CHAPTER VI

THE PROPOSED UNIFORM ARBITRATION ACT: A PANEL DISCUSSION

A. Introduction

CHAIRMAN RUSSELL SMITH: The subject scheduled for discussion today is the Proposed Uniform Arbitration Act. We have, as members of our Panel this morning: Professor Maynard E. Pirsig, Dean of the University of Minnesota Law School; Professor Robert L. Howard, one of our brethren, of the University of Missouri; and former Professor Whitley P. McCoy. I want to dignify him by the title of Professor before referring to the fact that he is now a full-time arbitrator.

We are very happy to have with us Dean Pirsig, who is not a professional arbitrator, but who will find, I am sure, that arbitrators treat visitors courteously, even though they disagree with them sometimes.

Dean Pirsig is one of our national authorities on Procedure. As a matter of fact, he was formerly a member of the United States Supreme Court Advisory Committee on Civil Procedure. He is the author of a two-volume work on Universal Pleading; a case book on Judicial Administration, and a book just recently off the press, which bears the very austere title, "Cases and Materials on Standards of the Legal Profession," which, I understand, means, in short, Legal Ethics.

He has been a Commissioner on Uniform State Laws since 1947, and was Chairman of the Committee or Subcommittee of the Commissioners on the Uniform Arbitration Act. He, therefore, knows intimately the progress and development of the Uniform Act, which we have for consideration today.

We are very happy to have you with us, Dean Pirsig.

In addition, we have one of our brothers, Professor Howard, who has been at the University of Missouri Law School since 1925. His particular academic fields of interest are Constitutional Law, Administrative Law and Labor Law. He has authored numerous law review

articles in the legal journals, and is one of the co-authors of this "socialist" case book on labor law. When I said "socialist," that meant "collectivist," of course, which means that some 30 authors got together and pre-empted the field by editing this volume which has all the basic material in it and people have to use it. May I add, it is a very good book.

Professor Howard wrote an article recently which appears in the January, 1956 *Missouri Law Review,* entitled: "There Ought to Be a Law; or, Ought There?" This has reference to the Uniform Act.

He has a rather interesting background with which I think some of you are familiar. He has been a Commissioner on Uniform State Laws since 1946. He is an alumnus of the War Labor Board, as are a good many members of the Academy, having been a panel member and a public member of the 7th Regional Board, and then, more recently, Chairman of the Regional War Stabilization Board, functioning in Kansas City.

The third member of our panel needs no introduction to this audience. He is Whitley McCoy, one-time Professor of Law at the University of Alabama for nigh on to 30 years; Director of the Federal Mediation and Conciliation Service, 1953 to 1955; co-author of a book with another of our brothers, Clarence Updegraff, on *Arbitration of Labor Disputes;* and, as we all know, a leading authority on industrial discipline in the telephone industry.

Our procedure will be as follows:

We are going to have statements of points of view, by Dean Pirsig, and Mr. McCoy, and Mr. Howard, in that order. I presume there will be some disagreement among them, some areas of discussion which will remain open as a result of what they say, or which may remain open in your minds, anyway, and it would be hoped that in due course we will have some discussion of questions in relation to the Uniform Act, in which you may be interested.

I should say, this is not a meeting to review further the Academy's position on the subject of the Uniform Act. You will all recall that the Academy did take a position last year, in opposition to the promulgation and adoption of the Uniform Act. Since then there have been certain amendments of the Act which may or may not result in a modification of the Academy's position, but, in any case, as of the moment, at least, the Academy officially is opposed to the adoption of the Uniform Act,

my authority for that being resolutions adopted at the last annual meeting of the Academy, which stand at the moment unmodified.

What our position will be after we have the enlightened discussion this morning and the further discussion of the matter by the membership, I do not profess to try to say.

B.

MAYNARD E. PIRSIG

Dean of the Law School
University of Minnesota

I do not know whether you know or not that the Conference of Commissioners on Uniform Laws considered very seriously and carefully the report that was made by the Committee[1] headed by Professor Smith —incidentally, we thought it an excellent report—and in light of that report, the Conference, on the recommendation of the Committee of which I was Chairman, changed the Act with respect to what we thought was the major objection that this group had to the Act; namely, certain provisions in Section 12, dealing with the setting aside of an award on the ground that it was contrary to public policy, and that it was so grossly erroneous as to imply bad faith.[2]

Let me suggest that, notwithstanding the fact that your Academy disapproved the Act, in the light of the subsequent removal of the major objections to the Act, I would assume that your minds are not closed to a discussion of its merits.

Now, let me give very briefly a description of the National Conference of Commissioners on Uniform Laws. The Uniform Act is, of course, only one of numerous uniform acts, extending over the whole range of law in any area where uniformity of legislation is deemed desirable.

The organization is over 65 years old. It is made up of 150 members, two to seven commissioners from each State, appointed usually by the

[1] EDITOR'S NOTE: See Report of Committee on Law and Legislation and Resolution on Proposed Uniform Arbitration Act in Appendix C, *Management Rights and the Arbitration Process* (Washington, BNA Incorporated, 1956).

[2] EDITOR'S NOTE: For text of the Act as originally proposed see Appendix D of *Management Rights and the Arbitration Process.* The revised draft is included in this volume as Appendix B.

Governor, the Attorney General, the Chief Justice or some combination of Judges, or even by the legislature.

The Commissioners meet once a year, the week preceding the meeting of the American Bar Association. The Commissioners, almost exclusively are lawyers, judges, some legislators, some Law Deans and professors. The Conference is organized into sections which, in turn, have various committees to whom the drafting of the various proposed acts is assigned. The spade work is done by these committees between the annual conferences. Then at the annual conferences there are separate meetings of sections, where these drafts are examined, reorganized, revised, then considered by the Conference as a whole, and each section is read, gone over section by section, carefully analyzed, criticized, and usually revised.

That process is gone over twice, and no Act is adopted, with certain exceptions that have to be acted upon by the Conference, without two years of consideration, and, I may say, the Uniform Arbitration Act had more than that. It had four or five years of consideration before it was finally adopted.

These committees, in considering these acts, invite and consult with different organizations interested in the Act and with individuals who are specialists in the field. With respect to the Uniform Arbitration Act, drafts were sent to this organization, to the American Arbitration Association, to the Committees of the American Bar Association, and to numerous individuals who were known nationally for their interest in this subject.

The result is, I think, with respect to this particular Act, that it is as good an Act as you are likely to get on a national scale upon which people can generally agree.

