University of Miami Law Review

Volume 7 | Number 2 Article 6

2-1-1953

The Role of Modern Arbitration in the Progressive Development of Florida Law

David S. Stern

Henry T. Troetschel Jr.

THE ROLE OF MODERN ARBITRATION IN THE PROGRESSIVE DEVELOPMENT OF FLORIDA LAW

DAVID S. STERN*
and
HENRY T. TROETSCHEL, JR.**

Florida's present Arbitration Act was first passed in 1828.[1] A typical statute of the nineteenth century variety, it contains the strengths and weaknesses that those enactments shared.

Usually these statutes attempted to give strength to a weak, neglected creature of the common law — arbitration. Common law arbitration was a perilous procedure indeed. Either party to the submission agreement could by notice or action withdraw at any time,[2] leaving the other party with a mere action for damages. Such actions were distinguished by their failure to gain adequate relief for what the party had lost.[3]

Attacked by courts which feared a loss of jurisdiction, unused by lawyers who mistakenly perceived it to be identical with lost fees, arbitration needed statutory medicine.[4]

Nineteenth century statutes usually provided that once a dispute had arisen the parties could submit this dispute to arbitration, and that such submission agreement would be irrevocable.[5] With one exception courts

*B.S., 1939, LL.B., 1947, Harvard University; LL.M., 1949, New York University; Associate Professor of Law, University of Miami; Member New York and Florida Bars.
**A.B.; 1946, LL.B., 1952, University of Miami; Graduate Fellow, Yale University School of Law; Member Florida Bar.

Editor's Note: This paper suggetss a need for a modern arbitration statute for Florida and describes how the statute proposed for passage by the Florida legislature would fill that need. Full discussion of any particular phase of arbitration is far beyond its scope.

The authors wish to acknowledge their debt to Richard B. Thomas, student in the University of Miami Law School, for his valuable assistance in the preparation of this article.

1. FLA. STAT. §§ 57.01-57.07 (1951).
2. Vynier's Case, 8 Coke 81b, 77 Eng. Reprint 597, 3 Eng. Rul. Case 371 (1809); People v. Nash, 111 N.Y. 310, 18 N.E. 630 (1888).
3. Wynne v. Greenleaf-Johnson Lumber Co., 179 N.C. 320, 102 S.E. 403 (1920).
4. For discussion see Park Const. Co. v. Independent School Dist. No. 32, Carver County, 209 Minn. 182, 296 N.W. 475 (1941). "Arbitration can serve as a flexible and expeditious process, . . . 'free from the myriad technicalities which beset and protract legislation' . . . for deciding controverted claims. BUT, the arbitral process is liable to judicial review at many different points, from the agreement right through the hearing and award. If a party becomes recalcitrant as to the performance of his agreement to arbitrate, or if he feels aggrieved by the arbitrator or the opposing party during the course of the arbitral proceedings, or with respect to the award rendered, his cause is likely to find its way to lawyers and to the courts. Courts and legislatures are currently dealing with many of these matters and are making the law which governs the process. As a consequence, parties, lawyers and arbitrators are well advised to take account of these legal controls in planning for, and in undertaking the use and practice of, arbitration." WESLEY A. STURGES, CASES ON ARBITRATION, to be published shortly by M. Bender & Co.
5. FLA. STAT. § 57.01 (1951); Ogden v. Baile, 73 Fla. 1103, 75 So. 794 (1917).

have interpreted these statutes to give parties a second method of arbitration, the common law method existing side by side with that of the statute.[6]

Saved from a lingering demise by this statutory help, arbitration found convalescence a wearing time. Courts and attorneys had not lost their common law antipathy, and judges frequently found omission or mistake in the parties' use of the statutory method.[7] Such omission, etc., meant that at best the arbitration in issue would be a mere common law one with revocability and the necessity of suit to obtain judgment on the award.[8]

Occasionally at common law future dispute clauses were permitted.[9] Parties who in their original contract had agreed to submit to arbitration controversies arising under the contract could do so. Such future dispute clauses were not permitted under the nineteenth century variety statutes.[10]

These clauses did not have an easy time at common law, however, and some of the noblest legal literature defending the rights of people to courts was devoted to attacking such clauses.[11]

Obviously, however, arbitration was doomed to perpetual mediocrity unless this phase of its potential, the handling of future disputes, was permitted to develop. In 1920 the legislature of the State of New York, influenced by the commercial and business interests of the state, passed the first of the modern acts.[12] Since then our once weak patient has gained bountiful health within that state. Legislative validation of future disputes clauses has brought modern arbitration to fruition. Today such clauses are commonplace in commercial contracts, both national and international.

