the testator was aware of the position to which he appointed his son he must have intended that his son's bias be reflected in all controversy resolutions.⁶⁸ However, the decision may not support any expansion of an arbitrator's power since the court noted that it agreed with the son's decision.⁶⁹ While the court approved arbitration, its exercise of concurrent jurisdiction by re-examining the merits lessens the value of arbitration and, in effect, limits the approval. It appears that if a court disagrees with

62. Judicial attitudes toward arbitration vary from reluctant acceptance, *see, e.g., In re Dobbins' Will*, 206 Misc. 64, 132 N.Y.S.2d 236 (Sur. Ct. 1953), to jealous preservation of the court's jurisdiction, *see, e.g., Taylor v. McClave*, 128 N.J. Eq. 109, 15 A.2d 213 (Ch. 1940).

63. *See American Bd. of Comm'rs of Foreign Missions v. Ferry*, 15 F. 696 (C.C.W.D. Mich. 1883); *Wait v. Huntington*, 40 Conn. 9 (1873).

64. *See In re Barbey's Will*, 177 Misc. 898, 32 N.Y.S.2d 191 (Sur. Ct. 1941).

65. *Philips v. Bury*, 90 Eng. Rep. 198 (K.B. 1695).

66. *See American Bd. of Comm'rs of Foreign Missions v. Ferry*, 15 F. 696 (C.C.W.D. Mich. 1883); *Wait v. Huntington*, 40 Conn. 9 (1873); *Nations v. Ulmer*, 139 S.W.2d 352 (Tex. Civ. App. 1940). *But see Talladega College v. Callanan*, 197 Iowa 556, 197 N.W. 635 (1924); Comment, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CALIF. L. REV. 521, 528 n.58 (1967).

67. 15 F. 696 (C.C.W.D. Mich. 1883).

68. *Id.* at 701-02.

69. *Id.* at 702.

the arbitrator's conclusion it will prohibit the use of arbitration.⁷⁰

The New York courts seem to agree with *American Board of Commissioners*, but require the testator's grant of arbitrative power be confined to specific issues.⁷¹ The holding of *In re Barbey's Will*⁷² is perhaps the origin of this requirement. The testamentary provision authorized executors "to determine in their absolute discretion" the specific question of which employees qualified as beneficiaries.⁷³ The court reviewed the executors' decision. Finding no abuse of discretion, it declined to "interfere"⁷⁴ and approved the grant.

The subsequent case of *In re Dobbins' Will*⁷⁵ adopted *Barbey's* narrow concept of discretion. The court confined the executor's power⁷⁶ "to dealings with the testator's sister . . . and with the specific legatees . . ."⁷⁷ The New York courts thus recognize the testator's ability to confer arbitrative powers, but limit such grants, even when broadly drafted, to narrowly defined questions.

Some jurisdictions display a more antagonistic attitude.⁷⁸ *Wait v. Huntington*⁷⁹ suggested that executors might fabricate disputes in order to benefit themselves by their resolution, and reasoned that "in order to give jurisdiction to the executors, there must be a bonâ

70. *But see* *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). "[T]he courts have no business overruling [the arbitrator] because their interpretation of the contract is different from his." *Id.* at 599.

71. *In re Dobbins' Will*, 206 Misc. 64, 132 N.Y.S.2d 236 (Sur. Ct. 1953).

72. 177 Misc. 898, 32 N.Y.S.2d 191 (Sur. Ct. 1941).

73. Under the provision of his will, the testator specifically authorized his executors "to determine in their absolute discretion which employees will qualify to receive a share under this paragraph" *Id.* at 899-900, 32 N.Y.S.2d at 192.

74. "In the absence of an abuse of discretion by the executors, the Court has no power to interfere." *Id.* at 900, 32 N.Y.S.2d at 193.

75. 206 Misc. 64, 132 N.Y.S.2d 236 (Sur. Ct. 1953).

76. "I select John Dobbins as executor and his decision or interpretation on any question of my will must be final." *Id.* at 65, 132 N.Y.S.2d at 238.