Any particular individual may find this or that item with which to disagree, and I am sure that he could to his own satisfaction do a better job. But, in terms of a uniform generally acceptable Act, it is my opinion that it is as good an Act as you are likely to get, with the objective in mind of promoting arbitration as a means of settling disputes.

Let me give you very briefly some of the highlights of this Act, in order to enable us to get some background of what we are discussing.

Briefly, the Uniform Arbitration Act is an improved version of those statutes which were originally adopted in New York, New Jersey and by the United States Government in the early '20's, and followed with

infinite variety by some 15 states. Taking that as the pattern, here are some of the major things accomplished by the Act:

First: It validates written agreements to arbitrate, relating to existing or future disputes. That is one of the important features of the Act. I might tell you that back in the early '20's, this Conference of Commissioners on Uniform Laws undertook to write a uniform arbitration act and they bogged down in that conference over the question whether it should apply to future disputes. The general attitude of judges and lawyers at that time was against arbitration. They regarded it as an interference with the judicial process, as in competition with the courts, as in competition with the practice of lawyers, and they were "agin" it, with the result that future disputes did not appear in the original Uniform Act. It was later withdrawn by the Conference and the subject was dead, until revived by the procedure I just described, resulting in the present Uniform Act.

Under this Act, the written agreement need not be signed, verified, recorded or acknowledged. The simple written agreement is all that is required. It is not confined to disputes arising out of the agreement, if the parties so wish, which is a provision common to most of the modern arbitration acts.

With respect to labor and management agreements to arbitrate, the draft permits the State to choose whether to allow the parties to provide that the Act shall not apply.

Second: The Uniform Act provides a simple method for court enforcement of the agreement to arbitrate and for enforcement of the Award. All applications to the Court are by way of the motion procedure of the State. Actions in the normal sense are not contemplated. Thus, all such applications are to be heard within five to ten days after they are made. Two such types of motions are contemplated.

Motions to Compel or to Stay Arbitration

The first type is motions to compel or to stay arbitration. The motion to compel may be either by an original application or in a pending action involving an arbitrable issue accompanied by stay of the action. The motion to stay arbitration is in substance a substitute for a declaratory judgment procedure, which will be found in most of the States of the United States. It substitutes the motion for the usual action for obtaining the declaration.

Now, the principal issue in these various motions to comply with

the agreement or stay the arbitration will be whether the issue in dispute comes within the agreement to arbitrate. While not specifically stated under the Act, this is a question for decision by the Courts, unless the parties have agreed to leave it to the arbitrator.

The Committee section and the Conference as a whole were aware of the arguments, under existing arbitration acts, that the Courts have assumed the arbitrator's function, under the guise of determining arbitrability. These critics point to some of the New York cases as exemplifying that tendency and to the New York doctrine that there must first be a bona fide or substantial dispute. These critics also hold that arbitrators are better qualified than judges to construe the arbitration clause, and that therefore this is the question that should be left to the arbitrators.

Under the Act, there is nothing to prevent the parties from agreeing that the subject of arbitrability shall be left to the Arbitrator, and they may do so in most modern Acts following the New York pattern.

The fact that they have not done so, despite the urgings of prominent writers and of lecturers and speakers before labor discussion groups, seemed to us to be an indication that the parties are not inclined to give the arbitrator that authority. Therefore, to write that provision into the contracts by legislation seemed to the Commissioners unwise.

The problem, then, is essentially one of educating the Courts to their proper role in this area and that means essentially the Appellate Courts. A recent article in the *Arbitration Journal,* indicating a recession by the New York Courts from their earlier position on the issue that I have just mentioned, would indicate that courts are not immune to the processes of education.[3]

After all, when those decisions were written there was very little in legal literature, and certainly nothing in the decisions to which the courts could turn for some guidance on this question, and it may be fairly assumed that with the rather widespread discussion that has occurred you will find a different attitude on the part of the courts in dealing specifically with that question.

The Uniform Arbitration Act provides that it shall not be a ground for setting aside or refusing to enforce the arbitration agreement, "that the claim or issue lacks merit or bona fides, or because any fault or grounds sought to be arbitrated have not been shown." It may be of

[3] EDITOR'S NOTE: See article by Ralph E. Kharas and Robert F. Koretz in *Arbitration Journal,* Vol. 11, n.s., No 3 (1956), pp. 135 et. seq.

interest to you that in the middle of this month I am attending a meeting where I shall have to defend that particular modification.

Motions to Reduce the Award to Judgment

The second type of motion contemplated by the Act is the motion for the reduction of the award to judgment, in the course of which the validity of the award is passed upon.

Sections 11, 12 and 13, dealing with confirmation, vacation or modification of the award do no more than recognize the traditional grounds for correcting or setting aside an award. They are grounds that exist under modern arbitration statutes and are grounds that existed in common law, and it was in those sections where the objectionable grounds appeared which have now been removed, as I said, in very substantial part, because of the action taken by your group. Those that remain, then, are essentially:

1. Fraud or corruption in securing the award.
2. Partiality or misconduct on the part of the arbitrator.
3. Acting beyond the powers of the arbitrators.
4. Improper conduct of the hearing; and,
5. The non-existence of an agreement to arbitrate, if that question has not been previously settled at an earlier stage.

That, then, is essentially a broad summary of the motion procedure.

Third: Another important feature of the Act appears in Section 9, which provides, more extensively than any legislation existing on the books of any State or Federal Government today, a modification of the old Common Law doctrine that the Arbitrator's powers cease with the signing of the award. This section provides that after an Award is made, on application of a party, or, if a motion has been made affecting the award, on order of the court, the arbitrator may then modify or correct the award or clarify it.

Heretofore, the Court itself has had to construe an ambiguous or uncertain award and if it was too uncertain and too ambiguous to be enforced, it was thrown out altogether. Now, on application of the parties, that question may be sent back to the arbitrator to fill in and clarify what he has undertaken to award.

Fourth: The Act contemplates the traditional informal arbitration hearing and procedure, unencumbered by any technical requirements. There is no requirement that a record be kept of the hearing; there is

no requirement that rules of evidence prevail; there is no requirement that the award be in any particular form, except that it be in writing and signed.

Representations were made to us that there ought to be something requiring an opinion along with the Award. That seemed to us simply to introduce another technical requirement which is undesirable.

There are a few provisions that are designed to effectuate the proceedings, such as that a decision by the majority of the arbitrators is sufficient; waiver in case of failure to appear; appointment of arbitrators where the method provided has failed; and the authorization of subpoenas and depositions, under the complete control of the arbitrator.

There are also some safeguards which the parties may not have provided for, such as notice of the hearing; right to present evidence; and right to counsel. Most of these specific provisions can be modified by the parties if they desire, by their own agreement.

