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THE MINNESOTA UNIFORM ARBITRATION ACT  
AND THE LINCOLN MILLS CASE

MAYNARD E. PIRSIG*

For Minnesota lawyers and judges interested in the law governing arbitration, two significant events took place in 1957. One was the adoption by the Minnesota legislature of the Uniform Arbitration Act. The other was the decision of the United States Supreme Court in *Textile Workers Union v. Lincoln Mills.* A brief discussion of the impact of these two developments is the purpose of this article.

I

Minnesota was the first state to adopt the Uniform Arbitration Act. It was sponsored by the Minnesota State Bar Association, again demonstrating its leadership in progressive legislation. There appeared to be substantially no opposition to its enactment although there was some temporary doubt on the part of those interested in labor arbitration, inspired, no doubt, by some articles which gave a distorted version to the meaning and effect of the Uniform Act. Once the provisions of the act were fully examined, any doubts that may have existed disappeared.

The prior Minnesota law on the subject was in a very unsatisfactory state. The former general statute on arbitration goes back unchanged to the 1905 revision. The act in the 1905 revision was in turn based on the Arbitration Act appearing in the 1866 revision but with some simplification and liberalization. The 1866 version was substantially the same as that appearing in the 1851 revision.

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1. Minn. Sess. Laws 1957, c. 633. The statute has been coded as Minn. Stat. §§ 572.08-.28. In the text and footnotes of this article, the act will be referred to simply by sections of the Minn. Sess. Laws.
3. The Uniform Act, with some modifications, was enacted also in Fla. Sess. Laws 1957, c. 57-402.
The act in the 1851 revision stemmed primarily from the New York statutes then in force but with free departures in a good many respects.9

This statute was of very narrow compass. It applied only to agreements to arbitrate which complied with the technical form prescribed and in practice was seldom resorted to. Agreements not within the terms of the statute were governed by common law principles. In Park Construction Co. v. Independent School Dist.10 a notable departure from these principles was made, when it was held that an agreement to arbitrate a future dispute could be specifically enforced, but in other respects the common law principles prevailed.

- Both the former general arbitration statute and the common law principles are superseded by the new Uniform Act to the extent that the act applies. Basically, the act is a simplified and modernized version of the arbitration statutes of New York, first enacted in 192011 and adopted with various modifications in a number of other states.12 Section one of the Uniform Arbitration Act provides:

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives unless otherwise provided in the agreement.13

This section is necessitated in most states by the common law principles otherwise prevailing. These have been summarized in the Restatement of Contracts as follows:14

9. For example, Minn. Stat. 572.02 (1953) probably had its origin in Iowa Rev. Stat. 1843, c. 4, § 2.
10. 209 Minn. 182, 296 N.W. 475 (1941).
11. N. Y. Laws 1920, c. 275; id., c. 925, art. 83.
13. The section as it appears in Minn. Sess. Law (1957), c. 633, omits the words “employers and” between the words “between” and “employees” in the last sentence. However, the statute as enacted is as reproduced in the text and will so appear in the Minnesota General Statutes.
A bargain to arbitrate, though it is not illegal, is practically unenforceable unless arbitration is named a condition . . . , since the bargain gives rise to neither a right to substantial damages nor to a right to specific performance. The authority of the arbitrator is revocable by either at any time before an award is made, and though the revocation is a violation of the agreement, the injured party is without substantial redress. If, however, the bargain to arbitrate is carried out and award made, the award is binding . . . .

In this state, the doctrine of revocability was repudiated by the Park Construction Co. case and agreements to arbitrate any dispute were subject to enforcement. Hence, section one introduces no new doctrine in this state. Its major change is in the fact that such agreements now are enforceable under the provisions of this act rather than by principles developed by judicial decision.

Section one is very broad in its terms. It covers agreements to arbitrate "any existing controversy" and "any controversy thereafter arising between the parties." The disputes covered by the agreement to arbitrate need not arise out of the contract in which the arbitration clause appears; that is, the dispute need not relate to the construction or meaning or breach of a term of the same contract. The section would include the new insurance policies being issued in which the insured driver of a car is insured against the negligence of the driver of another car, and which require disputes as to liability to be submitted to arbitration. It applies to arbitrations of disputes over title to real estate, boundary disputes, money claims, and any other disputes where countervailing considerations of public policy are not present. Such considerations would, however, limit the enforcement of agreements to arbitrate disputes relating to divorce, custody of minor children, criminal charges, etc. Without any explicit provision, the public interest would require that these be determined only by litigation in court.

15. For a recent case applying these principles to an arbitration clause in a collective bargaining agreement, see Machine Products Co. v. Prairie Local Lodge No. 1538, 94 So. 2d 344 (Miss. 1957).

16. Section 20 provides that "This act applies only to agreements made subsequent to the taking effect of this act." (The effective date is April 24, 1957.) A contract renewed would undoubtedly be covered by the act.
The act does not impose any requirement, by implication or otherwise, that the dispute to be arbitrated be one that is justiciable, that is, that it be one subject to litigation as a case or controversy in court. In fact, the implication is to the contrary, for section twelve provides that “the fact that relief [granted by an arbitration award] was such it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.”

The provision that agreements to arbitrate between employers and employees or their representatives may stipulate that the act shall not apply was incorporated to placate the fears these interests might have about the possible unknown adverse consequences of the act. If such a stipulation is inserted, the common law principles heretofore developed by judicial decision will apply. In view of the unsatisfactory state of the law which these principles represent, it is anticipated that these agreements will rarely undertake to invoke the exemption.

The act does not permit the same option to the parties of other arbitration agreements. The intent is that this act shall be the exclusive law governing these agreements on all questions to which it is applicable. Undoubtedly, a provision in a contract that the right to arbitrate shall be revocable at the option of either or both of the parties would be valid and permit the party to refuse to arbitrate at his pleasure. This would be one of the “grounds as existed at law or in equity for the revocation of any contract.” But, until so revoked, the provisions of the Uniform Act would govern.

The act does not apply to oral contracts to arbitrate. It was believed that the existence of an agreement should not be left to the uncertainties of an oral agreement. The question may be raised whether such agreements are governed by common law principles. In most states, this would be of no great moment for if such an agreement were claimed, it could promptly be revoked with little consequence to the revoking party. Minnesota presents a somewhat different situation. An oral agreement to arbitrate a dispute, whether one then existing or to arise in the future, may have been enforceable under prior Minnesota law. If so, it might be argued that

17. An illustration is afforded by Zelle v. Chicago & N.W. Ry. Co., 242 Minn. 439, 65 N.W.2d 583 (1954), in which the parties had agreed that if the parties could not agree to a revision of the terms of the contract, contingent on certain events, the dispute should be submitted to arbitration. The arbitration agreement was sustained. The revision of a contract would hardly be the subject matter for litigation in court.
18. Section 1.
19. See Larson v. Nygaard, 148 Minn. 104, 180 N.W. 1002 (1921). In this case there was an oral submission but the only question before the court was the validity of the written award made pursuant thereto.
this continues to be the law since the Uniform Act does not explicitly provide otherwise. However, it is believed that the better construction of the act is that in providing that a "written" agreement to arbitrate is "valid, enforceable and irrevocable," the intent was to deny the same characteristics to an oral agreement. Of course, if, under an oral agreement, a dispute has in fact been submitted to an arbitrator and he has rendered an award in writing, the award should be sustained even though the original agreement was oral.

Section one provides that the arbitration agreement can be revoked on grounds that are applicable to contracts generally. Such grounds would include fraud, mistake, and rescission by mutual agreement. The defenses of waiver and estoppel would also be available. However, the claim that the party seeking arbitration has breached the contract, when that question is the one on which arbitration is sought, could not be asserted as a ground for avoiding the arbitration. Likewise, a party cannot ignore the arbitration clause and bring suit for the breach covered by it on the ground that the breach permits him to disregard the clause. The existence of the breach is the very question which the parties had agreed to submit to arbitration.

20. Section 1.
21. In Knutson v. Lasher, 219 Minn. 594, 18 N. W. 2d 688 (1945), at the commencement of the arbitration hearing, the defendant served notice of revocation and withdrew. The plaintiff also abandoned the proceeding and commenced suit on the contract. The defendant asserted a set-off based on a claim covered by the arbitration clause. It was held that both parties had waived the arbitration clause and that defendant was therefore entitled to assert the set-off. Accord, Independent School Dist. No. 35 v. A. Hedenberg & Co., 214 Minn. 82, 89, 7 N. W. 2d 511, 516 (1943). The court stated:

The agreement to arbitrate was not irrevocable in the sense that it could not be modified by mutual agreement or waived by mutual acquiescence of the parties in submitting their controversy to a court of law. The word 'irrevocable,' even as used in an arbitration statute, means that the contract to arbitrate cannot be revoked at the will of one party over the objection of the other, but that it can only be set aside for facts existing at or before the time of its making, which would permit revocation of any other contract.

23. Fire insurance policies containing appraisal of loss clauses present a special problem which has led to some confusion in Minnesota cases. While these appraisals are considered by the Minnesota court as a form of arbitration, see discussion infra, p. 341, they spring from special statutory provisions of the insurance law, are limited to the narrow question of the amount of the loss and do not touch on other questions of liability. The court first took the position that "an unequivocal denial of all liability [leaves] no basis for an arbitration; hence it was a waiver of any right to an arbitration." Cash v. Concordia Fire Ins. Co., 111 Minn. 162, 165, 126 N. W. 524, 525 (1910). Without warrant, this was extended to a contract of employment in Anderson v. M. Burg & Sons, Inc., 170 Minn. 53, 57, 212 N. W. 9, 11 (1927). However, in Abramowitz v. Continental Ins. Co., 170 Minn. 215, 212 N. W. 449 (1927), and Itasca Paper Co. v. Niagara Fire Ins. Co., 175 Minn. 73, 220 N. W. 425 (1928), this position was repudiated and the insurer permitted to deny liability without waiver of the right to an appraisal.
The Uniform Act applies only to arbitrations. Sometimes the question raised is whether the agreement is one for arbitration or for some other method of resolving the dispute. A party may agree to abide by the decision of a third person that may be arrived at by a procedure which does not constitute an arbitration. For example, an employer may agree to pay his employee's wages during the latter's illness, the existence and extent of the illness to be determined by a physician agreed upon. Plainly, the parties do not intend the physician to conduct an arbitration proceeding.\footnote{24} A lease may provide that the lessee may purchase the leased property at a price and on terms to be determined by a designated third person. Arbitration is not intended thereby.\footnote{25} A sale of stock may be at a price having a prescribed ratio to corporate earnings, the earnings to be determined by an accountant. The accountant is not an arbitrator.\footnote{26} The scaling of logs by the state, to be conducted by a designated public official, does not contemplate arbitration.\footnote{27}