77. *Id.* at 67, 132 N.Y.S.2d at 240.

78. *See, e.g.*, *Taylor v. McClave*, 128 N.J. Eq. 109, 15 A.2d 213 (Ch. 1940); *In re Reilly's Estate*, 200 Pa. 288, 49 A. 939 (1901); text accompanying note 83 *infra*.

79. 40 Conn. 9 (1873).

fide question."⁸⁰ In *Taylor v. McClave*,⁸¹ a New Jersey court found no such "bonâ fide" question. The court decided the merits of the controversy by interpreting the will as having no ambiguous provisions,⁸² thus evading the arbitrability issue. Dictum in *Taylor* suggests that the court would refuse to relinquish its power to interpret wills even for meritorious questions:

This court cannot be deprived of its jurisdiction by any direction of the testator to the effect that his executor, or any other person, other than the court, shall construe or define the provisions of a will.⁸³

The testator's appointment of an arbitrator is only one of three methods by which arbitration is initiated in the context of wills and estate distribution. Beneficiaries can agree to arbitrate disputes among themselves or with independent third parties.⁸⁴

The court becomes most protective of its jurisdiction where beneficiaries enter into arbitration agreements among themselves. The leading New York case, *Swislocki v. Spiewak*,⁸⁵ holds that distribution of an estate is not a proper subject of arbitration.⁸⁶ Subsequent New York cases have supported this holding, and have added that questions involving probation of a will⁸⁷ and interests of an infant or third party creditor⁸⁸ are not appropriate for arbitration. *In re*

80. *Id.* at 11.

81. 128 N.J. Eq. 109, 15 A.2d 213 (Ch. 1940).

82. *Id.* at 114, 15 A.2d at 216. Note the similarity with the reasoning of the now discarded holding of International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1st Dep't 1947). See text accompanying note 25 *supra*.

83. 128 N.J. Eq. at 113-14, 15 A.2d at 216. The court justified this protective concern for its jurisdiction using language from *In re Reilly's Estate*, 200 Pa. 288, 306, 49 A. 939, 940-41 (1901): "A testator may not deny to his legatees the right of appeal to the regularly constituted courts." 128 N.J. Eq. at 113-14, 15 A.2d at 216.

84. See *Carpenter v. Bailey*, 127 Cal. 582, 60 P. 162 (1900); *Stahl v. Brown*, 72 Iowa 720, 32 N.W. 105 (1887); *In re Estate of Jacobovitz*, 58 Misc. 2d 330, 295 N.Y.S.2d 527 (Sur. Ct. 1968).

85. 273 App. Div. 768, 75 N.Y.S.2d 147 (1st Dep't 1947).

86. *Id.*

87. *In re Estate of Jacobovitz*, 58 Misc. 2d 330, 334, 295 N.Y.S.2d 527, 531 (Sur. Ct. 1968).

88. *In re Kabinoff*, 19 Misc. 2d 15, 163 N.Y.S.2d 798 (Sup. Ct. 1957).

Estate of Jacobovitz,⁸⁹ a recent surrogate's court decision, reasoned that the New York State Constitution confers jurisdiction over probate matters and administration of estates upon the surrogate's court,⁹⁰ and private parties cannot therefore agree among themselves to deprive the court of its constitutional authority.⁹¹

Other jurisdictions employ different reasoning⁹² but reach equally restrictive results when considering beneficiaries' agreements to arbitrate. In *Carpenter v. Bailey*,⁹³ purported heirs attempted to enter into a binding arbitration agreement.⁹⁴ The court refused to enforce the agreement, declaring "[t]he matter of the probate of a will is a proceeding in rem, binding upon the whole world. A few individuals, claiming to be heirs, cannot by stipulation determine such controversy."⁹⁵

Two Iowa cases, *Stahl v. Brown*⁹⁶ and *Christie v. Chicago R.I. &*

89. 58 Misc. 2d 330, 295 N.Y.S.2d 527 (Sur. Ct. 1968).