This is, of course, just a very rapid, sketchy summary of what the provisions of the Act are. Maybe I have omitted some of those that you deem important, but I think it should be sufficient to illustrate the simplicity and the limited area of court control that is contemplated by the Act.

The whole design of the Act is to make arbitration effective and to insure an effective, simple, non-technical arbitration procedure. Its use of the judicial procedure is solely to insure that purpose and to keep the judge out of the arbitrator's business. It repudiates the notion that arbitration is like a judicial proceeding and therefore should be subject to judicial review.

I am confident, after examining many of the Acts of this country and various States, that the adoption of this legislation would give arbitration a prestige, a strength and effectiveness that would advance arbitration in this country beyond anything achieved on the subject in the last one hundred years.

Friends of arbitration, in my opinion, should therefore get behind the Act and support it as a uniform measure throughout the country.

Now, two attacks have been made upon it, neither of which to us seemed to be persuasive.

Is Any Legislation Needed?

First it is said that, with respect to labor arbitration, it is undesirable to have any legislation. Management and unions have learned to live

together in harmony with arbitration voluntarily set up to settle any disputes that might arise. Litigation over the subject matter of arbitration in those states which do not have the more recent arbitration statutes is practically unheard of. Introduce this legislation and it is an open invitation to the parties to resort to litigation with all the expense and delay that goes with it. We are happy now, so leave us alone. I believe this was the tenor of an article attacking the Act, written by the late Herbert Syme.

It seemed to us there are several reasons why we could not accept that point of view.

First: No one questions that in the great majority of cases the parties live up to their agreement to arbitrate, but still there are cases in which bona fide disputes arise over the interpretation of the scope and applicability of the arbitration agreement and over the conduct of the parties or arbitrators in obtaining the award. To those parties involved in that dispute, and without means of resolving it, it is of no comfort to know that in other cases in which they are not concerned, no disputes arise and no remedy is needed. They are entitled to have their problems settled expeditiously, economically and in accordance with the principles and rules of law.

Second: The assumption that those who now maintain amicable relations would abandon them under this Act and go to Court, seem to us an unrealistic appraisal of the good faith and motives of these people. Under existing law now an astute lawyer can find more effective legal procedures for frustrating the arbitration process than would exist under this Act. The parties do not resort to them because they abide by the agreement they have made in good faith. They would also do so under this Act.

Third: The universal harmony assumed by this objection to the Act is probably not a true description of the situation. It was not verified to us by any representative of the committee appointed by Mr. Arthur Goldberg of the CIO, or by the American Arbitration Association and its committee, or by the general consensus within the National Conference of Commissioners on Uniform Laws, all of whom have their contacts and ties within their own particular States.

As Mr. William Isaacson has pointed out in the June, 1956, issue of the *Labor Law Journal,* the frantic efforts, particularly by union lawyers, to seek enforcement of arbitration agreements by resort to Sec. 301 of the National Labor Relations Act indicate that there is a

very real need and demand for some legal procedure and some legislation to permit the settlement of these disputes by a simple and effective judicial procedure.

Fourth: The number of New York cases appearing in the reports pointed to as proof of the objection we are now considering do not substantiate that objection. They reflect, rather: (1) the large extent to which arbitration is used in New York, a large industrial center; (2) New York is peculiar, in that lower court cases, including those of trial courts, county courts and even municipal courts, are reported and therefore distort the picture of the number of legal procedures or cases there are involving arbitration; (3) New York has a heterodox, patchwork type of statute, which is likely to invite rather than prevent resort to courts.

Obviously, a State providing no remedy will have no court cases. Contrasting such a State with New York, in terms of reported cases, warrants no conclusion invidious to the Arbitration Act. Every reported case compelling arbitration represents an arbitration saved, as well as a warning to others to heed their arbitration agreement. In States having no means of compelling arbitration, no one knows how many arbitration agreements are disregarded. They never see the light of day, either before an arbitrator or a court.

Should Labor and Commercial Arbitration Be Combined?

The second attack that has been made on the Uniform Act is that it combines both labor and commercial arbitration. The argument is that arbitration in each case serves essentially different purposes. In labor arbitration it is the end product of a grievance procedure within the plant, and is a procedure agreed upon by the parties as a substitute for the strike and the lockout. In commercial arbitration, it is said, arbitration is a substitute for litigation. In the one the parties must continue to live together. In the other, it is concerned but with one customer of many. Hence, the approach is different and the statutes should not be alike. Otherwise, the courts will carry concepts appropriate to one over to the other to which they are not applicable.

Again, for several reasons, the Commissioners could not see their way clear to accepting this contention. Let me summarize those reasons very briefly. All I can do is to state them, without developing them:

(1) For the most part, discussions in this tenor remain theoretical, and concrete demonstration is lacking. Pointing to the objectionable

New York cases involving the no-dispute doctrine is no answer, because they are as objectionable in commercial arbitration as they are in labor arbitration, and, as I have said, the Act specifically negatives that doctrine.

(2) The trend in recent legislation—a recent example is Ohio—is to the contrary. Both are being included in a single Act.

(3) Procedures, as distinguished from content, for both commercial and labor arbitration are essentially the same. The subject matter and content are, of course, different. There are objections to having two separate arbitration procedures in a single State, one dealing with labor and the other with commercial arbitration, and, I suppose, a third dealing with neither. We got away from the separate procedures when we joined law and equity, which, of course, differ as widely in content, approach and disposition as do labor, commercial and other types of arbitration. The same simplicity should apply to arbitration, whether labor or commercial.

(4) One would suppose that labor leaders should be the first to object to being included in the same act as commercial arbitrations. Yet the national labor leaders with whom we consulted and from whom we have heard did not disapprove of this combination.

(5) If anyone should object to this particular act, I would suppose it would be the commercial people, because this Act is drawn essentially with an eye to labor arbitration, as distinguished from commercial.

(6) A point that never seems to be discussed or dealt with in criticisms of the Act is that under the Act the parties are perfectly free to contract that the Act shall not apply.

Finally, there is, I think, a very real point and let me say that this argument was suggested to me by labor leaders on the national level, that separate labor arbitration statutes are likely to have less objective treatment when it comes to enactment than an Act which deals with all arbitration, commercial, labor and other types; that if labor arbitration is separated from the other types of arbitration, you open it and expose it to attack from hostile interests, and those with the greatest political power are going to determine the content of the Act.

For these reasons, then, the Conference felt that the two ought to be combined.