In each of these instances, the parties could have agreed to resolve the issues by arbitration. Whether they did so in a given agreement has been the subject of considerable confusion in the decisions. No clear test for determining the distinction has been developed. Sometimes it is said that "valuations, calculations, or measurements" are merely "ministerial acts."\footnote{28} But, in the illustrations given above, the fixing of a price or the determination of earnings surely is more than ministerial and calls for the exercise of very considerable judgment and probably investigation of fact. In other cases, arbitrations are considered to be concerned with the settlement of disputes, while valuations, etc., are deemed to call merely for the decision of the third party without reference to a

\footnote{24} See Shepard & Morse Lumber Co. v. Collins, 198 Ore. 290, 256 P. 2d 500 (1953).
\footnote{26} See Sanitary Farm Dairies v. Gammel, 195 F. 2d 106 (8th Cir. 1952).
\footnote{27} See State v. Equitable Surety Co., 140 Minn. 48, 50-51, 167 N. W. 292, 293 (1918), stating:
Without authority of any statute, parties may, if they see fit, stipulate in a contract of sale that the quantity of the property sold shall be determined by the estimate of a designated person or official. No public policy forbids this.\ldots Contracts of this kind are common in business transactions. A familiar instance is the ordinary form of building contract, by the terms of which the estimate of the supervising architect is made final. Such provisions are universally sustained.\ldots A requirement of notice will not be implied. In this respect, such a case differs from an arbitration where the aid or presence of the parties may be of importance. See also Hayday v. Mammermill Paper Co., 176 Minn. 315, 223 N. W. 614 (1929).
\footnote{28} Nelson v. Charles Betcher Lumber Co., 88 Minn. 517, 521, 93 N. W. 661, 662 (1903).
dispute and, indeed, for the purpose of preventing a dispute. But, rather than offering a determinative guide, this appears to be no more than a descriptive statement of the kind of situations in which one or the other of these procedures is in fact used. Again, "the final test should be whether or not the parties intended the 'arbitrators' to determine ultimate liability or merely facts incidental thereto." This test, also, seems to be an unworkable one. Most likely it was suggested by the distinction drawn at common law between an arbitration agreement limited to a narrow issue and leaving the dispute to be resolved in court (which was upheld) and a general submission to arbitration (which was not). Certainly, parties may agree that the narrow issue may be submitted to arbitration and, on the other hand, the single issue submitted, to a third person for decision without arbitration contemplated may be the sole one and thus determine liability. Finally, and more suggestive of the basic question, it has been stated that if the agreement contemplates that the third person is to act on his own judgment and not on the basis of data submitted to him, an arbitration is not intended.

Without undertaking to suggest a precise test, it may be stated that the Uniform Arbitration Act was not intended to apply to a case in which the agreement provides for an automatic referral of a limited question of fact to a third person, who is to exercise his judgment or apply his knowledge without reference to a hearing or submission of data by the parties. Whether the agreement does so provide must be determined on the basis of the facts of the particular case and the terms of the particular agreement. Common business practice, in the light of which the agreement was made, will have an important bearing on how the agreement should be construed.

The question will probably most frequently arise with respect to agreements providing for what are called appraisals or valuations, particularly those appearing in fire insurance policies. The leading case is *In re Fletcher,* in which some corporate stock had been sold at a "fair value" to be "determined by an appraisal thereof made by three arbiters, one to be appointed by [the buyer] another to be appointed by [the seller] and a third to be appointed by the other

29. See Citizens Bldg. v. Western Union Tel. Co., 120 F. 2d 982 (5th Cir. 1941); *In re Fletcher, 237 N. Y. 440, 143 N. E. 248 (1924).*
31. *Bewick v. Mecham, 26 Cal. 2d 92, 156 P. 2d 757 (1945).*
32. *237 N. Y. 440, 143 N.E. 248 (1924).*
33. *Id. at 442-43, 143 N.E. at 249.*
even.

This was held not to come within the terms of the New York Arbitration Act. The court observed:

Even prior to the Arbitration Law the courts have held that a provision in a contract that before a right of action arises certain facts shall be determined or amounts and values ascertained is valid and not against public policy . . ., and it cannot be doubted that the provision of the contract under consideration comes within this rule. The primary purpose of the Arbitration Law was to make valid and enforceable provisions for arbitration which had previously been regarded as contrary to public policy but it also provides a practical method for the enforcement of such provisions and both the letter and spirit of the statute require the courts to hold that this method was intended to apply to all contracts "to settle by arbitration a controversy thereafter arising;" both those which were regarded as valid before the Arbitration Law as well as those which were regarded as contrary to public policy. On the other hand, the language of the statute should not be stretched to cover contracts which do not come within its plain intent where the application of the method of procedure provided in the statute is not practicable.

The provisions [of the statutes on arbitration] require hearing upon notice and the taking of an oath by the arbitrators. They confer upon the arbitrators all the powers which are "conferred upon a board or member of a board authorized by law to hear testimony" including the power to require the attendance of witnesses. They give the arbitrators the right in their awards to require the payment by either party of fees and expenses. They fix the form of an award. They provide for motions to confirm, vacate, modify or correct an award and they permit the entry of a judgment after the confirmation of an award. That judgment "may be enforced as if it had been rendered in an action in the court in which it is entered" and "an appeal may be taken from an order vacating an award, or from a judgment entered upon an award, as from an order or judgment in an action." These provisions are appropriate to proceedings where parties substitute judges of their own choice for judges chosen by the state in the determination of disputes otherwise cognizable by the courts alone; they can have no application to proceedings through which disinterested persons are authorized to settle questions which would otherwise be left to the determination of the parties to the contract.54

In 1941 the New York Arbitration Act was amended to provide that it should apply to "questions arising out of valuations, appraisals or other controversies which may be collateral, incidental,
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precedent or subsequent to any issue between the parties.\textsuperscript{35} After some intimation by the New York Court of Appeals that the act still did not cover appraisal provisions in fire insurance policies,\textsuperscript{36} the act was further amended to make it applicable even though the appraisal was “independent” of any issue between the parties.\textsuperscript{37} Nevertheless, in \textit{In re Delmar Box Co.}\textsuperscript{38} it was held that the act was still inapplicable. The court followed the theory of \textit{In re Fletcher}, that the arbitration procedure provided by the act was not suited to the appraisal process contemplated by the fire insurance policy. It maintained that the appraisal procedure as developed by New York decisions contemplated an investigation by the appraisers themselves without the necessity of a formal hearing or formal notice to the parties. “[T]hey may apparently proceed by \textit{ex parte} investigation, so long as the parties are given an opportunity to make statements and explanations to the appraisers with regard to the matters in issue.”\textsuperscript{39} The court also noted that the umpire in an appraisal performed a different function than in an arbitration and that the setting aside of an appraisal for reasons not attributable to the insured permitted suit on the policy while, if an arbitrator’s award is set aside, this results in a new arbitration hearing. Because of these basic differences, the court felt the Arbitration Act should not apply.

This history was before the National Conference of Commissioners on Uniform Laws when the Uniform Arbitration Act was promulgated. The omission of appraisals, valuations, etc., was deliberate. It was not intended that they should be covered by the act.

The Minnesota standard fire policy must contain the following provision:

\begin{quote}
In case the insured and this company, except in case of total loss on buildings, shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within 20 days of such demand. In case either fails to select an appraiser within the time provided, then a presiding judge of the district court of the county wherein the loss occurs may appoint such appraiser for such party upon application of the other party in writing by giving five days’ notice thereof in writing to the party failing
\end{quote}

\textsuperscript{35} N.Y. Laws 1941, c. 288.
\textsuperscript{37} N.Y. Laws 1952, c. 757.
\textsuperscript{38} 309 N.Y. 60, 127 N.E. 2d 808 (1955).
\textsuperscript{39} Id. at 64, 127 N.E. 2d at 811.
to appoint. The appraisers shall first select a competent and disinterested umpire; and failing for 15 days to agree upon such umpire, then a presiding judge of the above mentioned court may appoint such an umpire upon application of party in writing by giving five days' notice thereof in writing to the other party. The appraisers shall then appraise the loss, stating separately actual value and loss to each item; and failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this company shall determine the amount of actual value and loss. Each appraiser shall be paid by the party selecting him, or for whom he was selected, and the expense of the appraisal and umpire shall be paid by the parties equally.40

The substance of these provisions has been in force in this state for many years, and the language corresponds to similar legislation in New York and other states. However, the interpretation given these provisions by the Minnesota court is quite different from that which has been followed in In re Fletcher and In re Delmar Box Co. While the New York court has emphasized the fact that appraisers may act on their own without a hearing and are, therefore, not arbitrators, the Minnesota court has taken the position that they cannot act on their own investigation or knowledge but, like arbitrators, must conduct a hearing at which the parties are entitled to be heard. Thus it has said:

The board of referees provided for under the standard policy is a quasi court, subject to the principles governing common-law arbitration. Such board should sit in a body, and receive evidence offered by the respective parties, submitting the same to the usual tests of cross-examination. While its individual members are prohibited from privately collecting evidence from different sources, a reasonable latitude is allowed them in the examination of the premises, remnants of goods, and causes of the fire, for the purpose of better understanding and weighing the evidence on the principal question before them, viz., what is the just damage to the property involved? But, while a certain liberality is permissible in acquainting themselves with the circumstances surrounding the fire without the medium of witnesses, such board is not selected for the purpose of seeking evidence secretly, and determining the amount of the loss by reason of such personal knowledge.41

41. Christianson v. Norwich Union Fire Ins. Soc., 84 Minn. 526, 530, 88 N.W. 16, 18 (1901); accord, Dufresne v. Marine Ins. Co., 157 Minn. 390, 196 N.W. 560 (1923); McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N.W. 97 (1920). An appraiser evaluating property under a lease was held an arbitrator within the meaning of a criminal statute forbidding promises to decide for or against a party in Earle v. Johnson, 81 Minn. 472, 84 N.W. 332 (1900). "The proceeding is, in effect, a common-law arbitration."
From this it might be concluded that the Uniform Arbitration Act should be held to apply. There is much to be said in favor of this view. There is nothing in the nature of a dispute over the amount of a fire loss which should exempt it when the attributes of arbitration have heretofore been applied to the appraisal. The repeated attempts to extend the New York Arbitration Act to appraisals indicates a very substantial opinion that the benefits of the act should be so extended.

Nevertheless, it is believed that the better view is that the act does not apply. Even under the Minnesota theory of the nature of appraisals, there may be some peculiarities and special problems that call for different treatment. These should be considered on their own merits. The appraisal clause is part of the statutory law of insurance. It was not intended that it should be superseded by the enactment of the Uniform Act. If a change is to be made in the law governing appraisals under insurance policies, it would be preferable to amend the statutes on the subject and explicitly provide that appraisals are to be made in accordance with the provisions of the Uniform Act.

