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THE MARITIME LAW ASSOCIATION
OF THE UNITED STATES

REPORT OF COMMITTEE ON ARBITRATION

The report of the Committee on Arbitration submitted at the Annual Meeting recommends certain changes in the United States Arbitration Act. At the Annual Meeting on May 14, 1954, the membership authorized the Executive Committee, after circulating the report of the Committee on Arbitration and giving opportunity for comment, to take appropriate action, including steps looking toward enactment of appropriate legislation.

The Executive Committee will hold its next meeting on June 15, 1954. Prior to that date, all comments should be in the hands of Mr. Clement C. Rinehart, Chairman of the Committee on Arbitration, 120 Broadway, New York 5, N. Y.

The report of the Committee on Arbitration is as follows:

In accordance with Article 6 of the Association's by-laws, the Committee on Arbitration submits the following report of its activities since its last report to the Association in May, 1953.

Following up the program outlined in its last report, the Committee has prepared and attaches to this report a proposed bill to amend Title 9 of the United States Code so as to correct various deficiencies and omissions in the present federal law regulating arbitration.

1. The most important of the proposed amendments are those which would amend Section 9 of the present law so as to provide for judicial review of questions of law arising in the course of arbitration proceedings.

Lack of provision for judicial review of questions of law arising in arbitration proceedings has been, in the Committee's opinion, a major defect in the present statute. An increasing number of standard forms of charter party and other contracts, both maritime and

non-maritime, contain arbitration clauses which specify that the arbitrators shall be commercial men.

While commercial men may be well qualified to deal with disputes of fact involving subject matter with which they are familiar, it is no reflection on their ability as business men to say that commercial arbitrators usually do not have either sufficient training in legal reasoning or sufficient familiarity with the guiding principles and precedents to determine questions of law satisfactorily. That lack of capacity to deal properly with questions of law has had unhappy consequences because the disputes which come before arbitrators often turn *entirely* on questions of law and *usually* turn on questions of law in addition to questions of fact.

Illustration of the incongruous results flowing from lay decisions of questions of law will probably occur to all of us who have had occasions to represent clients in arbitration proceedings. Some important instances occurred during the recent hostilities in Korea. Charter rates rose sharply and numerous disputes arose as to whether pre-existing long-term charters made at lower rates could be terminated under the war clauses or other terms of the charters. Some of those disputes went to arbitration with various irreconcilable awards resulting. No means was available to review the questions of law in those cases which involved large sums.

Modification of the statute to provide for such a review was originally proposed by a committee of this Association in 1927, soon after the United States Arbitration Act became effective. That committee's proposal was based on the statutory provisions then in force in Great Britain. Those provisions have recently been recodified and reenacted in the British Arbitration Act, 1950, which has also been used by your present Committee as the basis of the proposed amendments appearing on that subject in the attached bill.

In order to meet the objection which may be raised that judicial review would lead to burdensome, time-consuming and ill-founded applications to the district courts, the attached bill provides that the court may award costs and disbursements to the prevailing party, "in such amount as the court may consider reasonable under all the circumstances." The New York statute has an analogous provision. This provision, if fairly administered, should constitute a real deterrent to frivolous or dilatory applications.

2. Another proposed amendment in the attached bill would clarify and enlarge the jurisdiction of district courts to issue orders compelling arbitration.

In cases where the defaulting party cannot be served with summons in the district where the arbitration agreement requires the arbitration proceedings to be held, the present statute provides no adequate means for compelling arbitration, except in two special cases.

The first special case is where the party in default happens to be the one with the affirmative claim and happens to bring suit to enforce his claim. In such a case, Section 3 of the present statute enables the other party to obtain a stay of the proceedings until arbitration has been had. The other special case is where a ship or other property of the party in default can be found and arrested or attached by admiralty process issuing from any district court. Section 8 of the present statute permits the district court, after the property has been arrested, to direct the parties to proceed with arbitration.

In transactions involving foreign and interstate commerce, it is very frequently and, perhaps, usually the case, however, that the arbitration clause requires the arbitration to be held in a specified city which is, in fact, a place where service of process cannot be effected upon the party in default. Unless some of his property can be subjected to arrest or attachment by admiralty process, the present statute affords no remedy to the other party in such a case.

To correct this defect, your Committee has proposed amendments which are based on the proposition that where the parties have agreed to arbitration at a specified place, their agreement shall be deemed to include their consent to become amenable to process of the district court at such place to enforce the agreement in the manner provided by the statute. This proposition is now incorporated in the New York arbitration law by Section 1450, Civil Practice Act.