Coming back, then, to what I said to begin with, it seems to me that this Act might well serve as a milestone in the history of arbitration in this country; there are only some 15 or 18 States that have anything

like a modern arbitration act, based on the New York Act. All of the rest either have no arbitration act or they have some ancient or ineffective statutes with which they are completely dissatisfied.

One reason the Commissioners got into this is because there is a movement throughout the country in different States for legislation covering labor arbitration. The Commissioners thought they would be doing some service if they could provide an Act which would have some degree of objectivity, which would incorporate what was thought to be the best on the subject, and which had some prospect of general acceptance.

Without such example, without such a model, you are likely to get a heterogeneous and inadequate system of State legislation on the subject. I hope, therefore, that you gentlemen will give serious consideration to the re-examination of the Act, particularly since, as I understand it, your previous objection was based upon provisions which have now been removed.[4]

C.

WHITLEY P. McCOY
Washington, D. C.

So much has been said and written on the subject of the Uniform Arbitration Act, that in the little time allowed me here I cannot be expected to cover the subject. I can only suggest briefly the reasons, in general, that have led me to the conclusion I have reached.

The obvious purpose of the proposed Uniform Arbitration Act is to make arbitration more attractive to parties to disputes, and thus to stimulate its use, while diminishing litigation in commercial disputes and strikes in industrial disputes. No one can reasonably quarrel with that purpose. It is only on the means to attain that end that there is honest, and I hope entirely friendly, disagreement.

I am strongly in favor of the Uniform Arbitration Act, with an amendment providing that it shall have no application to Labor-Man-

[4] EDITOR'S NOTE: At the conclusion of the tenth annual meeting the Board of Governors decided to review the position taken by the Academy during the 1956 meeting on the subject of the Uniform Arbitration Act and to present at the 1958 meeting its recommendations as to whether the Academy position should be changed as a result of the amendments to the Uniform Act approved in August 1956 by the American Bar Association.

agement disputes. The reasons for my favoring the proposed law will indicate why I also favor the restricting amendment. The very reasons for a uniform Act covering commercial arbitrations are reasons against applying such a law to Labor-Management arbitration.

1. Arbitration of commercial disputes will be stimulated by enactment of the Uniform Act because of the factor of expedition. Our court dockets are crowded, the judges are overworked. Arbitration of cases that would otherwise take their slow, weary, and tortuous way through the courts would relieve those heavy dockets and result not only in speedy disposition of the cases arbitrated, but also speedier disposition of cases remaining in litigation. The fact that recourse could still be had to the courts, by motions to compel or stay arbitration, or to enforce, set aside, or modify awards, would not offset this advantage too much, for arbitrators would still have done a great deal of the court's work.

Now it is quite clear, without the necessity of elaboration, that this reason does not operate in favor of a uniform law to cover Labor-Management disputes. Quite the opposite. Such disputes are not in the courts but are already in common law arbitration. The effect of a uniform Act covering them would be to throw many of them into the courts, further crowding already overcrowded dockets, slowing up not only the arbitration process but also cases in litigation.

2. The Uniform Act will stimulate commercial arbitration because of the factor of economy. As contrasted with litigation in court, arbitration is a relatively simple and economical means of deciding the ordinary commercial case; for example, how much, if anything, does the X Corporation owe the Y Corporation? The slow wasteful procedures of pleading, of empanelling a jury, the wearisome technical arguments of corporation lawyers, the high court costs, the motions, the continuances, the appeals, the writs of certiorari, the new trials, the further appeals—the total cost can be frightful. I should like to hear from an authoritative source a rough estimate of what the average cost of a commercial arbitration is. I am sure it is not one-tenth of the cost of litigating the average case in court.

Now this reason, economy, is likewise a reason against including Labor-Management disputes in the Act. To do so would add to the present cost of arbitration, court costs and attorneys' fees in those cases where resort is had to the courts. An arbitration that might otherwise cost the Union and the Company $150 apiece, would be more apt to

cost $1500 or $3000 apiece after the motions and the appeals. How could a small Company, up against one of the larger and wealthier international unions, stand it for long? How could a small local union, up against a multi-million dollar Company, stand it for long? Pass this Act as it is now written, and arbitration of Labor-Management disputes might soon suffer a severe decline, at least in some industries and some sections of the country, with a consequent rise in strikes and other forms of self-help.

3. The Uniform Act will stimulate commercial arbitration because of the factor of truth and justice. Parties to commercial disputes, if they can be persuaded to arbitrate under a fair uniform Act which gives them adequate protection, are much more apt to get the correct result, for they can pick an arbitrator expert in the particular field of business, economics, or law involved. They may pick an insurance man for an insurance case, an accountant for an accounting case, a patent lawyer for a patent case, etc. They can pick the man for the case, instead of having to take whatever judge is assigned. And the arbitrator, not being entangled in the red tape of the law, can expeditiously find the facts and base a just award on it.

Does this apply to Labor-Management disputes? Quite the contrary. Ninety per cent of the 100,000 or more collective bargaining contracts now provide for arbitration; a body of competent arbitrators exists, knowing the field and trusted alike by companies and unions. Their awards are respected and lived up to with very rare exceptions. To apply the uniform Act in this field would subject the awards of recognized specialists to the review of men without the essential knowledge of industrial relations and plant problems. Truth and justice would be diminished, not enhanced.

I have given three reasons for the Act and for the restricting amendment. If I had time I could give others, and in each case the reason for the Act would be also a reason for the amendment, except with respect to specific enforcement of agreements to arbitrate and enforcement of awards. It would be well if we had some law to cover those aspects of Labor-Management arbitration, but if the cost of getting such a law is the acceptance of all the other provisions of the proposed Uniform Act, the price is far too high. I am afraid that if we can get such a law only at that price, there would soon cease to be so many labor arbitration agreements to seek specific performance of, or so many awards to seek enforcement of.

The proponents of the proposed Act in its present form, have, in my opinion, simply overlooked the fundamental differences between commercial arbitration and labor-management arbitration—differences that have been pointed out by Professor Howard, in the *Missouri Law Review,* and by Herbert Syme in the *Labor Law Journal.* The proponents think that the Uniform Act will increase labor arbitration. In the opinion of the opponents, passage of this Act will have the opposite effect.

It has been said that everybody is for the Act except the professors and the arbitrators. Of course this was never quite true, and becomes less true every day as the issue is studied and publicized. But even if true, the professors at least have studied the problem, and I know of none better qualified than arbitrators to speak on the subject of arbitration. And I suggest this thought to legislators: Where does the self-interest of the arbitrators lie? Are they in favor of more arbitration or less arbitration? If arbitrators thought that passage of the uniform act would increase arbitration, you may be very sure that they would be unanimously in favor of it. Instead, the great majority of arbitrators are convinced that passage of the Act would greatly curtail if not end labor-management arbitration, and would consequently lead to cancellation of no-strike clauses and a return to industrial warfare.