Preliminary to an arbitration hearing, there must be some formulation of the question which the arbitrator is being asked to determine. The act does not deal with this subject, and hence the traditional informality of proceeding will suffice. If the agreement is to arbitrate an existing dispute, the parties in the process of executing the agreement will arrive at a formulation of the issues in dispute. If the agreement was made prior to the dispute now existing, the party seeking arbitration will ordinarily have to frame the issues he wants arbitrated. In practical operation, this will consist of some written form of a demand for arbitration served upon the opposing party. It may be merely a letter or some more formal notice. Formal rules of pleading need not be observed. The proper framing of the question is still, however, of considerable importance both as a guide to the arbitrator and to the court in the event a mo-

42. Zelle v. Chicago & N. W. Ry. Co., 242 Minn. 439, 448, 65 N.W.2d 583, 589-90 (1954) stating:

The demands arising from a controversy between the parties which are to be submitted to arbitration must be sufficiently described so as to be identifiable either from the contractual provision or with the aid of parol evidence if that be necessary. It is not necessary that they should be in the same specific form as required in a pleading. The only requirement is that the demands be described sufficiently to be identified. . . .

The provision constituting the submission agreement may be in general terms without specification or enumeration as to the various items in dispute. Reference to arbitrators of 'all matters in dispute' with reference to the subject matter has been held sufficiently certain and comprehensive to support an award. Cyacchiolo v. Carlucci, 62 Ariz. 284 157 P.2d 352.
tion to compel arbitration must be made. The demand should, of course, be limited to the questions to which the arbitration clause is limited.

A clear statement of the issues sought to be arbitrated may avoid much trouble and litigation later. Thus, in *McKay v. McKay*, in submitting their differences to arbitration, the partners failed to make clear whether the arbitrator was to have power to direct dissolution of the partnership. In sustaining the trial court's decision that the arbitrator did not have such power, the Minnesota Supreme Court observed:

> The trouble with the arbitration agreement and the proceeding is that it nowhere appears with any certainty what questions, if any, were to be or were submitted to arbitration outside of the matter of the account between the parties relating to the partnership. The general rule is that the subject matter of a controversy should be so specifically set out as to leave no reasonable doubt as to what has been submitted. . . . [T]he parties do not agree as to what was submitted to arbitration outside of the matter of the account.  

Included in the demand for arbitration should be a request that the opposing party take the steps specified in the contract for the appointment of the arbitrators.  

There is, of course, nothing to prevent the opposing party from specifying other issues which he wishes included in the arbitration proceeding.

Should the party seeking arbitration desire not to proceed with an arbitration hearing without settlement of his right thereto, he now has a new and simple remedy open to him under section 2(a), which provides:

> On application of a party showing an agreement described in Section 1, and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

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43. 187 Minn. 521, 246 N.W. 12 (1932).
44. *Id.* at 525-26, 246 N.W. at 14.
45. Refusal so to act would warrant an application under §3, reading:

> If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.
This works a major change in Minnesota law with respect to the procedure available for the enforcement of an arbitration agreement. Heretofore, except for the limited area covered by section 572 of the Minnesota statute, the enforcement of these agreements appeared to be confined to the bringing of an ordinary action, either for specific performance or for a declaratory judgment that the arbitration agreement was enforceable accompanied with an order for arbitration.46

In *Park Construction Co. v. Independent School Dist. No. 32,*47 an action had been commenced on an award in an arbitration proceeding conducted over the objection of the defendant. It was held that the defendant could not revoke his agreement to arbitrate and, thus, the award was valid and enforceable. By analogy, if an action were brought on issues the parties had agreed to arbitrate, the defendant probably could assert the agreement as a defense to the action.

This probably exhausted the means available for enforcing an arbitration clause and all these were dilatory, cumbersome and expensive. Section 2(a) substitutes a motion procedure48 governed by the Minnesota Rules of Civil Procedure. The following motion should suffice.

A.B., Petitioner,

v.

C.D., Respondent:

To the Above Named Respondent:

Please take notice that upon the affidavits of E.F. and G.H., attached hereto, petitioner will move the above named court at a special term thereof to be held at the city of ________, Minnesota, in the above named County, on ________, 19___, at _______ o'clock, or as soon thereafter as counsel can be heard, for an order:

(1) Directing the above named parties to proceed with arbitration pursuant to agreement entered into by them on ________, 19___, of the following issues:

[Here state the issues as demanded prior to the motion.]

(2) Appointing an arbitrator, in the event that the parties cannot agree thereon or the defendant refuses to participate therein.

46. The declaratory judgment procedure was followed in *Zelle v. Chicago & N. W. Ry. Co.,* 242 Minn. 439, 65 N.W. 2d 583 (1954). The granting of summary judgment to the plaintiff was sustained.

47. 209 Minn. 182, 296 N.W. 475, 135 A.L.R. 59 (1941).

48. Section 16 provides:

Except as otherwise provided, an application to the court under this act shall by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.
This notice of motion should be served as is a summons in an action. It should be accompanied with affidavits setting out the contract upon which it is claimed the right to arbitration rests and the existence of the disputes upon which arbitration is sought. If there are certain conditions, compliance with which is required by the contract before the right to arbitration arises, such as observance of the grievance procedure provided in a collective bargaining agreement, the affidavits should show that these conditions have been complied with. It should also appear that a demand for arbitration of these disputes has been made. The respondent has, of course, the right to interpose counter-affidavits denying any or all of these facts. The issues thus presented are tried by the court without a jury. If necessary to a full or adequate presentation of the facts, oral testimony may be taken as on any other motion.\footnote{Ibid.}

Ordinarily, the only question likely to be raised is whether the respondent is under a duty to submit the particular dispute involved to arbitration. This will turn on the proper construction to be made of the arbitration clause. If he has not agreed to arbitrate the issue in dispute, he should not be compelled to do so. Under the Uniform Act, unless he has agreed to submit this question also to arbitration, he is entitled to a judicial determination of it.

This seems simple enough, and yet this question of arbitrability has caused a considerable amount of litigation. Some of the decisions have been properly open to the criticism that the courts have invaded the function of the arbitrator under the guise of passing on the question of arbitrability of the dispute. This problem was considered at length by those entrusted with the preparation of the Uniform Act for the National Conference of Commissions on Uniform State Laws and the conclusion reached was that the act should limit the court's function on a motion to compel arbitration to determining "the existence of the agreement to arbitrate."\footnote{Section 2 (a).}

An order for an arbitration should be denied if the terms of the arbitration clause are clear, and (putting the pending dispute beside them) if it is evident that any possible award that the arbitrator could make would not come within them. More difficult situations arise when interpretation of the arbitration clause also decides the dispute which the parties intended to leave to arbitration. Thus, a collective bargaining agreement prohibits transfers from one job to another without consultation with the union and provides that any disputes as to such transfers shall be arbitrated. The employer without consultation transfers an employee from one machine to another
less desirable, but performing the same function. The employer contends that since it is the same job, there was therefore no transfer and hence nothing to arbitrate. The dispute is one of the kind contemplated which should be settled by arbitration. Hence the court should not determine what was intended by the term "transfer" under the guise of determining the authority of the arbitrator. To do so would decide the issue in dispute and leave nothing to arbitrate.

A more common provision is one in a collective bargaining agreement that the construction, interpretation and application of the various provisions of the contract shall be determined by arbitration in case of a dispute that cannot be resolved by the usual grievance procedures. Sometimes a provision is added that the arbitrator shall not add to or vary the terms of the contract. The management wishes to discontinue a portion of its operations or to move the plant to another location. The union insists it was an implied term of the agreement that operations were to continue without such drastic changes, and demands arbitration. It is an easy error for a court to conclude on a motion to compel arbitration that what is not in the contract is not subject to arbitration, and that the contract did not deal with these prerogatives of management. But, whatever the merits of that position, they are not for the court to determine. The issue involves the interpretation of the contract and this has been left to the arbitrator. To hold otherwise would destroy the arbitration clause itself. To avoid these judicial invasions of the arbitrator's authority, the Uniform Act deliberately confined the courts' function to the determination of "the existence of the agreement to arbitrate." There is, of course, nothing to prevent the parties from agreeing to a more restricted arbitration clause. Further, whether the arbitrator has gone beyond his authority remains a question that is to be determined after he has made his award.

Under the New York Arbitration Act, it has been held that, before a court would direct arbitration, it must appear that the dispute sought to be arbitrated was bona fide and that there was some reasonable basis or ground for making the claim. What might seem


groundless or bad faith to a judge might appear quite differently to the arbitrator. To avoid substitution of the judge's view for that of the arbitrator, the Uniform Act provides that "an order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown."53

There are other procedures than the motion to confirm under the act by which the foregoing questions may be raised. The party resisting arbitration may himself bring the matter into court by a motion to stay an arbitration commenced or threatened, and raise the question that there was no arbitration agreement.54 This is, in substance, a summary means of obtaining a declaratory judgment on the issue. Or the party may appear at the arbitration hearing, make his objection and thereafter, if he likes, participate in the hearing without losing his objection. He may then oppose on this ground a motion to confirm any award rendered against him, or he may make his own motion to vacate the award.55 He may also disregard the hearing and raise the objection by attacking the award rendered against him. But in that event, if the objection does not prevail, he will have lost his opportunity to appear at the hearing. The act also provides that if an action is brought on an issue subject to arbitration, the defendant may move for a stay and an order directing arbitration.56

By these several methods, the duty of a party to submit an issue to arbitration may be determined prior to the arbitration hearing itself and in all of them the principles governing the judicial function stated above will control.

Section five is the principal section governing arbitration hearings. It provides:

Unless otherwise provided by the agreement:

(a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered mail not less than five days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on a request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The

53. Section 2(e).
54. Section 2(b).
55. Section 12(1) (5).
56. Section 2(c) and (d).
court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(b) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.57

These provisions clarify the procedure to be followed where the arbitration agreement does not define it. They are designed to assure notice and a fair hearing66 and to provide some flexibility to the conduct of the hearing, including the rendering of a default award where the opposing party fails to appear.69 The procedure prescribed may be changed by agreement and its observance may be waived.60 Subdivision (b) states no more than the traditional rights given a party in an arbitration hearing.61 Failure to observe the essentials of this section with resulting prejudice to a party entitles him to a vacation of an adverse award.62 Other sections give the right to be represented by an attorney which cannot be waived prior to the hearing63 and empower the arbitrator to issue subpoenas and permit the taking of depositions.64 Depositions may be used only where the witness cannot be subpoenaed or is unable to attend the hearing and the arbitrator concludes that the information he has is essential to the hearing. The general use of depositions would defeat the purpose of keeping the proceeding an informal one capable of being conducted by laymen not versed in the refinements of procedure.