90. *Id.* at 333-34, 295 N.Y.S.2d at 530-31. In *In re Kabinoff*, 19 Misc. 2d 15, 163 N.Y.S.2d 798 (Sup. Ct. 1957) and *Swislocki*, the courts' dicta indicated that an agreement to arbitrate disputes between beneficiaries would be judicially respected if such agreements arose in the proper manner. However, neither decision indicates what that proper manner might be. The *Jacobovitz* holding, based on N.Y. CONST. art 6, § 12(d), suggests, by way of contrast, an intensified disinclination to favor arbitration agreements among beneficiaries. 58 Misc. 2d at 333-34, 295 N.Y.S.2d at 530-31.

91. N.Y. CONST. art. VI, § 12(d).

92. The legal bases for the variety of judicial reasoning include: constitutional limitations in New York (N.Y. CONST. art. 6, § 12(d)), in rem jurisdiction in California (*Carpenter v. Bailey*, 127 Cal. 582, 60 P.162 (1900)) and Michigan (*In re Meredith's Estate*, 275 Mich. 278, 266 N.W. 351 (1936)), and delayed passage of title concepts in Iowa (*Stahl v. Brown*, 72 Iowa 720, 32 N.W. 105 (1887)).

93. 127 Cal. 582, 60 P. 162 (1900).

94. *Id.* at 584-85, 60 P. at 163.

95. *Id.* at 585, 60 P. at 163 (dictum); accord, *In re Meredith's Estate*, 275 Mich. 278, 266 N.W. 351 (1936). For a treatment of *Carpenter* as a minority view, see Comment, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CALIF. L. REV. 521, 529 (1967). While it may be true that the "in rem" reasoning of the *Carpenter* court is followed in only a minority of jurisdictions, the conclusions as to arbitrability appear to be representative of the prevailing judicial mood.

96. 72 Iowa 720, 32 N.W. 105 (1887).

Pac. Ry.,⁹⁷ illustrate other forms of judicial thinking which deny beneficiaries the advantages of an arbitration forum. Before appointment of an administrator, the heirs in *Stahl* agreed with a third party claimant to submit his claim against the decedent's estate to arbitration.⁹⁸ Reasoning that neither title nor ownership of personal property devolved upon the heirs until the estate's administration, the court found that the heirs had no authority to bind either the estate or its administrator.⁹⁹ *Christie* criticizes the *Stahl* reasoning, saying that the right to personal property "vests *instanter* in the heir upon the death of the owner."¹⁰⁰ The cases are not contradictory, however, because in *Stahl* no agreement was made to forego administration of the estate.

The majority of courts have denied beneficiaries the ability to enter into enforceable arbitration agreements either among themselves or with third parties.¹⁰¹ While couching their reasoning in different principles of law,¹⁰² courts decline to recognize arbitral ability out of concern for the interests of those not parties to the agreement.¹⁰³ Such thinking overlooks the assistance arbitration could lend the estate representative in settling conflicts and crystallizing beneficiaries' desires.

Arbitration arising from the third method, the personal representative's initiative, has met with a less hostile judicial response. In the early nineteenth century, the United States Supreme Court acknowledged the executor's power to make a binding determination concerning the estate when the will so provided.¹⁰⁴ State courts¹⁰⁵ have recognized the same power in estate administrators.¹⁰⁶ While this power embraces the use of arbitration,¹⁰⁷ courts continue to

97. 104 Iowa 707, 74 N.W. 697 (1898).

98. 72 Iowa at 720-21, 32 N.W. at 105.

99. *Id.* at 723, 32 N.W. at 106.

100. 104 Iowa at 709, 74 N.W. at 697.

101. *See* text accompanying notes 84-85 *supra*.

102. *See* note 92 *supra*.

103. *See* text accompanying notes 84-85 *supra*.

104. *Pray v. Belt*, 26 U.S. (1 Pet.) 670, 679-80 (1828).

105. *See, e.g., Wheatley v. Martin's Adm'r*, 33 Va. (6 Leigh) 62 (1835).

106. *See, e.g., Wood v. Tunnichliff*, 74 N.Y. 38 (1878).