Now obviously this is not the expression of a hope. We hope our fears are unfounded. But it is a real fear, based upon our intimate, day to day contacts with the people involved in labor arbitrations, our knowledge of the problems involved in making arbitration work satisfactorily, and our familiarity with the psychology, the emotions, the thought processes of the people concerned.

Labor leaders have already been alerted to, and recognize, the danger to arbitration, but many of them are not too concerned because they have never really lost their first love—self-help, strike, slowdown. Some are openly opposed to arbitration, and would welcome an excuse to abolish it with consequent abolition of no-strike pledges. Management leaders, though of course in favor of the safeguards which the Act would give them, have begun to see the threat to arbitration and no-strike clauses involved in passage of the Act. I think that they too see the cost of the safeguards of the Act as too high, especially since the need for them is largely imaginary and theoretical. I am informed that the Labor Relations Committee of the National Chamber of Commerce has just in the last two or three weeks expressed concern over this Act,

pronounced it inappropriate legislation, and has so notified the State Chambers.

Arbitration of labor-management disputes on a purely voluntary basis, conducted under the common-law without benefit of statute, has had in just 16 years time such a tremendous growth and almost universal acceptance as to be amazing. It is accepted as a part of the grievance procedure, part of the everyday running of the plant. As long as it is working, let's let it alone. The risks in tinkering with it are too great.

I have said that I favor an amendment to Section 1 excluding labor-management disputes from the coverage of the Act. I think, perhaps, I might go along with a compromise. At least I have a compromise in mind that I think should be considered and discussed. I therefore propose for your consideration an amendment to the Act reading as follows:

> Strike out the last sentence of Section 1 and substitute in lieu thereof the following:
>
> "This Act shall have no application to the arbitration of so-called labor-management disputes, that is, disputes between employers and employees or their duly constituted representatives or agents, but the arbitration of such disputes shall continue as now to be conducted under the principles of the common law and of equity, except where the parties to such disputes, after the effective date of this Act, shall have expressly agreed in writing, in their collective bargaining agreement or otherwise, to arbitrate under the terms and provisions of this Act, in which case the terms and provisions of this Act shall apply."

I will not suggest arguments for or against this amendment, at least until we get some reactions from other members of the Panel or from the floor.

D.

ROBERT L. HOWARD

Law School, University of Missouri

It is a reasonable assumption that all persons present at this meeting have a friendly interest in labor-management arbitration, and would like to see it improved, perfected and encouraged as an instrument for the promotion of industrial peace.

I take it we are concerned today with two questions: First, whether we do or do not need legislation applicable to labor-management arbitration, and second, if we accept an affirmative answer to that question, whether the present Uniform Arbitration Act is an appropriate instrument to meet that need.

In order that my position may be clear initially, I may say that I am convinced that in most areas of the United States we do not need such legislation; and that where legislation may be regarded as desirable, the present Uniform Act does not satisfactorily supply the need, for the reasons, among others, that it goes too far; that it contains many provisions that may possibly be appropriate enough when applied to commercial arbitration, but which have no proper place in a measure applicable to labor-management arbitration; that it injects the court into the picture where it was never the intention of the parties to an arbitration provision in a collective bargaining agreement to have it enter, and allows it to encroach upon the function of the arbitrator; that it has in it the very great danger of weakening, if not destroying, that expeditiously final and binding character of the arbitration determination which is the chief merit of this process of industrial dispute settlement; and that it may well weaken or destroy the completely voluntary character of labor-management arbitration as it exists today.

In any consideration of this problem, the first alleged justification for even talking in terms of a need for legislation is uniformly asserted to be the common law rule by which a party to an agreement to arbitrate may repudiate that agreement any time he may see fit to do so, and that he may withdraw from an arbitration *proceeding* any time before an award is made, and repudiate his agreement to arbitrate.

If that statement accurately reflects the common law situation now existing in most jurisdictions, and if labor and management, as the parties to an arbitration provision in a collective bargaining agreement, commonly, or with any substantial frequency, assert their right to repudiate their obligation to arbitrate, then a strong case is made for some sort of legislation.

It is submitted, however, that where such a situation exists, and where some legislation as a remedy therefore is deemed desirable, the first sentence of the first Section of the Uniform Act largely supplies the need, without all of the complex provisions that follow. When a statute provides that "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," the foundation has been provided upon the basis of which a court, in the exercise of its common law authority, and without further statutory elaboration, can provide all the remedy that may be required.

But that is not the only answer to the alleged problem created by the asserted common law rule.

In the area of the country from which I come, the representatives of management and of labor habitually, traditionally and uniformly consider their agreements to arbitrate as binding obligations, and they conduct themselves accordingly. They do not repudiate those obligations.

In the middle west where I am most intimately conversant with the arbitration process we do not need this legislation, not even the first sentence, because the problem does not arise. Furthermore, we do not want such legislation, and when I say we, I include both labor and management.

There is also another angle to this first aspect of our problem that must not be overlooked in any long range consideration. And that goes back to the soundness of the common law doctrine in its application to labor-management arbitration.

We are all aware of the fact that that doctrine is commonly said to have had its origin primarily in the jealousy of the courts over the feeling that parties to a contract, who agreed to by-pass the court and submit any dispute arising therefrom to final and binding arbitration, were improperly interfering with the jurisdiction of the court. Absent the agreement to arbitrate, the dispute would have gone to the court for disposition. To say that the court was being deprived of jurisdiction seemed like a reasonably clear assertion, and the doctrine that one may repudiate his agreement at any time has persisted in many, and perhaps most, jurisdictions.

But however applicable this common law rule may be to commercial arbitration in which it had its origin, if there is any strength in the commonly asserted adage that when the reasons for the rule do not exist, the rule should not apply, then no reason could ever possibly have existed for the application of this rule to labor-management arbitration. By no stretch of the imagination could it ever be said that labor-management arbitration encroached upon, restricted, or took from what would

otherwise be within the jurisdiction of the court. Labor-management arbitration is not a substitute for litigation, as is commercial arbitration, but rather a substitute for resort to economic force. And it is almost invariably joined with a no-strike, no-lockout agreement which the parties and the courts do regard as binding and enforceable. Thus, whether we may prefer to rely on the dictum of Lord Coke that an agreement to arbitrate is in its nature revocable, or that of Lord Campbell that it is against public policy because it ousts courts of jurisdiction and for that reason revocable, it stands on no stronger ground with reference to labor-management arbitration.