The forthcoming establishment of an Inter-American trade center at Miami has pointed up the need of a modern act for Florida. International traders use future disputes clauses constantly; yet the present Florida statute does not provide for them. International traders might find the advantages of a Florida trade center not too inviting if forced to use the legal machinery of other jurisdictions to dispose of or settle disputes arising out of their contracts.

The draft of the Arbitration Act for Florida herein discussed embodies the best features of the modern acts.[13] Parties may, by a written submission agreement or by a future disputes clause, agree to arbitrate present or future disputes. The dispute need not be of a justiciable character for a valid

---

6. The Washington statute was held to abolish common law arbitration, State *ex rel* Fancher v. Everett, 144 Wash. 592, 258 Pac. 486 (1927).

7. *E.g.*, Franks v. Battles, 147 Ark. 169, 227 S.W. 32 (1921).

8. But see discussion in Park Const. Co. v. Independent School Dist., *supra* note 4.

9. Red Cross Line v. Atlantic Fruit Co., 264 U.S. 109 (1924); Williams v. Branning Mfg. Co., 153 N.C. 7, 68 S.E. 902 (1910).

10. Myers v. Jenkins, 63 Ohio St. 101, 57 N.E. 1089 (1900); Baltimore & Ohio R.R. v. Standard, 56 Ohio St. 224, 46 N.E. 577 (1897).

11. Baltimore & Ohio R.R. v. Standard, 56 Ohio St. 224, 46 N.E. 577 (1897).

12. N.Y. Civ. Prac. Act § 84. This act has now been passed in 13 other states.

13. The New York Act was the first of the modern acts and has served as a model for latter ones. Citations will be made to that act as occasion demands.

arbitration.[14] Labor agreements are specifically included within the terms of the Act. Power is reserved to the parties to specifically provide that their arbitration agreement be not subject to the statute, thereby preserving their right to common law arbitration. The making of a provision or submission for arbitration is deemed a consent to the jurisdiction of the circuit courts to enforce the agreement or to enter judgment on an award thereon.[15]

If a dispute arises, arbitration may be initiated by the party demanding arbitration under the statute by serving (personally or by registered mail) a written notice on the other party. Such notice must state that unless within ten days after service the party served shall serve a notice of motion to stay the arbitration, he shall be thereafter barred from putting in issue the existence or validity of the agreement or the failure to comply therewith.[16] The court may, upon the parties' application, do what is necessary to preserve property or to secure satisfaction of the award.

Normally, of course, the parties would proceed without court intervention to arbitration. If one party is recalcitrant, however, the other may seek court aid by applying for an order to proceed to arbitration. Ten days notice of such application shall be served upon the recalcitrant party. A hearing on the motion is held; if the court is then satisfied that there is no substantial issue regarding the existence or validity of the agreement to arbitrate, the court will make an order directing the parties to proceed.[17]

If, however, a substantial issue is raised as to the existence or validity of the agreement, the court shall proceed to trial on the issue. Either party has the right to demand jury trial of this issue but such demand must be made before the return day of the motion to proceed or in the application for a motion to stay arbitration.[18] Note that the recalcitrant party has two opportunities to raise questions concerning the existence or validity of the agreement: he may raise the question by a motion to stay arbitration or by contesting a motion to compel arbitration. He has the right of jury trial on these issues. His failure to exercise the rights at an appropriate time, of course, bars him from raising these questions later in the proceedings.

Assuming that the order to proceed has issued, we move to the next step, the arbitral proceedings. The arbitrators have been appointed perhaps by the court, (1) if the agreement did not provide a method of appointment, or (2) if the parties had not appointed them within the time prescribed, or (3) if an arbitrator had failed or was unable to act, or (4) if the parties chose two who were to choose a third and the two were unable to agree on the third. These court appointments must be made on motion, of course,

14. *Compare* N.Y. Civ. Prac. Act § 1448; Matter of Fletcher, 237 N.Y. 440, 143 N.E. 248 (1924).
15. Lehigh Structural Steel Co. v. Rust Engineering Co., 59 F.2d 1038, *cert. denied* 287 U.S. 622 (1932).
16. See N.Y. Civ. Prac. Act § 1458(2).
17. *Id.* § 1450.
18. *Id.* § 1458(2).

with proper notice being given to the other parties. If the agreement is silent as to the number of arbitrators, the court appoints three. Court appointed arbitrators have the same power as those appointed under the agreement.[19]