107. *Id.* at 42-43. *Contra, Sullivan v. Nicoulin*, 113 Iowa 76, 84 N.W. 978 (1901).

consider the merits of a controversy by investigating the estate representative's exercise of discretion. In at least one case,¹⁰⁸ the resulting concurrent jurisdiction so lessened the representative's authority that arbitration was reduced to a meaningless gesture.¹⁰⁹

The personal representative's ability to use arbitration, though judicially recognized, is limited by the same judicial caution that constricts the ability of the testator-appointed arbitrator. This caution is most clearly manifested by courts' persistent reservation of jurisdiction to decide the merits *de novo*. Mere difference of opinion¹¹⁰ is sufficient to overcome an arbitrator's award,¹¹¹ and the judge who disagrees with an arbitrator's holding will prevail. In short, there appears to be no lack of agreements¹¹² to arbitrate in the area of estate distribution and wills, but the courts' inclination to preserve exclusive jurisdiction severely diminishes the ability of parties to enforce agreements.

V. Consumer Affairs

The preceding sections of this Comment have, for the most part, concentrated on judicial analysis of the arbitration agreement. The issues of arbitrability raised in those sections presuppose that the parties have provided for some sort of arbitration mechanism, and deal primarily with whether such private settlement is permissible. This section will illustrate how both private agencies and the courts have attempted to encourage the acceptance of arbitration in an area where it has not been widely used: consumer affairs.

One such private agency was the National Center for Dispute

108. *In re Fales' Will*, 22 Misc. 2d 68, 195 N.Y.S.2d 466 (Sur. Ct. 1960).

109. See Comment, *The Validity of Arbitration Provisions in Trust Instruments*, 55 CALIF. L. REV. 521, 530 (1967).

110. See, e.g., *Taylor v. McClave*, 128 N.J. Eq. 109, 15 A.2d 213 (Ch. 1940).

111. *But see* *United Steelworkers of America v. American Mfg. Co.*, 363 U.S. 564, 568 (1960); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960). Fraud or partiality of the arbitrator overreaching, rather than mere difference of opinion between the arbitrator and the judge, are the usual grounds for overturning an arbitrator's award. See, e.g., N.Y. C.P.L.R. § 7511 (McKinney 1963).

112. "Agreements" here is used to include the testamentary mandate and the estate representative's exercise of discretion.

Settlement (NCDS).¹¹³ Its purpose was to develop and apply arbitration, mediation, and other dispute settlement techniques to the resolution of conflicts which arise in a community setting.

The NCDS program invited merchants and consumers to submit to arbitration any dispute which arose over alleged defects in a product, failure to honor service contracts, or non-payment of installment obligations. The project was discontinued without arbitration of a single claim. The major reason was the unwillingness of local merchants to bind themselves to the decision of a non-judicial third party. Businessmen felt the program was oriented for the benefit of the customer, and were not attracted to it. Since the project depended upon the voluntary submission of disputes, there was no pressure on the merchants to change their traditional methods of handling customer complaints.¹¹⁴

The Better Business Bureau (BBB) has made some effort to supply the pressure necessary to secure the cooperation and support of local merchants.¹¹⁵ The BBB program, called "Arbitration for Business and Consumer," proposes that customers be urged to patronize establishments which follow a so-called "fair dealer" policy.¹¹⁶ Stores which participate would be allowed to display a distinctive emblem indicating to the public that they will agree to submit any claim to an unbiased third party.¹¹⁷ The plan also includes a program to educate consumers about the benefits of arbitration as a consumer remedy.¹¹⁸ In theory, participating stores would thus acquire a competitive advantage over non-participants, and this would generate pressure for others to join the program. Whether this

113. The NCDS was founded by the American Arbitration Association with the assistance of the Ford Foundation. For an in-depth account of the NCDS experience in consumer arbitration see Jones & Boyer, *Improving the Quality of Justice in the Marketplace: The Need for Better Consumer Remedies*, 40 GEO. WASH. L. REV. 357 (1971) [hereinafter cited as Jones & Boyer]; McGonagle, *Arbitration of Consumer Disputes*, 27 ARB. J. (n.s.) 65 (1972) [hereinafter cited as McGonagle].