This whole problem has been pointed up by a recent decision in the Chancery Court of Monroe County, Mississippi, in a case with which you are all probably familiar, and which is now pending before the Supreme Court of that State. The arbitration provisions of the agreement in that case were coupled with a no-strike provision. The Chancery Court called attention to the fact that the Supreme Court of the State had held that "a written agreement for submission to arbitration is revocable by either party before an award is made" in cases involving commercial arbitration, but pointed out that the "Court had never ruled on the question of whether an arbitration clause in a collective bargaining contract is enforceable," an observation that would be equally applicable to the courts of most other jurisdictions.

The opinion then goes on to point out that since a decision in 1931, the State Supreme Court had put its stamp of approval on contracts made by unions with employers; that with the Mississippi Theatres Case in 1936 the State Supreme Court had held that a court of equity could properly enforce obedience to collective bargaining agreements by injunctive relief, on the ground that such agreements advance the general public welfare by avoiding boycotts, strikes, lockouts and other evils.

Then, after commenting on the recognized merits of arbitration as the most satisfactory method of settling disputes between labor and management, and emphasizing the no-strike provision of the arbitration clause as adding to its value to the company, to the union, and to the public generally, the Chancery Court concluded that the arbitration clause in a collective bargaining contract is likewise in the interest of the general public welfare and should be enforced in the same

manner as any other lawful provision of the contract is enforced," and accordingly issued its mandatory injunction.[5]

I submit, gentlemen, that the approach of the Chancery Court to the problem in this case, and its reasoning and decision, are eminently sound; that they should commend themselves strongly to the Supreme Court of Mississippi in its review of this case, and in like fashion to other courts wherever the question may arise.

Incidentally, I assume that this case, and others like it, serve to give vital content to the suggestion of our good friend Alex Frey when, in his testimony before the Pennsylvania Governor's Commission in 1953, he called for the correction of some judicial errors in this field that would eliminate the need for legislation.

Obviously, if the Supreme Court of Mississippi can be persuaded to accept this challenge to correct a "judicial error" which it, incidentally, has not been guilty of with respect to labor-management arbitration, and if other courts will follow suit, the most commonly asserted reason for legislation of the nature here under consideration will have ceased to exist.

If I may now be permitted to pass on to the assumption being widely made that legislation is desirable, at least in some areas, and to comment more directly on the Proposed Uniform Arbitration Act, I would suggest that the combination of commercial arbitration and labor-management arbitration under application of the same legislative measure is one of the major defects of the Uniform Act. I have yet to encounter any one, personally, or by way of the printed word, who has been willing to admit that the combination is otherwise than desirable.

I have no purpose to controvert the contention that many, and possibly most or even all, of the provisions of the Uniform Act may be desirable for commercial arbitration, just as they were so considered desirable by those who drafted the same or similar provisions included in earlier statutes, all of which were directed in their application solely to commercial arbitration.

But just because both processes are called "arbitration," does not necessarily mean that the same statutory provisions are equally desirable in both cases.

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[5] Machine Products Co. v. Prairie Local Lodge No. 1538, Miss. Chanc. Ct. 27 LA 285. ED. NOTE: Subsequently reversed by Miss. Sup. Ct., 28 LA 339.

The long time relationships between the parties to a collective bargaining agreement containing a provision for arbitration coupled with a no-strike, no-lockout provision bear almost no similarity to the relationships between the parties to an ordinary commercial contract. The two types of arbitration are designed for very different purposes. The one, as has been stated, is a substitute for litigation, the other a substitute for resort to economic force. Commercial arbitration concerns itself with business relationships for the breach of which a dollars and cents award ordinarily provides an adequate remedy.

Labor-management arbitration, in contrast, deals not with dollars and cents issues, but, for example, with the technical details of a wage incentive plan as applied to the various skills in a modern steel mill, with the application of a technical plan of job evaluation to the varying duties of employees engaged in the numerous aspects of any of our many complicated industrial establishments, or even with the matter of promotions, lay-offs and rehires in the application of combinations of plant-wide and departmental seniority in any large scale production enterprise. All are likely to be matters with which the average trial court is wholly unfamiliar; to the disposition of which the court process is ill adapted; which neither party to a collective bargaining agreement had any purpose to entrust to the disposition of a court; and which must be disposed of finally and without delay if the parties to a collective bargaining agreement are to go on living together and working together with any degree of harmony. The delay incident to court intervention in the arbitration process may produce small injury to the relationship of the parties to commercial arbitration, but such is not the case with labor-management arbitration. And one of the major objections to the many provisions of the Uniform Act that invite court intervention is the consequent inevitable delay.

While it is true that some concessions have been made by way of accepting amendments that delete the most objectionable features of Section 12 of the Uniform Act, the basic offense of trying to apply a commercial act to the labor-management relationship still exists.

The very nature and purposes of the labor-management arbitration process makes highly inappropriate the application of most of the detailed provisions of the Uniform Act.

The process is one based solely on the voluntary agreement of the parties, and the element of complete *voluntarism,* together with that of

finality, constitute the two most significant and essential aspects of the whole process. And the provisions of this statute do violence to both.

The essence of labor-management arbitration as provided for in most modern collective bargaining agreements lies in the fact that it is coupled with, as its necessary counterpart, a no-strike, no-lockout agreement. The parties have voluntarily agreed to give up these remedies of self-help, but only for a price, and only on terms which they, themselves, have determined to substitute therefor. They have not agreed to subject their relationship to the application of some statute or to the intervention of a court. What they have agreed to do is to forego their right to resort to the strike or the lockout, in exchange for an arbitration process under which the determination of the arbitrator or the arbitration board selected by the parties is to be final and binding, and they do mean final and binding.

When a statute provides for court appointment of an arbitrator, even under the restricted language of the Uniform Act, something is taken away from the essential characteristic of voluntarism, to say nothing of the fact that the average trial judge is not well equipped to make an effective appointment.

When we further provide for a species of judicial review by the various provisions set forth in Sections 12 and 13 for vacating or correcting an award, and when we add the multiplicity of opportunities for appeal provided by Section 19, those basic and essential elements of voluntarism and finality are left bearing small resemblance to the original intention of the parties.

The provisions of the Uniform Act with its many open invitations to a party to call upon a court to intervene in the arbitration process is, in my judgment, fundamentally inconsistent with the basic major features of voluntary labor-management arbitration, intended to be the terminal point in every dispute, and not the signal for the beginning of court intervention, review, and a process of appeals.