The same proposition is also applied in Section 9 of the present United States statute relating to entry of judgments upon awards. In cases where the arbitration agreement specifies the court, Section 9 now requires that the court, upon application of any party, *shall* enter an order confirming the award. Notice of the application is

permitted to be served on a non-resident by the marshal of any district in which the non-resident is found.

The Committee's proposals to extend the principle of jurisdiction by consent appear in Section 2(b) and Section 3 of the attached bill.

3. Another proposed amendment in the attached bill is intended to preclude the enforcement of arbitration where the dispute has become time-barred.

Two recent decisions of the United States Court of Appeals, Second Circuit, have upheld the right to arbitration of causes of action which clearly would have been barred by lapse of time if brought in a civil action or suit in admiralty.

Those decisions were *Son Shipping Co.* v. *De Fosse,* 1952 A. M. C. 1931 and *Reconstruction Finance Corp.* v. *Harrisons & Crosfield, Ltd.,* 1953 A. M. C. 1013.

In the first of those decisions, a consignee demanded arbitration of its claim against the shipowner for shortage of cargo delivered more than one year before the demand for the arbitration was made. The court held that the consignee was entitled to arbitration, notwithstanding the one-year suit limitation contained in the Carriage of Goods by Sea Act. The ground of decision was that an arbitration proceeding is not a "suit" and, therefore, is not barred by the limitation in the Carriage of Goods by Sea Act.

In the *Reconstruction Finance* case, the Court of Appeals affirmed an order directing arbitration of a claim arising in 1942 out of a sales contract which had been made in 1941 and contained an arbitration clause. No demand for arbitration had been made until September, 1951, about nine years after the alleged breach of contract had occurred. The majority of the Court of Appeals held that even if the six-year statute of limitation were applicable to proceedings brought to compel arbitration, there had been no breach of the contract to arbitrate until the demand to arbitrate had been made in 1951 and had been refused. The effect of the limitation statute on the cause of action on which the demand for arbitration was based, was held by the court to be a matter for the arbitrators to decide, notwithstanding the fact that the court expressly assumed that the statute of limitations would have provided a complete defense to a civil action on the same cause of action.

The result of the foregoing decisions seems undesirable to your Committee. We are not aware of any reason why an agreement to arbitrate a dispute should of itself furnish any basis for supposing that the parties intended to become bound to submit time-barred claims to arbitration. The British Limitation Act applies to arbitrations as it applied to actions in court. *Russell on Arbitration,* 15th Ed., pp. 5-7; *Naamlooze etc. "Vulcaan"* v. *Mowinckel,* 1938, House of Lords, 60 Lloyd's List 217.

4. Other proposed amendments are intended to incorporate into the statute the prevailing judicial view that, unless the parties expressly agree otherwise, all arbitrators should be impartial persons and should not decide disputes on the basis of evidence which has not been submitted to them in the presence or with the knowledge of both parties.

These amendments appear in Sections 4 and 6 of the attached bill, together with other provisions intended to supply more definite standards for arbitrators and to provide for judicial appointment or removal of arbitrators where the circumstances warrant.

At present, the court is powerless to prevent indefinite delays in arbitrations where one of the arbitrators may refuse or delay action in the selection of a third arbitrator or umpire. The court is also powerless to remove arbitrators for cause. In the latter case, the only remedy available is by a motion to vacate, made *after* an award has been made.

5. The other proposed amendments are procedural.

Various provisions which are scattered through the present statute and which relate to venue and to procedure on applications to the district courts, have been consolidated in Section 5 of the attached bill and codified in accordance with existing decisions and practice.

Section 10 of the bill is intended to clarify the present uncertainty as to what decisions of the district courts are appealable to the United States Courts of Appeals.

Concluding its report, your Committee makes the following recommendations:

(a) That the proposed amendments be approved, in principle, by the Association, subject to any modification in form or substance which the Association or its Executive Committee may find desirable as a result of further consideration;

(b) That this Committee or a successor Committee be authorized to arrange to have the proposed bill introduced in Congress; and

(c) That this Committee or a successor Committee be authorized to appear, by one or more of its members, on behalf of the Association at any Congressional hearing or hearings which may be held in respect of the proposed bill or any revised or substitute bill and to take such other action as may be advisable and proper in the premises.

Respectfully submitted,

CLEMENT C. RINEHART, *Chairman*
NORMAN M. BARRON
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NICHOLAS J. HEALY, 3RD
WALTER T. HUGHES, JR.
JOHN C. MOORE

The bill recommended by the Committee on Arbitration is as follows:

A BILL

To amend Title 9, United States Code, entitled "Arbitration," so as to provide for correction of defects and omissions in the present law regulating arbitration, for judicial review of questions of law arising in arbitration proceedings, and for other purposes.

BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled, that Title 9, United States Code (Public Law 282, 80th Congress, approved July 30, 1947, Ch. 392, Sec. 1, 61 Stat. 669), hereinafter called the "Title," is hereby amended in the manner set forth in the following sections.

SEC. 2: Section 2 of the Title is amended by inserting "(a)" immediately before the present text of Section 2 and by adding the two following subsections at the end thereof:

> "(b) If such a provision or agreement shall specify a place in the United States at which the arbitration is to be held, such specific provision or agreement shall be deemed a consent of the parties thereto to the jurisdiction of the United States District Court in and for the district in which such specified place is located, to enforce such provision or agreement in the manner provided in this Title, and to enter judgment on any award made pursuant thereto in the manner provided in Section 9 of this Title.
>
> "(c) No claim shall be enforced by arbitration proceedings subject to this Title, when such claim would have been barred by lapse of time if asserted in a civil action or suit in admiralty brought in the United States District Court for the district in which the arbitration is held or is properly sought to be held, at the same time as the arbitration proceeding was commenced by demand for arbitration. Any such defense of lapse of time shall be deemed waived, however, unless duly asserted prior to or at the arbitration hearing."

SEC. 3: The present second and third sentences of Section 4 of the Title are repealed and the following sentences are substituted therefor:

> "At least five days' notice in writing of such application shall be served upon each party in default, unless the agreement speci-

fies a diffferent time, in which case notice shall be given accordingly. In other cases, any such notice shall be served on each party in default in the manner provided for the service of a summons by the Rules of Civil Procedure for the district courts, except that if a place in the United States at which the arbitration is to be held has been specified in the agreement or provision referred to in Section 2 of this Title, and if any such party is not an inhabitant of the district within which such place is situated or found within the territorial limits of effective service of process of the district court for such district as provided by said Rules, the court may order the notice to be served on such party by the United States Marshal of any district of the United States or of its territories or possessions or by an appropriate consular officer of the United States or by registered mail. When such an order is made, the court shall also prescribe the length of notice and proof of service thereof which the court may consider appropriate."

SEC. 4: Section 5 of the Title is hereby amended to read as follows:

"(a) Unless a contrary intention is expressed therein, every arbitration agreement shall be deemed to provide: (i) that the arbitrator or arbitrators shall be impartial persons; (ii) for arbitration by a single arbitator; (iii) if the agreement provides that each party is to select an arbitrator, it shall also be deemed to provide that the two arbitrators shall appoint a third arbitrator immediately after they themselves are appointed; and (iv) in cases where the reference is to three or more arbitrators, the decision or award of a majority of the arbitrators shall be binding.

"(b) On application of any party to an agreement, the district court shall designate and appoint an arbitrator or arbitrators, as the circumstances may require, who shall act with the same force and effect as if he or they had been specifically named in such agreement in any of the following cases:

"(i) Where no method for the selection of the arbitrator or arbitrators is provided in the agreement and any party or the arbitrators chosen by the parties shall have failed to agree, within a reasonable time after being requested to do so, upon

the appointment of an arbitrator or upon the successor to any arbitrator who resigns or is disqualified or refuses or fails to act or becomes incapable of doing so;

"(ii) Where the agreement provides a method for the selection of the arbitrator or arbitrators, but any party thereto or the arbitrators chosen by the parties shall have failed, within a reasonable time after being requested to do so, to select an arbitrator in accordance with such method; or

"(iii) Where for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or in filling a vacancy.

"(c) Where an arbitrator has misconducted himself or the proceeding or other good cause is shown, the district court may, on application of any party to the agreement, set aside the appointment of any arbitrator and may set aside or make such other order regarding any hearings or proceedings theretofore had as may be appropriate to bring about a just award."

SEC. 5: Section 6 of the Title is amended to read as follows:

"(a) All applications provided for in this Title shall be made to the United States District Court in and for the district within which (according to the agreement of the parties or to the direction of a court made pursuant to Sections 3, 4 or 8 of this Title), the arbitration hearings and proceedings would be or have been held, except:

"(i) Insofar as application to a different court may be necessary or appropriate to give effect to the provisions of Sections 3 or 8 of this Title; or

"(ii) Where the agreement of the parties specifies that the arbitration is to be held at a place outside the United States, in which case the United States District Court shall have only the jurisdiction provided by Sections 3 and 8 of this Title.