114. MCGONAGLE 73.

115. JONES & BOYER 375.

116. OFFICE OF CONSUMER ARBITRATION, COUNCIL OF BETTER BUSINESS BUREAUS, INC., *ARBITRATION FOR BUSINESS AND CONSUMERS* (undated pamphlet).

117. *Id.*

118. JONES & BOYER 375.

approach will succeed cannot be answered with certainty. The "fair dealer" program is still in the developmental stage, and has yet to achieve much notice among business or consumers.¹¹⁹

Although consumer arbitration has not enjoyed wide acceptance, there are some continuing programs for the arbitration of consumer complaints. The programs which have achieved successful settlements are typically organized and operated by and for trade and industry associations.¹²⁰ One such program is the Major Appliance Consumer Action Panel (MACAP) which is sponsored by an association of companies which produce home appliances. If MACAP concludes that the customer's complaint is justified, a recommendation will be issued to the responsible party to correct the defect.¹²¹ The panel's decision is not binding, however, and merely has the effect of moral suasion.¹²²

The Cleaners and Dyers Institute in New York City incorporates an arbitration clause on the back of its standard claim check. If a dispute arises, either the store or the customer can submit the dispute to binding arbitration before the American Arbitration Association.¹²³ This arrangement avoids the appearance that the forum is dominated by one side of the dispute—a criticism which has been leveled at MACAP.¹²⁴ The singular success of industry-sponsored programs substantiates the findings of the NCDS¹²⁵ that the essential factor in making consumer affairs arbitrable is the businessman's acceptance of arbitration provisions.

The number of court decisions construing the arbitrability of consumer complaints is understandably small because of the general absence of arbitration agreements in retail transactions. The court's willingness to recognize the parties' ability to use non-judicial forums may, however, be gauged by another indicator. Increasing numbers of state statutes and rules of court procedure¹²⁶ are provid-

119. *Id.* at 377.

120. McGonagle 69.

121. Jones & Boyer 370.

122. *Id.*

123. McGonagle 70.

124. Jones & Boyer 372.

125. *Id.* at 379.

126. D.C. CODE ENCYCL. ANN. § 11-1342 (1966); N.Y. JUDICIARY LAW § 213(8) (McKinney Supp. 1973); N.Y.C. CIVIL CT. RULES § 2900.33(o)(1) (McKinney 1974).

ing alternatives to court litigation in cases involving relatively minor sums of money. Although small claims and consumer affairs are not synonymous, a large percentage of cases heard in small claims courts involve disputes between merchants and consumers.¹²⁷ It appears, therefore, that an analysis of a court's attitude toward the arbitrability of small claims should give an indication of a court's view in consumer affairs.

New York Civil Court Rule section 2900.33 makes arbitration an integral part of the settlement procedure in the Small Claims Court of New York City.¹²⁸ Both sides must agree to arbitrate, and the resulting award is final, binding, and non-appealable.¹²⁹

The District of Columbia Small Claims and Conciliation Branch has a similar provision for voluntary arbitration. The methods of arbitration and conciliation may be used there to settle cases irrespective of the amount of money involved.¹³⁰ The provision thus increases the freedom of the parties to use arbitration beyond the jurisdictional limits of the small claims court. The inference which may be drawn is that in some areas both the legislature and the judiciary desire that a wider range of conflicts become arbitrable.¹³¹

Other states have endorsed the use of arbitration by enacting even

127. A study of the small claims courts in forty-two states revealed that the most common type of dispute before these courts involves consumer goods and services. SMALL CLAIMS STUDY GROUP, *THE SMALL CLAIMS COURTS AND THE AMERICAN CONSUMER* 141 (1972). See also Driscoll, *De Minimus Curat Lex—Small Claims Courts in New York City*, 2 *FORDHAM URBAN L.J.* 479, 486 (1974).