57. Subdivision (c) provides for hearing by all of the arbitrators but determination by a majority is sufficient. If any one of them ceases to act, the remaining neutral arbitrators may continue.
58. "Neither party was entitled to be present when the arbitrators were deliberating on their award, after the parties had submitted their respective claims. A fair opportunity to present a claim to arbitrators, which a party is entitled to, and to be present to meet the claim of his adversary, does not include the right to be present when the arbitrators are making up their award." Segal v. Fred, 105 Minn. 126, 128, 117 N.W. 225, 226 (1908).
59. Proceedings by default were permitted under the common law rule in this state prior to the act. Knutson v. Lasher, 219 Minn. 594, 600, 18 N.W.2d 688, 693 (1945). N. Y. Sess. Laws 1957, c. 325, introduces a most novel procedure, by which an award may be obtained "by confession." Both parties must sign a sworn statement stating the award to be made and facts showing a just liability has been confessed. Thereupon, the arbitrator or the agency designated to name the arbitrator or by whose rules the arbitration was to be governed may make the award agreed upon. The apparent purpose is to avoid a hearing and the expense of an arbitrator, both parties having agreed to the award which may be rendered. Why the cumbersome procedure provided was necessary for this purpose is not evident.
61. "[C]ertainly under common law rules relating to arbitration the parties are entitled to notice and an opportunity to be heard...." Dufresne v. Marine Ins Co., 157 Minn. 390, 392, 196 N.W. 560, 561 (1923).
62. Section 12(4) set out in the text at p. 352.
63. Section 6.
64. Rule 27.07, Minn. Rules of Civ. Proc., which provided for depositions in arbitration cases is superseded by § 6. See § 24(2) so providing.
There is no attempt to prescribe the manner in which the hearing shall be conducted. That the traditional informality of such hearings will be continued is assumed. Unless the agreement provides otherwise, no stenographic record of the testimony need be made; witnesses may but need not be sworn; technical objections to the reception of evidence have no place; and affidavits, signed statements, and hearsay may be received, the parties being free, of course, to urge upon the arbitrator the value that such evidence does or does not have. There is no requirement that there be findings of fact by the arbitrators and none need be made. Neither is there any prohibition against such findings and the arbitrator will usually be well advised to state the reasons for his decision and award.

The act requires the award rendered to be in writing and signed by the arbitrators joining in it and it must be made within the governing time limits. Copies must be sent to the parties.

If, on receiving the award, a party deems it incomplete or unclear or indefinite, the act permits a party to apply to the arbitrator for a clarification of the award. This is a quite unique feature of the act which should prove helpful in many cases and avoid litigation over the meaning of an award or over its validity. Absent such a provision, the powers of the arbitrator have been considered terminated and they have no power even to correct an obvious mistake. But there are definite limits to what an arbitrator may do under this authority. He may "modify or correct the award upon the grounds stated in clauses (1) and (3) of subdivision 1, section 13, or for

65. See McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 257, 180 N.W. 97, 98 (1920) stating, "It is well settled, in the absence of statute otherwise providing, that in the common-law arbitration the arbitrators need not specify in detail the facts made the basis of their decision, but may report the result of their deliberations in the form of general conclusions, which determine the points involved, together with a statement of the gross allowance made."

66. Section 8.

67. Section 9.

68. Sturges, Commercial Arbitrations and Awards § 220 (1930).

69. Subdivision 1 of §13 provides the grounds for modification by the court on motion and reads as follows:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issue submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

Subsection (2) was excluded from the grounds for modification by the arbitrator since it would permit him to pass on his own powers. This is a question reserved for the court unless the agreement otherwise provides. See §12, subdiv. 1(3), set out on p. 352.
the purpose of clarifying the award." The he may not under the guise of clarification, make a new and inconsistent award nor is he permitted by this section alone to undertake a rehearing of the case.

Once the award has been rendered, it may be reduced to judgment by simply moving for an order to confirm the award. On such a motion the opposing party must assert all the defenses he may have to the enforcement of the award. Indeed, he must assert his defenses within the 90 day period specified for the assertion of grounds for avoiding an award, whether or not a motion to confirm has been made. If no motion to confirm is made within that period, he must bring his own motion to vacate the award or his defenses are lost.

The motions to confirm an award and for the reduction of the award to judgment and the motions to vacate or modify or correct an award are the exclusive means of accomplishing these ends. An action on the award or an action to vacate or set aside an award or for an injunction against the enforcement of an award or for a declaratory judgment on any of these questions is no longer permissible. To permit them would expose the arbitration process to the delays and expense of litigation which it was the purpose of the act to avoid.

The grounds for vacating an award are the following:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

70. Section 9.
71. The court may order a rehearing under §12 before the same or new arbitrators in the event the award is vacated.
72. Section 11.
73. Section 11 provides:

Upon application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13.

Subdivision 2 of §12 provides:

An application under this section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

74. See §14, providing in part, "Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree."

75. A temporary restraining order or injunction pending the hearing of a motion to vacate or modify would appear to be permissible to maintain the status quo pending the hearing of the motion.
(3) The arbitrators exceeded their powers;
(4) The arbitrators refused to postpone the hearing upon
sufficient cause being shown therefor or refused to hear evidence
material to the controversy or otherwise so conducted the hear-
ing, contrary to the provisions of Section 5, as to prejudice sub-
stantially the rights of a party; or
(5) There was no arbitration agreement and the issue was
not adversely determined in proceedings under Section 2 and the
party did not participate in the arbitration hearing without rais-
ing the objection. 76

These grounds have been widely enacted in numerous states and
had their origin in the New York Revision of 1829, which in turn
attempted only the codification of the existing common law prin-
ciples. They appeared in substantial part in the former Minnesota
general arbitration act77 but the act was used so seldom that there
has been practically no opportunity for judicial interpretation of
these provisions, and such Minnesota law as there was on these
questions was developed as the common law of the state independent
of the statute. So far as section twelve embodies common law prin-
ciples, the prior Minnesota decisions will be relevant.

Few direct charges of corruption, fraud or undue influence ap-
pear in the Minnesota cases. The court had displayed considerable
interference with awards made by appraisers of losses covered by
fire insurance policies but these present peculiar problems and the
principles developed should not be applied to arbitrations generally.78
Several Minnesota cases have considered the question of prejudice on the part of the arbitrator, most of them involving loss appraisals under fire insurance policies. The following guiding principle has been laid down:

It is the general rule that a person is disqualified to act as arbitrator who has any secret interest in the result or decision of the controversy, or if there exists any relationship or family connection between the arbitrator and a party to the submission, or if he had formed an opinion or is otherwise prejudiced in respect to the subject-matter. The board of arbitrators is a quasi court, governed by rules applicable to common-law arbitration, and should constitute a body of disinterested men, whose business it is to proceed in a judicial and impartial manner to ascertain the facts in controversy, without regard to the manner in which the duty has been devolved upon them. . . . Arbitrators not avowedly selected as partisans are, indeed, bound, as in the execution of a joint trust, to look impartially at the true merits of the matter submitted to their judgment.79

The question is essentially one of fact for determination in each individual case and the determination of the trial court will usually be sustained.80

Several possible objections to the award are open to the losing party under subsections 3 and 5. One is that there was no agreement to arbitrate the subject matter in dispute. As has already been noted, this could have been the basis of a motion to compel or stay the arbitration. If such a motion was made and adjudicated, the points rather than their value for the remainder of the term was held unenforceable.

The last two cases reflect a desire to limit the function of appraisers to that of fixing monetary value, leaving to the courts the determination of what is to be valued. Whatever the merits of this policy, it is inapplicable to arbitrations generally.


The quotation recognizes that there may be arbitrators intended to be selected as partisans. This is not uncommon in labor arbitrations and even in commercial arbitrations. See Note, The Use of Tripartite Boards in Labor, Commercial, and International Arbitration, 68 Harv. L. Rev. 293 (1954). This is recognized by the Uniform Act in § 12 quoted above and in § 5(c). See also § 2(c). Obviously, in such a case, the award should not be set aside on this ground.

80. That an appraiser acted for insurance companies in other cases is not in itself evidence of bias. McQuaid Market House Co. v. Home Ins. Co., 147 Minn. 254, 180 N.W. 97 (1920). But if his conduct shows a persistent attitude of favoring the party selecting him and he has a history of long association with insurance companies in adjusting similar losses, the trial court may be warranted in finding him disqualified. Produce Refrigerator Co. v. Norwich Union Fire Ins. Soc., 91 Minn. 210, 97 N.W. 875 (1904), aff’d on rehearing, 91 Minn. 217, 98 N.W. 100 (1904); Christianson v. Norwich Union Fire Ins. Soc., 84 Minn. 526, 88 N.W. 16 (1901), (bias accompanied with private gathering of information on which award was based); Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N.W. 855 (1896).
not be raised again on a motion to vacate the award. But, even if there is such an agreement, the further objection may be raised that the arbitrator's award did not remain within the limits of his authority as defined by the agreement. Finally, even though the award falls within the terms of the arbitration agreement, the contention may be urged that the parties in their submission did not present the issue which the award purports to decide and was not contested by consent at the arbitration hearing.

When raised, these are questions for judicial determination. When the award is attacked on the ground that it is one beyond the power of the arbitrator to make because the terms of the arbitration clause do not permit him to consider the question or decide as he did, the problem is again presented as to the degree of judicial interference with the arbitrator's functions permitted by the Uniform Act. The principles discussed earlier with respect to motions to compel or stay arbitrations are applicable in this instance also. But they are applied in a different context. There is now an award accompanied with such explanations as the arbitrator has made. The question is not simply whether there was an arbitration agreement in existence. In addition, the court must decide whether the award made is one that falls within the reasonable compass of the authority given him. Thus, if the arbitrator was empowered to construe the terms of the contract and his award constitutes a construction that is a reasonably possible one, it should be sustained though the court may disagree, even violently, with the construction arrived at. This is what the parties agreed to and should be expected to abide by. It is only when all reasonable minds would agree that the arbitrator's award presents an impossible construction of the contract that the award may be said to have gone beyond what the parties intended when they entrusted him with the decision of the issue and that the award should, therefore, be set aside.

A recent Minnesota decision indicates that these principles will be observed in the construction of the Uniform Act.\textsuperscript{81} A collective bargaining agreement entered into between the parties provided that any dispute arising "as to the meaning and application of the provisions"\textsuperscript{82} of the contract, should, if not otherwise settled, be submitted to an arbitration board, its decision to "be final and binding on both parties."\textsuperscript{83} It added also that the board should "not have

\begin{footnotesize}
\begin{enumerate}
\item Cournoyer v. American Television & Radio Co., 83 N.W. 2d 409 (Minn. 1957). The case arose prior to the adoption of the Uniform Arbitration Act and involved the application of judge-made law.
\item Id. at 411.
\item Ibid.
\end{enumerate}
\end{footnotesize}
authority to modify, change or amend any of the terms or provisions of this Agreement or to add to or delete from this Agreement.\textsuperscript{89}

A term of the contract provided that if lay-offs became necessary, "the employee having the greatest length of continuous service, skill and ability shall be the last laid off and the first recalled."\textsuperscript{90}
Lay-offs occurring, a dispute occurred over whether the employer had observed this requirement. On submission to arbitration, an award was rendered favorable to the employees. The arbitrators construed the phrase "greatest length of continuous service, skill and ability" so that the term "greatest" applied only to "length of service" and not to "skill and ability." The employer's contention was that this interpretation was "demonstrably and inescapably wrong"\textsuperscript{91} and, hence, modified and changed the terms of the agreement.