Among the powers of arbitrators are the following: (1) to appoint a time and place for hearing and notify the parties; (2) to adjourn the hearing from time to time; (3) to postpone the hearing but not beyond the date fixed for making the award; (4) to proceed *ex parte* if any party neglects to appear after being given reasonable notice of the time and place of the hearing; (5) to require any person to attend as a witness and to bring with him any book, record, document or other evidence. Subpoenae, when issued, are signed by the arbitrators or a majority of them, and are directed to the person and served in the same manner as subpoenae to testify before a court of record. Upon petition of the majority of the arbitrators, the court may by its contempt power compel attendance of those persons who fail to obey the subpoenae.[20]

If, after the commencement of the first meeting and before final award, an arbitrator for any reason fails to act as such, a majority of the remaining arbitrators, if there be more than one, may determine any question and render a final award. The parties may, of course, under the terms of the agreement or by petition to the court, have replacements appointed.

During the course of the hearing, the arbitrators may subpoena witnesses and admit depositions taken upon proper legal grounds. The conduct of the hearing is governed by allowing a party to apply for an order to vacate the award specifying the particular breach of proper conduct in his motion, from the grounds listed in the statute.[21] The award must be in writing and signed by a majority of the arbitrators, and immediately upon its rendition, a true copy of the award must be transmitted to each of the parties or their attorneys.[22]

In many cases, the time within which the award shall be made is fixed in the arbitration agreement. If the time has not been fixed, it must be made within a reasonable time after the close of the proceedings. The court in its order directing the arbitrators to proceed promptly may set the time deemed to be reasonable. Awards rendered after the reasonable time have no legal effect, unless, of course, the parties in writing agree to extend the time or to ratify the award.[23]

Though the validity of an award is not affected by the fact that no motion is made to confirm it, such a motion may be made by any party within one year after the award is made. Five days written notice must be

19. Compare *id.* §§ 1452, 1453.
20. See *id.* § 1456.
21. *Infra* note 24.
22. N.Y. Civ. Prac. Act § 1460.
23. *Id.* § 1461.

served on the adverse party or his attorney. The court must grant this motion unless the award is vacated, modified or corrected.

A party wishing to have the award vacated, modified or corrected, may make such a motion and serve notice within three months after a copy of the award has been received by the party or his attorney.[24]

The grounds for vacating the award are as follows: (a) Where the award was procured by corruption, fraud or other undue means; (b) where there was evident partiality or corruption in the arbitrators or any of them; (c) where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior, by which the rights of any party have been prejudiced; (d) where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made; (e) if there was no valid submission or arbitration agreement and the proceeding was instituted without either serving a notice of intention to arbitrate, as provided in Section 7, or without serving a motion to compel arbitration, as provided in Section 4, paragraph 2.[25]

The grounds for modification or correction are as follows: (a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award; (b) where the arbitrators have awarded upon a matter not submitted to them not affecting the merits of the decision upon the issues submitted; (c) where the award is imperfect in a matter of form, not affecting the merits of the controversy.[26]

If the court vacates the award it may, in its discretion, direct a rehearing before the same arbitrators or new ones, the original agreement governing selection and time of award.

Upon the granting of an order, confirming, modifying, correcting or vacating an award, judgment or decree must be entered in conformity therewith. The judgment may be docketed and has the same effect as a judgment or decree in action or special proceeding. It may be enforced as if it had been rendered in an action in a court in which it has been entered.[27]

Appeals may be taken from any final order or from a judgment entered upon an award or from an order or judgment in any action or special proceeding.[28]

Note that though the Act provides for speedy, efficient enforcement of both arbitration agreements and awards, the rights of all parties are fully preserved. Notice and hearing and trial by jury are carefully spelled out.

---

24. *Id.* § 1463.
25. *Id.* § 1462.
26. *Id.* § 1463.
27. *Id.* § 1464.
28. *Id.* § 1467.

Modern arbitration statutes have been declared constitutional wherever enacted.[29]

The passage of a modern arbitration statute such as the one described herein would greatly aid in the overall industrial growth of Florida through a more efficient functioning of the proposed Inter-American center and through the rapid settlement of labor disputes and other important highly technical matters more adequately handled in this fashion. It is hoped that all Florida, the general public, and the bench and bar will soon participate in the benefits accompanying such statutes.

29. Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1931) (federal statute); Finsilver, Still & Mess v. Goldberg M. & Co., 253 N.Y. 382, 171 N.E. 579 (1930) (New York statute).