I have elsewhere entered the plea that we should exercise some degree of patience with a system that is yet in its experimental and developmental stage, and that we may find it much wiser to let the processes involved in labor-management arbitration have a chance to mature unrestricted, instead of attempting to put them into a legislative straight jacket, or authorizing the court to barge in upon that very sensitive development. This is peculiarly a field in which legislation

should not enter unless the necessity therefor to save the usefulness of the institution has been demonstrated beyond all rational doubt. No such urgent necessity has been been discerned in the part of the country with whose arbitration practices and needs I am most intimately familiar.

E. General Discussion

I. ROBERT FEINBERG: Some of the speakers have made the point that one of the reasons they are opposed to the Uniform Arbitration Act is that the courts are not familiar with labor relations, or would get into such questions as seniority, discharges and other matters with which the courts necessarily would not be familiar, and that, consequently, the arbitrator who has been selected by the parties, as an expert, should ultimately decide the case.

Now, isn't it true that under the Uniform Act, just as under the New York and other statutes, the courts are prohibited from getting into the merits of the dispute and can only set aside an award on collateral grounds, so that, consequently, those issues, in any event, would not be submitted to a judge?

PROFESSOR HOWARD: That is a question I definitely wanted answered by someone who is not particularly for or against the statute. It has seemed to me that Section 2, for instance, of the Act, especially in (c) and (d), which deal with "an issue referring to arbitration", and "an issue subject to arbitration", implies that the court is going to have to determine the question of arbitrability. My theory is, that when they deal with that question of arbitrability, they are going to get into the very problem of interpretation of the provisions of the contract that were intended to be left to the arbitrator.

There are certain other provisions that, it seems to me, lend themselves to the same possibility.

CHAIRMAN SMITH: Do you consider this an answer to your question, Mr. Feinberg?

MR. FEINBERG: Only in a limited sense.

ARCHIBALD COX: I would like to elaborate a little a sentence in Dean Pirsig's remarks, which I think we sometimes have not thought enough about, and perhaps some of the other speakers would comment upon it, so I would ask Dean Pirsig if I may turn it into a question.

Dean Pirsig suggested, and I think rightly, that a lawyer today could do more to tie up a labor arbitration and to haul people through the courts and to make it expensive to challenge the award, without any statute, than could possibly be done under this statute.

There are decisions that support the view that you can go in and get a stay of arbitration, where the arbitrator is going to decide something not arbitrable. There are grounds in common law for attacking awards that are broader than the grounds set forth in the statute. It is true, people have not done that on a very wide scale, but there are indications that it is being done more broadly.

We have had two cases in the Supreme Judicial Court in Massachusetts where this was done, and the proceeding was tied up below—part of it permanently. I have an award of my own in court now that has been there for a year, where the employer was challenging it, because I ordered reinstatement instead of simply finding that a person had been discharged without cause.

These things can be done, and I think they are going to be done increasingly. I think the real point here is that in the past, arbitrations and industrial relations have been carried on separate from the law, and it is likely to be true that the union lawyers are trying to take advantage of the courts as much as employer lawyers, and I venture the suggestion, that Dean Pirsig is not only right, but 15 years from now, without arbitration statutes, you will find a host of situations in which the courts are exercising their existing powers.

My other thought follows along in line with the first. I sat here wondering when Professor Howard spoke about a court decision enforcing agreements to arbitrate, and Whitley McCoy said he liked the first section of the Uniform Act, but nothing else, just what powers he thought the courts would exercise under such a common law decision or under such a general declaration. They will surely make up some rules for deciding when they will send you to arbitration and when they won't send you to arbitration. They will surely make up some rules for deciding what awards they will set aside and which ones they will enforce. The real question there is whether you have more confidence in a statute that is drawn at the present time somewhat in advance, before people have too much vested in a line of court decisions; or whether you have confidence in the courts to work out a better set of rules than could be worked out in a statute.

I do not detect that confidence, and I wonder whether someone could answer this?

MR. MCCOY: I think Professor Cox is pessimistic in thinking that the trend is going to be toward more appeal to the courts in the absence of statute.

It seems to me that the trend is entirely the other way, that labor and management, which were at each other's throats 20 or 30 years ago, are learning more and more to live together and there is less danger of going to courts today than there ever was, and there will be less in the future, unless you adopt a statute which invites the parties to go to court, and that is what the statute would do. It would be an open invitation.

Today when you get a situation of a company or a union losing a case, and they say to the lawyer, "What can I do?", the lawyer doesn't start to tell them all their common law remedies. He says, "You can't do anything; it is final and binding." But what would the lawyer say under this Act? He would say, "Oh, under Section So-and-So, we will take this to court," so I think the trend is the other way.

PROFESSOR HOWARD: I would like to say just one word to what Professor Cox had to say on the earlier question.

My chief plea is that we not adopt this as a Uniform Act and try to get it enacted in the states where people feel that they do not need it. My people, I am strongly convinced, feel that they do not need it.

In comformity with what Mr. McCoy just said, not long ago I had a conversation with one of the leading lawyers representing industry in St. Louis, who spends his whole time in the field of labor-management relations, and he gave voice to exactly the same situation. He says, "Today, when one of my companies is disgruntled with an arbitration award and asks me what I can do, I say, 'You agreed that this arbitration should be final and binding, didn't you?', and they say, 'Yes.' " And, he says, "I say, 'Forget about it', but, if they had the statute and with these provisions, where you can ask the court to modify or vacate the award, I would be forced to tell them, 'There is a statute allowing you to do it,' and we would be getting into court every day, and that is the primary reason I am opposed to the Act."

A lot of industry and labor lawyers in that area are of the same view.

CHAIRMAN SMITH: I am sure the lawyer would feel he had to tell his clients about remedies available at common law.

ABRAM H. STOCKMAN: Did the Commissioners consider the suggested change in the last sentence of the first section, as suggested by Professors Howard and McCoy?

DEAN PIRSIG: Yes, they did, and it was felt, as a matter of fact, the disposition was even not to put in the qualifying clause now. The qualification was put in essentially at the insistence of labor representatives with whom we consulted, and they were completely satisfied with the provision as it now stands.

In effect, the purpose of this reversal of the language is to exclude the provision and make it a subject of bargaining between labor and management. It seemed to us, if this is a good Act, and we think it is, then the weight ought to be on the other side; that if it does not apply in this particular case, then, let the parties discuss that. I think there is a good deal of risk that a contract might not provide for it, on the assumption that it is already covered by the Act, so that in many cases it would defeat the intention of the parties.