In rejecting this contention, Justice Matson stated:

In passing on the issue of whether the award of an arbitrator may be set aside as invalid because of alleged misinterpretation of controlling contract provisions, it is well to bear in mind the general rule that an arbitrator, in the absence of any agreement limiting his authority, is the final judge of both law and fact, including the interpretation of the terms of any contract, and his award will not be reviewed or set aside for mistake of either law or fact in the absence of fraud, mistake in applying his own theory, misconduct, or other disregard of duty. An award will not be set aside merely because the court thinks the arbitrators erred either as to the law or the facts. If the rule were otherwise, arbitration proceedings, instead of facilitating the settlement of controversies, would serve but to delay the final determination of the rights of the parties.\textsuperscript{92}

\textsuperscript{84.} Ibid.
\textsuperscript{85.} Ibid.
\textsuperscript{86.} Ibid.
\textsuperscript{87.} In Zelle v. Chicago & N. W. Ry. Co., 242 Minn. 439, 446, 65 N.W. 2d 583, 589 (1954), the court declared:

Arbitration has been looked upon with favor in this state both in the statutory and decision field. This court has declared that arbitrators constitute private tribunals, deriving their powers from the parties as manifested by the terms of the submission; that the submission is the commission of the arbitrator; that, while judges are in duty bound to apply the applicable law in deciding cases, arbitrators do not exercise judicial power; that arbitrators derive their power from the parties, which power may include deciding the law as well as the facts, and the parties are bound thereby; and that the arbitrators may do what no other person acting in the capacity of one who judges can or has a right to do, namely, they may intentionally decide contrary to the law and still have their judgment stand. It follows that, if the parties by their agreement direct that a dispute shall be decided in accordance with applicable law, the arbitrators will be bound thereby; if the parties have not insisted that the applicable law shall govern the decision on the facts, the arbitrators may decide the dispute according to their notion of justice without regard to the applicable law.

The former Minnesota arbitration statute, Minn. Stat. §572.05(5) (1953),
Since we have here no mistake by the arbitrators in the application of their own theory, rule, or formula, and no evidence of fraud, the arbitrator's award may be impeached only if it appears that their conclusions, and the inferences upon which they are based, are so at variance with any conclusions which might legitimately be drawn from the evidence before them — including the interpretation of the contract — as to imply bad faith or a failure to exercise an honest judgment.\textsuperscript{88}

What this comes down to saying is that an impossible construction to which no reasonable mind could agree will not be sustained. In that case, good faith or honest ignorance should not, and undoubtedly will not, save it. Such cases are, of course, quite rare. As the court held in the \textit{Cournoyer} case, the interpretation there placed by the arbitrator on the contract, while not necessarily the only or better one, was plainly a permissible one.

Uncertainty or incompleteness of the award, commonly found in statutes on the subject,\textsuperscript{89} is not included in the Uniform Arbitration Act as a ground for vacation of the award. This was omitted in the belief that it was unnecessary and undesirable since under section nine the award may be returned to the arbitrator by the court or the parties to correct and clarify.\textsuperscript{90}

An occasional case may arise where the arbitrator has died, disappeared or refuses further to act. If the award has failed to make a full disposition of the issues submitted or is of such degree of uncertainty as to what is to be performed that it cannot be enforced, it can properly be said that there has as yet been no award or determination made by the arbitrator and the obligation to continue the arbitration still remains,\textsuperscript{91} assuming the time limits of the contract permitted vacation of an award on the ground "that the award is contrary to law and evidence." A provision of this kind was deliberately omitted from the Uniform Act, and the principles stated in the Cournoyer and Zelle cases will govern.

\textsuperscript{88} Cournoyer v. American Television & Radio Co., 83 N.W. 2d 409, 411-12 (Minn. 1957).

\textsuperscript{89} Thus, the former Minn. Stat. §572.05(4) (1953), permitted vacation if the arbitrators exceeded their powers "or executed them so imperfectly that a mutual, final, and definite award was not made."

\textsuperscript{90} See discussion \textit{supra}, p. 350.

\textsuperscript{91} See Mueller v. Chicago & N. W. Ry. Co., 194 Minn. 83, 259 N.W. 798 (1935), in which the employer justified the discharge of an employee on several grounds. The arbitrators considered only what to them was "the primary charge" and held the discharge unjustified. Suit was on the award. The award was held invalid. "Stated generally, the rule is that the award of arbitrators must be responsive to the submission; that is, it must decide all of the determinative issues submitted. If on its face it fails in that, the award is invalid. \textit{In other and more accurate words, there is no award.}" Mueller v. Chicago & N. W. Ry. Co., \textit{supra} at 90, 259 N.W. at 801. (Emphasis added.)
have not expired. Another ground for vacation of the award, not mentioned in the Uniform Act, and which is recognized by the courts irrespective of statute, is that the contract is illegal or contrary to public policy.

A motion to confirm the award should follow the usual form of motions under the Minnesota Rules of Civil Procedure. It should request "an order confirming the award rendered by A.B. and C.D. as arbitrators pursuant to agreement dated ____ 19____, between petitioner and respondent herein [and as directed by this court on ____ 19____] and directing that judgment be entered accordingly." It should be accompanied with copies of the contract of arbitration, the demand for arbitration and the award. Affidavits or other appropriate evidence should also show the due and proper appointment of the arbitrators, the notice of the arbitration hearing, the holding of the hearing and the fact that a copy of the award was delivered to the respondent. The order rendered on the motion should contain appropriate findings on these matters and, if the motion is granted, should specify the judgment that is to be entered.

A motion to vacate an award should specify the grounds upon which it is based and should be accompanied by affidavits or other proper documents showing in detail the facts on which these grounds are based. When the motion is based on fraud, misconduct, bias and the like, and the facts are in dispute, it will ordinarily be necessary to receive oral testimony at the hearing of the motion to permit a full presentation and determination of the issue. The order disposing of the motion should be accompanied by findings corresponding to those made on a court trial. An order denying the motion to vacate should also order that the award be confirmed and direct the judgment that is to be entered in accordance with it.

Actions to enforce the award or to set it aside are superseded by these motions and are no longer available.

It must not be assumed from this account that the Uniform Arbitration Act offers a general invitation to parties to arbitration agreements to resort to the procedures it provides. In the great majority of cases, parties have complied with their agreements to arbitrate and with the awards rendered and will continue to do so.

92. See §§8(b).
93. See §3.
94. The form set out on p. 345 may be adapted for this purpose.
95. Section 12(4) provides that "if the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award."
They will find in the act many helpful and clarifying provisions designed to facilitate the process. With this state being the first to adopt the act, the Minnesota courts will have an opportunity to set the pattern for the country by a fair and sympathetic interpretation of the statute's terms. When so administered, the effect of the act will be to discourage those who formerly saw in lengthy and expensive court trials both the opportunity to delay and discourage resort to the arbitration of disputes to which they had agreed and the means to frustrate the enforcement of awards. There will always be a small number of cases in which the parties are in bona fide disagreement as to the scope and meaning of the arbitration clause and as to the validity of an award. These issues can now be promptly raised and resolved by a simple motion procedure and with a minimum of expense. The net effect will be to strengthen the arbitration process.

II

The recent case of Textile Workers Union v. Lincoln Mills and its companion cases raise the question as to the extent state courts may still enforce arbitration clauses appearing in collective bargaining agreements when they affect interstate commerce. These cases present the possibility that the full benefits of the Minnesota Uniform Arbitration Act cannot be realized because federal courts rather than state courts will be utilized, notwithstanding the fact that a correspondingly effective procedure is not available.

With but few states affording any effective means for the enforcement of arbitration clauses and with the widespread inclusion of such clauses in collective bargaining agreements, parties to these agreements have turned increasingly to federal courts as a possible avenue of relief. More than a summary account of the ensuing development is beyond the purpose of this discussion. But a brief review of the enforcement of such clauses in federal courts and some consideration of the impact of the Lincoln Mills case seems necessary to an understanding of the present availability of the Uniform Arbitration Act.

Parties seeking enforcement of arbitration clauses in federal courts have relied upon two avenues of approach. One has been by way of the United States Arbitration Act, enacted in 1925 and patterned on the New York Arbitration Act. The other has been resort to section 301(a) of the Labor Management Relations Act,

96. 353 U.S. 448 (1957).
commonly referred to as the Taft-Hartley Act.\textsuperscript{99} Section 2 of the United States Arbitration Act provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity. . . .

In enacting this legislation, Congress was under the necessity of limiting its application to those areas in which Congress might legitimately act. This is the purpose of the provisions of section 2 that the arbitration clause must be part of a "maritime transaction" or of a "contract evidencing a transaction involving commerce." When the clause so qualifies, this section makes it "valid," "irrevocable" and "enforceable." Succeeding sections provide the procedure for enforcement of the arbitration clause by stay and motion procedure. They provide also in certain contingencies for court appointment of arbitrators, for the appearance of witnesses, for the confirmation or vacation of modification of the award and its reduction to judgment etc., following in rough measure the New York prototype.

The definitions of "maritime transactions" and "commerce" appear in section 1 of the act as follows:

'Maritime transactions,' as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; 'commerce,' as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, and or between any such Territory any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but 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.

The several provisions of the Arbitration Act must, of course, be considered against the background of the general principles which govern the jurisdiction of federal courts under the federal constitution and statutes, and the constitutional limits on the legislative powers of Congress. It is elementary that, under present statutes,
the principal source of federal court jurisdiction depends either upon
diversity of citizenship or upon the existence of a claim made or
question arising under a federal statute or the federal constitution.\textsuperscript{100}
If an action is brought in a state court on a claim based on a federal
right which might in the first instance have been brought in a federal
court, it may be removed to the federal district court,\textsuperscript{101} or, as it has done in the case of the Federal Employers Liability Act,\textsuperscript{102} Congress may deny the right of such removal and leave the enforcement
of the federal right to the state court in which the plaintiff has
chosen to bring the action. If the action is brought in or removed
to the federal court on the ground of diversity of citizenship, the
doctrine of \textit{Erie Ry. Co. v. Tompkins}\textsuperscript{103} controls, state substantive
law rather than federal governs, and the power of Congress to enact
substantive laws applicable to such cases is questionable.