128. N.Y.C. CIVIL CT. RULES § 2900.33(o)(1) (McKinney 1974) provides that: "The parties to any controversy, except infants and incompetents, may submit the same for arbitration to any attorney duly appointed as a Small Claims arbitrator by the Administrative Judge of this court, so assigned for such duty at that term of the court and upon whom they shall agree."

129. See Driscoll, *supra* note 127, at 497.

130. D.C. CODE ENCYCL. ANN. § 11-1342 (1966) provides in pertinent part: "In order to effect the speedy settlement of controversies, and with the consent of all parties thereto, the Small Claims and Conciliation Branch may settle cases, irrespective of the amount involved, by the methods of arbitration and conciliation."

131. Another method by which the arbitration of consumer disputes has been encouraged is the inclusion of an arbitration clause in consent orders, which result from an understanding between a prosecutor and a

more forceful legislation. For example, Pennsylvania provides for broad compulsory arbitration in all cases involving up to \$10,000, exclusive of any dispute concerning title to real property.¹³² New York has recently enacted a pilot program mandating compulsory arbitration of disputes up to \$4,000.¹³³ This program, originally instituted in Monroe County, has been extended to other areas of the state.

Through a combination of legislative enactment and the courts' interpretation of the legislative intent, the prospects of judicially enforced arbitration agreements appear favorable in consumer affairs. As has been shown, the major obstacle is the unwillingness of the parties to agree to arbitrate. Whether the parties will change their attitude in the near future is questionable, but until they do there is little hope for expansion of arbitration absent judicial or legislative compulsion.

VI. Conclusion

The areas examined illustrate that the judicial attitude toward arbitrability varies with the subject of the dispute. As the foregoing

business charged with unfair or deceptive trade practices. The consent order generally compels the business to make an offer of settlement to those injured by its activities in return for a cessation of prosecution. The arbitration clause provides that should a dispute arise over the terms of the settlement, the issue will be submitted to arbitration. The principal task of the arbitrator is to decide factual issues, since the legal issues have been resolved by the court order. For a discussion of this recent development in consumer remedies, see Frankel, *Arbitration Clauses in Consent Decrees*, 28 BUS. LAW. 605 (1973); Wexler, *Court Ordered Consumer Arbitration*, 28 ARB. J. (n.s.) 175 (1973).

132. PA. STAT. ANN. tit., 5, § 30 (Supp. 1974) provides in pertinent part: "The several courts of common pleas may by rules of court, provide that all cases which are at issue where the amount in controversy shall be ten thousand dollars (\$10,000) or less . . . except those involving title to real estate, shall be submitted to and heard by a board of three (3) members of the bar"

133. N.Y. JUDICIARY LAW § 213(8) (McKinney Supp. 1973) provides that: "[T]he administrative board shall have power to [p]romulgate rules for the compulsory arbitration of claims for the recovery of a sum of money not exceeding four thousand dollars, exclusive of interest, pending in any court or courts. Such rules must permit a jury trial de novo upon demand by any party following the determination of the arbitrators"

analysis illustrates, the courts have used the concept of "public policy" to limit the use of arbitration. In labor-management relations, public policy encourages the use of arbitration.¹³⁴ In domestic relations, public policy permits the use of arbitration only in those matters which do not fundamentally affect the interests of the child.¹³⁵ In will probate and estate distribution, the courts severely limit the use of arbitration, preferring to rely on the existing surrogate court system.¹³⁶ In consumer protection, public policy permits the use of arbitration, but the unwillingness of the parties has limited its use.¹³⁷

The question of arbitrability is of growing importance as the effects of an overburdened court system and the costs of litigation increase the pressure to develop alternatives to judicial settlement of disputes. Before incorporating an arbitration agreement in any document, the parties must recognize that the power to arbitrate is not co-extensive with the right to contract. Until it is, the parties must be aware of the possibility that their arbitration agreement will be held unenforceable.

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134. See notes 36, 37 *supra* and accompanying text.

135. See notes 41, 42, 44 *supra* and accompanying text.

136. See notes 62, 83, 86-88, 90-93, 96, 97, 101 *supra* and accompanying text.

137. See notes 114, 125 *supra* and accompanying text.