"(b) Except as may be otherwise expressly provided in this Title, any application authorized by this Title to be made to a district court shall be made and heard in the manner provided by law for the hearing of a motion. Notice of each such application shall be served upon the adverse party either in the manner,

if any, provided in the agreement or in the manner provided by Section 4 of this Title or upon the attorney, if any, representing such party for the purposes of the arbitration proceedings."

SEC. 6: Section 7 of the Title is amended by inserting "(b)" immediately before the present words of Section 7 and by inserting prior thereto a new subsection reading as follows:

"(a) Unless the taking of an oath is waived in writing by all the parties to the arbitration, the arbitrator or arbitrators shall, before receiving any statement, testimony, writing or other evidence, take an oath substantially in the following form:

'I solemnly swear (or affirm) that I will faithfully hear and examine the matters in controversy which have been submitted to me pursuant to the agreement of the parties to this arbitration and that I will make a just award according to the best of my understanding; and that I have not received and will not receive any statement, testimony, writing or other evidence whatever relating to the matters in controversy, except according to the regular course of proceeding upon the hearing or hearings attended by all the parties or their representatives or of which any absent party has had due notice.'"

SEC. 7: Section 9 of the Title is amended by inserting "(d)" immediately before the present words in Section 9 and by adding three new subsections "(a)", "(b)" and "(c)" immediately before the present words of Section 9, such new subsections to read as follows:

"(a) Unless the hearing provided by this subsection is waived in writing by the parties, no final award shall be issued until after the arbitrator or arbitrators shall have submitted to the parties a statement in writing of his or their proposed award and shall also have afforded the parties a reasonable opportunity to specify and to be heard in respect of any omissions, ambiguities or errors which they may claim to exist in the terms of the proposed award.

"(b) At any time before the final award is issued, the arbitrator or arbitrators (or a majority of them) shall, if so directed by order of the district court, and may, upon the application of any party to the arbitration agreement or upon their own motion, state, for decision of the district court:

"(i) Any question of law arising in the course of the arbitration; or

"(ii) the award, or a part thereof, in the form of a special case.

Each such statement of a question of law or of a special case shall contain a statement of the nature of the controversy, of the findings of fact by the arbitrator or arbitrators on which the question or questions of law arise, and a special case shall also state alternative awards to be made depending upon the decision of the court on the question or questions of law stated therein. If in any such case the district court shall consider that the findings of fact are insufficient to enable the court to determine the question or questions of law, the court may remit the matter to the arbitrators for such further finding or findings of fact as the court may direct.

"(c) Any party to the arbitration agreement may apply to the district court for an order directing the arbitrator or arbitrators to state a question of law or to state a special case as provided in subsection (b). After decision of any question submitted to the district court in accordance with subsection (b), the court may remit the matter to the arbitrator or arbitrators with such instructions as may be appropriate, and after decision of a special case, judgment (as in the case of confirmation of an award in accordance with Section 13 of this Title), may be entered in the district court upon whichever of the alternative awards the court has decided to be correct. The district court is also authorized, on such terms as it may consider necessary or appropriate, to provide at any time for a stay of the arbitration proceedings, for securing the amount in dispute, or for the detention of preservation or interim custody or sale of any goods which are the subject matter of the reference."

SEC. 8: Section 11 of the Title is amended by adding the following provision immediately prior to the final paragraph of present Section 11:

"(d) Where the fee of the arbitrator or arbitrators specified in the award exceeds a reasonable amount."

SEC. 9: Section 12 of the Title is amended by inserting "(a)" before the present words of Section 12 and by adding a new subsection reading as follows:

"(b) The court may award to the prevailing party its reasonable disbursements and costs of the application, in such amount as the court may consider reasonable under all the circumstances, in the cases of an application to the district court for an order or judgment: (i) staying an action or suit pursuant to Sections 3 or 8 of this Title; (ii) directing the parties to proceed to arbitration in accordance with Section 4 of this Title; or (iii) removing or appointing an arbitrator or arbitrators pursuant to Section 5 of this Title; or for an order determining questions of law pursuant to Section 9 of this Title; or for an order confirming, vacating or modifying an award as provided in Sections 9, 10 and 11 of this Title."

SEC. 10: The Title is amended by adding a new section reading as follows:

"15. In addition to the jurisdiction provided by Sections 1291 and 1292 of Title 28, United States Code, the courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts staying or refusing to stay the trial of an action as provided in Section 3 or Section 8 of this Title, from orders pursuant to Section 4 of this Title directing or refusing to direct the parties to proceed to arbitration, from orders deciding or denying an application to decide a question of law or special case as provided in Section 9 of this Title, and from orders confirming, vacating or modifying or refusing to confirm, vacate or modify an award pursuant to Sections 9, 10 or 11 of this Title."