Considerations of this character led to the incorporation of pro-
visions in the United States Arbitration Act referred to above and
not found in corresponding state laws. These must be complied with

\textsuperscript{100} \textit{60 Stat. 930} (1948), \textit{28 U.S.C. § 1332} (1952) provides:
(a) The district courts shall have original jurisdiction of all civil
actions where the matter in controversy exceeds the sum or value of
$3,000 exclusive of interest and costs, and is between:
(1) Citizens of different States;
(2) Citizens of a State, and foreign states or citizens or subjects
thereof;
(3) Citizens of different States and in which foreign states or
citizens or subjects thereof are additional parties.
(b) The word "States", as used in this section, includes the
Territories and the District of Columbia.
The district courts shall have original jurisdiction of all civil actions
wherein the matter in controversy exceeds the sum or value of $3,000,
exclusive of interest and costs, and arises under the Constitution, laws or
treaties of the United States.
There are other statutes conferring jurisdiction under prescribed condi-
tions which, for purposes of this discussion, need not be considered.
\textsuperscript{101} \textit{62 Stat. 937} (1948), \textit{28 U.S.C. §1441} (1952) provides:
(a) Except as otherwise expressly provided by Act of Congress,
any civil action brought in the State court of which the district courts of
the United States have original jurisdiction, may be removed by the
defendant or the defendants, to the district court of the United States
for the district and division embracing the place where such action is
pending.
(b) Any civil action of which the district courts have original
jurisdiction founded on a claim or right arising under the Constitution,
treaties or laws of the United States shall be removable without regard
to the citizenship or residence of the parties. Any other such action
shall be removable only if none of the parties in interest properly joined
and served as defendants is a citizen of the State in which such action is
brought.
\textit{U.S. 1}, 46 (1912); \textit{Miles v. Illinois Central R. Co.}, 315 \textit{U.S. 698} (1942).
\textsuperscript{103} \textit{304 U.S. 64} (1938).
before relief under this act can be obtained. Reading sections 1 and 2 together, the arbitration clause must appear in a "maritime transaction" or in "a contract evidencing a transaction involving" commerce among the several states. The latter alternative can be given a broad or narrow interpretation. Lower federal court decisions tend to favor the former and to identify it as equivalent to the constitutional grant of federal power over interstate commerce.

Even though the arbitration clause qualifies in this respect, it must not fall within the exception stated in section 1. It must not be a contract "of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Conflict has existed among the lower federal courts over the meaning of this restriction. Some do not consider a collective bargaining agreement in which the arbitration clause appears as a contract of "employment," since from it alone no specific hiring results. Others do, on the ground that the history of the act shows such legislative intent. Some cases give the phrase "any other class of workers engaged in foreign or interstate commerce" a narrow construction and confine it to the movement of goods in interstate commerce by analogy to seamen and railroad workers, the references to which the phrase immediately succeeds.

Further hurdles must be faced if relief is sought under section 4 of the Federal Arbitration Act in the way of an order directing that arbitration proceed. The court from which the order is sought must be one "which save for such agreement [to arbitrate], would have

105. Ibid.
107. "'Commerce' is given its traditional definition...." United Steelworkers v. Galland-Henning Mfg. Co., 241 F.2d 323, 326 (7th Cir. 1957). See Sturges and Murphy, Some Confusing Matters Relating To Arbitration Under The United States Arbitration Act, 17 Law & Contemp. Prob. 580, 585 (1952). Compare the following observation: "No maritime transaction is involved here. Nor does this contract evidence 'a transaction involving commerce' within the meaning of §2 of the Act. There is no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaged in activity that affected commerce, within the meaning of our decisions." Bernhardt v. Polygraphic Co., 350 U.S. 198, 200-01 (1956).
jurisdiction under the judicial code at law, in equity, or in admiralty of the subject matter of a suit arising out of the controversy between the parties. . . ." This again offers difficulties of construction. What it appears to say is that the Arbitration Act and the arbitration clause which it undertakes to validate and effectuate are not in themselves bases for federal court jurisdiction. There must be an independent basis for such jurisdiction covering "the subject matter of a suit arising out of the controversy between the parties."111 As already noted, the independent source of jurisdiction may be either diversity of citizenship of the parties or the presence of a claim which is dependent in some measure on federal law or the federal constitution.

Under the Erie doctrine, if jurisdiction is based on diversity of citizenship, the governing substantive law must be that of the state. Under this case and its successors, the line of demarcation between substance and procedure is essentially dependent on whether differences in a principle or rule on a given question will substantially affect the outcome of the litigation so that with conflicting views prevailing in the state and federal courts, different results will follow depending on whether the action is in the state or federal court. Hence, if the United States Arbitration Act is to apply in a diversity of citizenship case, its provisions must be considered as procedural within the meaning of this test. For a time, it was thought that they could be so considered. In Red Cross Line v. Atlantic Fruit Co.113 the question was raised whether the New York Arbitration Act could be resorted to in the New York courts to enforce an arbitration agreement.

111. If this means that a justiciable dispute must be present, capable of becoming the subject matter of an action in federal court, it would place a serious limitation on the availability of the act. It would prevent the enforcement, for example, of an agreement to arbitrate a dispute between equally divided stockholders over the policy to be pursued by the corporation, see O'Neal, Resolving Disputes in Closely Held Corporations: Intra-Institutional Arbitration, 67 Harv. L. Rev. 786 (1954), or of a reference to arbitration of a dispute as to future wages to be paid. See § 12 of the Uniform Arbitration Act, discussion in the text at p. 336.

Succeeding sections of the United States Arbitration Act do not make clear whether the term "court" is likewise so restricted in authorizing other applications to the court. No doubt, such construction was intended.

112. See Guaranty Trust Co. v. York, 326 U.S. 99 (1945), stating the intent of the Erie case was "to insure that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, the outcome of the litigation in the federal court should be substantially the same, as far as legal rules determine the outcome of a litigation, as it would be if tried in a State court. The nub of the policy that underlies Erie R. Co. v. Tompkins is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of a State court a block away should not lead to a substantially different result." Id. at 109. A state statute of limitations was held substantive in character.

113. 264 U.S. 109 (1924).
tion clause in a charter party as against the contention that this would constitute state intervention in the exclusive jurisdiction of the federal admiralty courts. The contention was not sustained and the New York courts were permitted to proceed. The position taken was that the federal admiralty courts recognized arbitration clauses as valid and enforceable although the remedies afforded were not always complete. The legislation conferring admiralty jurisdiction on the federal courts permitted states to extend "the right of a common law remedy" and arbitration was recognized, however limited in degree, at common law.

The state, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit. New York, therefore, had the power to confer upon its courts the authority to compel parties within its jurisdiction to specifically perform an agreement for arbitration, which is valid by the general maritime law, as well as by the law of the State, which is contained in a contract made in New York and which, by its terms, is to be performed there.

The Arbitration Law [of New York] deals merely with the remedy in the state courts in respect of obligations voluntarily and lawfully incurred. It does not attempt either to modify the substantive maritime law or to deal with the remedy in courts of admiralty.114

This reasoning would appear to warrant the conclusion that the Federal Arbitration Act was likewise merely a procedural act which would apply in accordance with section 4 where jurisdiction was grounded on diversity of citizenship.115 This question was presented in Bernhardt v. Polygraphic Co.116 and the opposite conclusion was reached. The action was one for breach of contract and had been removed to the federal district court. The contract contained an arbitration clause but there was no showing that a maritime transaction was involved or that the contract involved interstate commerce. Jurisdiction depended solely on diversity of citizenship. The defendant sought a stay pending arbitration on the ground that New York law was applicable. The federal district court denied the stay on the ground that Vermont law applied and Vermont did not enforce arbitration agreements. Section 3 of the United States Arbitration Act also authorizes a stay of an action brought in violation of an arbi-

114. Id. at 124.
115. See Sturges & Murphy, supra note 107.
The Supreme Court held, first, that this section was subject to the limitations of sections 1 and 2 discussed above. Otherwise, it felt, "a constitutional question might be presented. Erie R. Co. v. Tompkins indicated that Congress does not have the constitutional authority to make the law that is applicable to controversies in diversity of citizenship cases."

The court continued:

The question remains whether, apart from the Federal Act, a provision of a contract providing for arbitration is enforceable in a diversity case.

The Court of Appeals, in disagreeing with the District Court as to the effect of an arbitration agreement under Erie R. Co. v. Tompkins, followed its earlier decision of Murray Oil Products Co. v. Mitsui & Co., 146 F.2d 381, 338, which held that, 'Arbitration is merely a form of trial, to be adopted in the action itself, in place of the trial at common law: it is like a reference to a master, or an 'advisory trial' under Federal Rules of Civil Procedure...'

We disagree with that conclusion. We deal here with a right to recover that owes its existence to one of the States, not to the United States. The federal court enforces the state-created right by rules of procedure which it has acquired from the Federal Government and which, therefore, are not identical with those of the state courts. Yet, in spite of that difference in procedure, the federal court enforcing a state-created right in a diversity case is, as we said in Guaranty Trust Co. v. York, 326 U.S. 99, 108, in substance 'only another court of the State.' The federal court, therefore, may not 'substantially affect the enforcement of the right as given by the State.' Id., 109. If the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make a radical difference in ultimate result.

117. 61 Stat. 670 (1947), 9 U.S.C. § 3 (1952) provides:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.


119. Id. at 202-03.
The Red Cross Line case was not discussed although the characterization of statutes dealing with the enforcement of arbitration agreements differed widely in the two cases. But the cases can be reconciled. In Red Cross Line, both state and federal law sustained the validity of arbitration agreements, the difference between the two relating only to the details of procedure for enforcement. In Bernhardt, the difference was more fundamental. In practical effect, the state law denied the validity of such agreements and thus was in direct contradiction to the federal law. That this denial and the contradiction appeared in procedural terms should be immaterial in applying the doctrine of the Erie Ry. Co. case. Substantive rights can rise no higher than their ability to be enforced through appropriate procedural steps.

It is believed, therefore, that the two cases are not inconsistent with the position that if an action is properly brought or removed to a federal court on the basis of diversity of citizenship, the relevant state law provides for substantial enforcement of arbitration agreements and the requirements of sections 1 and 2 of the Federal Arbitration Act have been met, the procedural details of the latter act will be applied rather than those of the state.

Other than diversity of citizenship, the primary source of jurisdiction contemplated by section 4 would be a claim which invokes federal law or the Constitution. A charter party subject to federal maritime jurisdiction would be an example. If the charter party contained an arbitration clause, it could be enforced in federal court in the exercise of its maritime or admiralty jurisdiction and the provisions of the Federal Arbitration Act would apply. It has frequently been assumed in lower federal court decisions that the same result follows if the contract containing the arbitration clause involved interstate commerce within the meaning of section 1 of the act. Section 2 states that the clause “shall be valid, irrevocable and enforceable.” This certainly appears to create a federal right to its enforcement. Nevertheless, it does not follow that the federal courts thus have jurisdiction to carry out such enforcement. To so conclude from sections 1 and 2 alone would ignore the intended limitations appearing in section 4 that the only federal court to which application can be made is one which “would have jurisdiction under the judicial code at law, in equity, or in admiralty” save for such

121. San Carlo Opera Co. v. Conley, 72 F.Supp. 825 (S.D. N.Y. 1946), aff’d per curiam, 163 F. 2d 310 (1947); Krauss Bros. Lumber Co. v. Louis Brossert & Sons, 62 F.2d 1004 (2d Cir. 1933).
agreement. Hence, it would appear that some other source of jurisdiction than the Federal Arbitration Act must be found in federal law before it, or at least section 4, and probably the procedural facilities provided in subsequent sections, can be resorted to in cases not involving diversity of citizenship.

Because of the multiplicity of uncertainties attendant on the use of the Federal Arbitration Act, it has not often been resorted to. With the rapidly expanding use of arbitration as a means of settling labor disputes arising under collective bargaining agreements and in the desire to resort to some means of judicial enforcement as an alternative to economic conflict, lawyers have sought relief in the federal courts through another avenue of possible jurisdiction. They have relied upon section 301(a) of the Taft-Hartley Act usually without much regard to its possible supplementation by the United States Arbitration Act. Section 301(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

This section, which on its face is little more than a grant of jurisdiction, obviously required considerable construction of meaning beyond its literal terms if support was to be found in it for the enforcement of an arbitration clause in a collective bargaining agreement. It would be necessary to conclude that it intended not merely to confer jurisdiction on the federal courts, but also to provide a body of federal substantive law which gave effect and validity and enforcibility to an arbitration clause. In view of the generality of the terms of the section, any such intendment could hardly be confined to arbitration clauses but would be applicable to all aspects of the collective bargaining agreement. We are here, of course, only concerned with the former.

Prior to the Lincoln Mills case, lower federal court decisions on this question reached conflicting results. The various problems

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122. The absence of a similar provision in §3, providing for a stay of "any suit or proceeding...brought in any of the courts of the United States upon any issue referable to arbitration..." is consistent with the point made in the text, for such "suit or proceeding" could not be brought or survive absent a basis of jurisdiction independent of the clause.

123. See Amalgamated Ass'n v. Southern Bus Line, 189 F.2d 219 (5th Cir. 1951).


125. See Textile Workers Union v. American Thread Co., 113 F. Supp. 137 (D. Mass. 1953). This case, which has had wide influence, did
considered, how they were resolved and the confused state of the law is well illustrated by the decisions of the lower courts from which appeals had been taken in *Lincoln Mills* and its companion cases.

In the *Lincoln Mills* case itself, the district court had "decreed that the Employer submit the grievances to arbitration as provided in Article IX(F) of the agreement. Jurisdiction was found under §301 of the Labor Management Relations Act of 1947, 29 U.S.C.A. §185." The majority opinion of the court of appeals took a different view. It conceded that the act gave the federal courts jurisdiction to adjudicate causes of action between employers and labor organizations, but it could not find any congressional authority to enforce an arbitration clause by specific enforcement. It did not find such authority in the United States Arbitration Act because a collective bargaining agreement is a "contract of employment" within the meaning of the exception stated in section 1 of that act.327

Neither did it consider that section 301(a) conferred any such right. Since applicable state law of Alabama likewise did not enforce such agreements, the district court order was reversed. The majority opinion stated:

We have, in the case before us, a complaint by the Union that the Employer has breached a provision of a collective bargaining agreement. Out of such complaint arose a case and controversy of which the Federal courts have jurisdiction under the Constitution as implemented by Section 301. And see 28 U.S.C.A. §1337. But it does not follow that because jurisdiction is given to Federal courts, there is a new federal law concept that authorizes the courts to enforce submission to arbitration. Before such a result is reached, we must find a rule of law derived from state or Federal sources. We do not think it matters whether a right to enforce submission to arbitration is or is not substantive, as was considered in Bernhardt v. Polygraphic Company of America, 2 Cir., 1954, 218 F.2d 948; or whether as said by Mr. Justice Brandeis, there is 'the substantive right created by agreement to submit disputes to arbitration,' which he said 'is recognized as a perfect obligation.'

not meet the question squarely. The action was one for specific performance. Under Massachusetts law, the arbitration clause was valid. The court deemed it unnecessary, therefore, to determine which law governed the rights of the parties, since "it seems to this Court that the Congress which enacted §301 would have preferred that remedies should be determined without reference to state law and should include specific enforcement of arbitration clauses in labor contracts." Id. at 141. To treat specific performance as a matter of remedy to be governed by the law of the forum was considered to be a "more mechanical way" of reaching the same conclusion.

127. See discussion supra, p. 361.
Finding nothing of Federal origin or in the laws of Alabama, of either common law or statutory enactment, or from any other source, that requires or permits, or from which we might, in the language of Mr. Justice Douglas, fashion a rule requiring or permitting, the enforcement of the covenant for arbitration of grievances, and concluding that Section 301 does not of itself provide or furnish the source for such a rule, we hold that there is no legal right to the relief sought.

The second case originated in the federal district court of Massachusetts. A union sought to obtain specific enforcement of an arbitration clause as equitable relief under section 301 (a). The district court granted the defendant's motion to strike the claim for want of jurisdiction on the ground that the Norris-LaGuardia Act forbidding injunctions in labor disputes applied. With this the court of appeals disagreed, and since the Norris-LaGuardia Act did not apply, it was deemed necessary to consider whether there was a legal basis upon which relief could be granted. On this question, the court accepted the views of the American Thread Co. case that whether specific performance was an available remedy should be governed by the law of the forum and, hence, by federal law. It felt that the Bernhardt case was inapplicable since that case was concerned with the law applicable in diversity of citizenship cases under the Erie Ry. Co. doctrine where the objective was identity of result in the application of state law. Here, jurisdiction was under section 301 (a) to which that objective was irrelevant. But the court felt that in view of traditional judicial hostility to arbitration clauses, "a pretty explicit statutory basis" for specific enforcement should be found and this it could not discover in section 301 (a):

128. The reference is to the dissent of Mr. Justice Douglas in Ass'n of Westinghouse v. Westinghouse Elec. Corp., 348 U.S. 437, 465 (1955), in which he stated: "I agree ..., that Congress in the Taft-Hartley Act created federal sanctions for collective bargaining agreements, made the cases and controversies concerning them justiciable questions for the federal courts, and permitted those courts to fashion from the federal statute, from state law, or from other germane sources, federal rules for the construction and interpretation of those collective bargaining agreements."

The case held that the right to recover certain wages in dispute was personal to the employee and gave no right of action to the union. But no one opinion commanded the assent of a majority of the court. For a discussion of the case, see Mendelsohn, Enforceability of Arbitration Agreements Under Taft-Hartley Section 301, 66 Yale L.J. 167 (1956).


134. See text, supra p. 363.
Practical grounds support this conclusion. A glance at a typical arbitration statute shows that it lays down procedural specifications for use of the new power to compel arbitration. Topics covered may include requisites of a submission, selection of an arbitrator, procedure and subpoena power for the arbitration, stay and specific enforcement authority in a court, grounds and procedure for confirming or vacating an award. A court decision could overrule the common law bar to specific enforcement, but could not substitute for them the comprehensive and consistent scheme that legislative action could afford, and which is necessary for effective yet safeguarded arbitration.186

But the court did find in the United States Arbitration Act, the needed authority to enforce the arbitration clause. The collective bargaining agreement before it was a contract “involving commerce” and was deemed not to be a “contract of employment” within the meaning of the exception stated in section 1.136 Since section 301(a) conferred jurisdiction on the court, jurisdiction did not depend on the arbitration clause and hence the limitation of section 4 of the Arbitration Act was met.

These same principles were applied by the same court of appeals in the third case which came before the United States Supreme Court.137

With these three cases before the Supreme Court, the majority opinion was written in the *Lincoln Mills* case, with Mr. Justice Douglas speaking for the majority of five justices.138 Section 301 (a) was considered not only to be a grant of jurisdiction to the federal courts but also to call for the application of federal substantive law. After reviewing the history of the section, the Court observed:

Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this

136. See discussion *supra*, p. 361.
137. Goodall-Sanford, Inc. v. United Textile Workers, 233 F.2d 104 (1st Cir. 1956). Although the procedure in district court was by way of summary judgment, substantial compliance with the requirements of the Arbitration Act was found. There was no disputed fact question and the primary question was the arbitrability of the dispute involved under the terms of the arbitration agreement. The opinion of the district court appears in United Textile Workers v. Goodall-Sanford, Inc., 131 F.Supp. 767 (S. D. Me. 1955).
138. Mr. Justice Burton, with whom Mr. Justice Harlan joined, concurred in result but did “not subscribe to the conclusion of the Court that the substantive law to be applied in a suit under §301 is federal law.... [S]ome federal rights may necessarily be involved in a §301 case, and hence the constitutionality of §301 can be upheld as a congressional grant to Federal District Courts of what has been called ‘protective jurisdiction.’” Textile Workers Union v. Lincoln Mills, 353 U. S. 448, 460 (1957).
Mr. Justice Black did not participate.
light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.

It seems... clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule... against enforcement of executory agreements to arbitrate. We would undercut the Act and defeat its policy if we read § 301 narrowly as only conferring jurisdiction over labor organizations.

The question then is, what is the substantive law to be applied in suits under § 301(a)? We conclude that the substantive law to apply in suits under § 301(a) is federal law which the courts must fashion from the policy of our national labor laws.... The Labor Management Relations Act expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations. Other problems will lie in the penumbra of express mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problems.... Federal interpretation of the federal law will govern, not state law.... But state law, if compatible with the purpose of § 301, may be resorted to in order to find the rule that will best effectuate the federal policy.... Any state law applied, however, will be absorbed as federal law and will not be an independent source of private rights.\textsuperscript{139}

Accordingly, the judgment of the court of appeals was reversed. In affirming the Local 205 case, the Court noted that the court of appeals had held that section 301(a) did not supply or create the necessary substantive law and that the United States Arbitration Act applied, but observed: "We follow in part a different path than the Court of Appeals, though we reach the same result."\textsuperscript{140}

The vigorous dissent of Mr. Justice Frankfurter indicates the strong objections that may be made to the position of the Court. He believed that the section's history demonstrated it to be a purely procedural statute; that to hold it created an as yet unknown substantive federal law presented grave and complex problems of conflict between state law and courts and federal law and courts; that judicial enforcement of arbitration clauses in collective bargaining agreements would defeat rather than further collective bar-

\textsuperscript{139} Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455-57 (1957). The court also held that the Norris-La Guardia Act did not apply.

\textsuperscript{140} General Elec. Co. v. Local 205, 353 U. S. 547, 548 (1957). The Goodall-Sanford case was affirmed simply by reference to the Lincoln Mills case.
gaining and the arbitration process; that Congress, in excepting "contracts of employment" from the Federal Arbitration Act manifested a policy of non-enforcement of such clauses which should not be taken "by implication" to have been repealed by section 301(a); that, since section 301(a) does not create federal substantive law, state law must govern and there are grave constitutional objections to federal jurisdiction to enforce state law in other than diversity of citizenship cases; and finally, that if any substantive rights are to be drawn from section 301(a), they can consist of no more than the right of a union to enter into a binding collective bargaining contract with an employer and to sue thereon and, since this right is not the basis of the present suits, it cannot be relied upon as a basis of jurisdiction.

These objections failed to persuade the majority of the court. The decision to recognize sanctions for the enforcement of arbitration clauses in collective bargaining agreements, and to base this on the thin reed of section 301(a) represents a response to the pressures which have prevailed upon federal courts from both labor and management to provide some relief in the face of the failure of the states to do so. It represents a repudiation of the notion sometimes vigorously asserted that arbitration agreements between union and employer must remain beyond the pale of judicial enforcement and the parties left to the destructive forces of economic warfare. The *Lincoln Mills* case is a landmark in the development of the law governing labor arbitration and of the federal courts' participation in it.

But it is no more than a landmark. The extent of its holding is that under section 301(a) arbitration clauses in collective bargaining agreements may be enforced by the parties in federal courts under principles of federal substantive law yet to be interpreted and developed. This leaves unresolved not only the content of the substantive law which will control, but also the procedure that may be employed for the enforcement of arbitration clauses and the role of state law and state courts. This void must be filled either by the long and painful process of litigation in federal courts or by legislation.

The decision itself recognizes the problem of developing the federal substantive law which it determines must be applied and suggests some of the sources to which one must look.

With respect to the procedure to be followed in seeking enforcement of an arbitration clause falling within section 301(a), the decision remains silent. No mention is made of the possible applica-
tion of the United States Arbitration Act, notwithstanding the court of appeals in one of the cases before the Court expressly based its decision on this act. The court of appeals is simply affirmed "by a different path." Studiously ignored also is Mr. Justice Frankfurter's observation that "I find rejection, thought not explicit, of the availability of the Federal Arbitration Act to enforce arbitration clauses in collective bargaining agreements in the silent treatment given that Act by the Court's opinion." In the cases before the Court, the procedure of the Arbitration Act had in fact not been resorted to and instead an action for specific performance had been brought. It may be that the Court desired only to defer determination of this question until it was squarely before it.

If the United States Arbitration Act is not to be available, the parties to the arbitration agreement face the prospect of the delay and expense of long drawn out litigation in federal courts similar to that which prevailed in this state prior to the adoption of the Uniform Act. Suits will be required for specific performance. If actions are brought on the contract on issues covered by the arbitration clause, the only remedy will be by way of affirmative defense. Awards can be reduced to enforceable judgment only by way of action on the award. Awards claimed to be the product of fraud, prejudice or misconduct may be attacked by actions to set aside with accompanying injunctions against their enforcement. All this will indeed provide a fruitful means of tying up arbitration in the federal courts for months on end. But thus far this has been the only procedural method of settling disputes that courts have succeeded in devising without the aid of legislation.

In view of these prospects, it might well be held, in the exercise of "judicial inventiveness," that Congress in enacting the United States Arbitration Act expressed its policy that arbitration agreements and awards should be enforced by the summary procedures there prescribed. Section 301(a) was enacted with that policy in force. Hence, those procedures may be adopted by analogy in 301(a) cases and adapted by the courts to the needs of section 301(a). At least one lower court had proceeded in this manner prior to the Lincoln Mills case.\footnote{142}{Textile Workers Union v. American Thread Co., 113 F.Supp. 137, 142 (D. Mass. 1953), stating: Defendant's final point is that this case cannot be sent to arbitration because no arbitration has been named under the 1951 memoranda [entered into between the parties]. But this defect can be and should be cured by this Court adopting as a guiding analogy the practice under §5 of the Federal Arbitration Act, 9 U.S.C. §5. If the parties are unable...}
The *Lincoln Mills* case leaves unsettled also the jurisdiction of state courts to enforce arbitration agreements which fall within the scope of section 301 (a). Neither the case nor the section says that the jurisdiction of the federal courts shall be exclusive. That federal substantive law must govern does not require that only the federal courts enforce it. Cases denying state power over matters committed exclusively to the jurisdiction of the National Labor Relations Board\(^ {143} \) are inapplicable for neither section 301 (a) nor *Lincoln Mills* makes it apparent that federal courts alone are to enforce the act. This is the view taken in a recent California case in which the court stated:

Section 301 does not expressly exclude state courts. On the contrary, it merely declares that an action for breach of a collective bargaining agreement may be brought in a federal court. Surely, if Congress had intended to exclude state courts it would have used more forthright language. Nor does enforcement of collective bargaining agreements in state courts conflict with any federal policy embodied in section 301 or any other part of the federal statute. [Union officials] contend that the rationale of Garner v. Teamsters Union, and Weber v. Anheuser-Busch, Inc., which excludes state court jurisdiction over unfair labor practices in order that the National Labor Relations Board may be free to develop a consistent federal policy, applies equally to exclude state court jurisdiction over actions that could be brought under section 301. Section 301, however, does not confine jurisdiction to one expert tribunal for the development of federal policy, but on the contrary gives jurisdiction to all the federal district courts. The possibility of conflict between state and federal courts is no greater than the possibility of conflict among the federal courts themselves, with uniformity ultimately dependent in either case on review by the United States Supreme Court. Moreover, federal courts are no more expert than state courts in the interpretation of contracts. . . .

State courts therefore have concurrent jurisdiction with federal courts over actions that can be brought in the federal courts under section 301. It is obvious that in exercising this jurisdiction state courts are no longer free to apply state law, but must

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within ten days to agree upon an arbitrator, this Court will appoint one. Plaintiff is directed to prepare a suitable decree adopting, whenever practical, the forms and procedures which would be used if this case fell within the scope of the Federal Arbitration Act.

The Court in *Lincoln Mills* referred to this case as "perhaps the leading decision" for the view that federal law governs. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 451 (1957).


apply the federal law of collective bargaining agreements, otherwise the scope of the litigants' rights will depend on the accident of the forum in which the action is brought. What the substantive federal law of collective bargaining agreements is we cannot now know. Until it is elaborated by the federal courts we assume it does not differ significantly from our own law.\textsuperscript{144}

Assuming that a state action may be brought to enforce an arbitration agreement controlled by federal substantive law under section 301(a), matters of procedure will undoubtedly be controlled by state law, the law of the forum. This introduces new problems of what is procedure and what is substance. The distinction drawn in applying the doctrine of \textit{Erie Ry. Co. v. Tompkins} in diversity of citizenship cases will not be controlling for the problem is a different one. Here the question is how far may the state prescribe rules and principles, under the label of procedure, which must be followed in the enforcement of the federal right to performance of the arbitration clause. The essential test which suggests itself is the protection of the federal right against procedural limitations, the effect of which would be to encumber, defeat or limit the right itself.\textsuperscript{145} As a minimum, that right would seem to encompass specific performance of the arbitration agreement, the federally developed principles for determining arbitrability including the limits on judicial interference with the arbitrator's powers, the maintenance of minimum legal safeguards necessary to assure an adequate arbitration hearing, the recognition of federally defined grounds for vacating or modifying awards, and, finally, the enforcement of the award itself. Collateral questions of substantive law traditionally left to the states such as the general law of contracts, on which, of course, the collective bargaining agreement is premised and general defenses such as fraud, mistake, and rescission will probably be left to state law as not within the concern of the Taft-Hartley Act. A state procedure which proceeded consistent with or which was designed to further the federal right as thus defined would control. This would include procedures for the enforcement of the arbitration agreement and the award such as the summary motion procedure provided by the Uniform Arbitration Act, the issuance of subpoenas and the taking of depositions, court appointment of arbitrators, the form of the notice of the arbitration hearing, continuances of these hearings, the form of the award, etc.

For states not now providing an adequate procedure for the enforcement of arbitration clauses, the \textit{Lincoln Mills} case raises the

\textsuperscript{145} See Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109, 124 (1924).
difficult problem of the degree to which the federal government can insist on state enforcement of a federal right. This problem will not be present in Minnesota and other states having the Uniform Arbitration Act or a corresponding statute. The Uniform Act provides a simple, expeditious and effective means of enforcing arbitration agreements. It gives full recognition to the federal right in all its aspects.

There remains the question of removal to the federal court of proceedings brought in a state court to enforce an arbitration agreement. If the action is based on section 301(a), it would seem clear that it is based on a federal law and that the case is removable. But the complaint may be grounded on the Minnesota Uniform Arbitration Act. This would raise the question whether section 301(a) has pre-empted the field or whether a state may still legislate on the subject consistent with the federal law. Neither section 301(a) nor the *Lincoln Mills* case gives the answer. All the case decides is that in a federal action, which section 301(a) permits, federal substantive law controls. The question was not before the Court, and it did not decide, that similar state legislation is forbidden. If not forbidden, and the complaint is based on state law, of course it cannot be removed to the federal district court.

Notwithstanding the problems the *Lincoln Mills* decision raises, it was a desirable and laudable decision, for it gives judicial recognition via statutory interpretation to the urgent need for some effective means of enforcing arbitration agreements, particularly those in the labor-management field. For the first time, arbitration clauses appearing in collective bargaining agreements and affecting interstate commerce may be enforced on a nationwide scale. This stands in strong contrast to the obstinate adherence of most courts to the outmoded and discredited concept of revocability and unenforceability of arbitration clauses in the face of their familiar, normal, and necessary use in modern commercial and industrial life. The variety of unsolved problems which the decision presents, some of which

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147. "Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties..." 62 Stat. 938 (1947), 28 U.S.C. §1441(b) (1952).

have been noted in this discussion, merely demonstrates the unsatisfactory state of the law and the need for some positive action. Left to themselves, the federal courts, in the course of time and with much expense, friction and delay sustained by the interests involved, can work out some solutions, procedures and principles implementing the *Lincoln Mills* decision. The legislative approach, however, is much the preferable one. Only some relatively simple legislation is needed.

It is suggested that this legislation proceed along the following lines. The United States Arbitration Act should be revised following the model of the Uniform Arbitration Act with such changes and additions as may be needed to adapt it to the federal forum. It should provide explicitly that proceedings for the enforcement of arbitration agreements coming under section 301(a) should be governed by the Federal Arbitration Act in all actions brought in federal court. This accomplished, removal of state actions based on section 301(a) might well be denied when the action is in a state which has adopted the Uniform Act or legislation substantially similar to it. The Employer's Liability Act, in some measure, furnishes an analogy.\(^{149}\) The end result would be a uniform substantive and procedural law governing in both state and federal courts, with state courts sharing a large measure of the burden of the routine administration of the law. If the *Lincoln Mills* decision leads to this accomplishment, it will, indeed, be a milestone in the history of the law of arbitration.