I might just add one word to Professor Cox's observation. It seems to me that that Mississippi case will invite the very kind of obstructive legal tactics that he is anticipating, because, if a court may go in as an equity court to tie up the enforcement of the award, or for specific performance of an agreement to arbitrate, you can tie up an arbitration for years by an action, and this Act was specifically designed to substitute a quick and economical procedure to replace it.

CHAIRMAN SMITH: I suppose it would be interesting to find out statistically the extent to which one side or the other might introduce at the bargaining table in contract negotiations in any state adopting the Uniform Act, the question of whether the parties should agree to exclude its application in a particular case.

Are there any other questions?

REV. LEO C. BROWN: Like Professor Howard, I am from Missouri. My remarks are based upon the assumption that this Act, laying the basis for appeals, will facilitate appeals. If that is true, it seems to me that the Act will very definitely discourage arbitration.

I think most of us have seen very few cases in which people have refused to arbitrate or refused to abide by an award, but I think many of us have seen cases where one party had somewhat unwillingly submitted to arbitration, or cases where one party has insisted that you will arbitrate only one case at a time, the reason being quite obvious, that

they wanted to increase the costs and discourage the other party from arbitrating.

Even in instances where the arbitrator was entitled to a very substantial fee, even in cases where parties wanted to discourage arbitration by increasing the costs, I think, with an Act that invites litigation, they have this opportunity, and while I am not saying there are a large number of cases where this is likely to be true, I think there are many more such cases than there are instances of people refusing at the present time to arbitrate or to abide by an award.

NATHAN P. FEINSINGER: It seems to me that one thing that is lacking in this Act is a statement or declaration of policy at the outset.

As it stands now, courts, unfamiliar with the process of arbitration, have no guide by which to determine what is to be accomplished, and I am wondering, Dean, whether it wouldn't be worthwhile to insert a policy statement at the outset which would still some of the fears that have been expressed here, as to what would be the ultimate outcome of the adoption of the proposed Act.

I was thinking of something along these lines, a policy statement which would read somewhat as follows:

1. The object of the Act is to encourage resort to arbitration as a voluntary and peaceful and expeditious procedure for the settlement of commercial and labor disputes (assuming both remained connected in the same Act).
2. To make agreements to arbitrate enforceable.
3. To clarify and limit the grounds on which awards intended to be final and binding may be attacked through judicial proceedings and in the same vein, to discourage frivolous attacks on arbitration awards intended to be final and binding.

Have you given any thought to such a statement?

DEAN PIRSIG: Let me give you a little background on that. I think it is a very good statement. I have no objection to it.

The policy of the Conference of Commissioners on Uniform Laws, after having had experience with prefatory introductory policy statements, and having found that it gets itself into all kinds of difficulties with them, not with just this Act, but all acts, has been not to include policy statements.

A good deal of what you have mentioned in that prefatory statement of policy is now included in the prefatory note, which accompanies the

Act itself and is before all the legislatures through their commissions, so, what you have in mind is, in substance, accomplished by this prefatory note.

This does not, of course, get on to the statutes, but I think it would be rather ample annotation that accompanies the Act, so we can anticipate that it will be before the courts.

MR. FEINSINGER: Is that note available?

DEAN PIRSIG: Yes.

ALBERT J. HOBAN: On the point raised by Mr. Feinsinger, we actually had that come up in Rhode Island, where one of the lower courts, assuming the Act had been drafted from the New York Act, has ruled that, of course, we adopted the New York decisions, which was not the intention of the legislature at all, and if you do not have either a policy statement or something very strong in the notes, I am afraid you will run into that in the adoption of the statute.

WILLIAM SIMKIN: I don't know whether this is a comment or a question, but it seems to me that we all would agree that for perhaps the bulk of relationships, there is no problem with or without an Act. Where relationships are good, there will be no problem. But where there is a reasonable degree of reluctance, either to arbitrate or to comply with the award, then I would suggest, and I think it is implicit in what has already been said, that the existing sanction and the reason so few cases get into court, is the fact that the union has given up the right to strike, and that when there is undue reluctance either to arbitrate or to comply with an award, that sanction comes up.

My question is this: Would the enactment of an Act like this weaken the sanctions which exist, which are primarily the union's likelihood to strike where reluctance exists?

DEAN PIRSIG: I am not sure about the kind of case you are assuming. If you are assuming a case where the reluctance is based upon a bona fide claim that the arbitration agreement does not apply, then, essentially, it comes down to an argument that a man ought to forego his right to be heard on that, lest he run into a strike.

Now, if the claim is not bona fide, then I suppose that the order will result in an order to arbitrate and you will have arbitration in a very short time.

I am not sure that I get your point.

MR. SIMKIN: Realistically, I don't think it makes much difference

whether it is a good case or a bad case. If it is a bad case, in the present situation, we, as arbitrators, have a question of arbitrability at the hearing, but the hidden force of the strike is what forces it into the hearing, and we decide that question, rather than the courts. I don't know whether that is answering your point or not.

DEAN PIRSIG: Well, I do not quite see how this Act could substantially affect the motivation of those people. Maybe I am wrong, but I mention that as a factor. I suppose, if a man still wants to maintain his good relations with management or labor on the other side, that that will continue to be a factor which will avoid resort to courts.

MR. SIMKIN: The reason for my comment is, my observation is only as to cases that go into the courts, where one side or the other has no economic strength. Those are the only cases, by and large, that ever get into the courts.

PROFESSOR MCCOY: I wanted to add this thought along the lines that Mr. Simkin has been suggesting, at least. I don't suppose there is an arbitrator here who has not been amazed at times, at the theories of companies as to what is a proper raising of the issue of arbitrability. They come before me all the time making an argument on the merits, and thinking they are making an argument that it is not arbitrable. In other words, the company has a perfect defense in this case: There is nothing arbitrable here. They just confuse the merits with the issue of arbitrability, and if this Uniform Act is passed, instead of coming before the arbitrator and making that argument on the merits, which they think is an argument on arbitrability, they are going to go into court with a motion to stay arbitration, and I can see that there will be a lot of such motions made.

Now, you go into court with a motion for a stay of arbitration, and make that argument, which is really an argument on the merits, and one or the other of two things happens—either the court disposes of it as we arbitrators do, by telling the parties that it is arbitrable, that you are talking about the merits; or the court goes into the merits, as the courts in New York have done a good many times. So it seems to me that whenever you have an encouragement to go into the courts like that, you have also an encouragement to resort to a quickie strike instead of to arbitration.

BERTHOLD W. LEVY: It seems to me, somewhat along the lines that Mr. Simkin just spoke of, perhaps you have not got a rather funda-

mental point here this morning. We seem to be assuming that the existence of an arbitration statute, even generally like the proposed Uniform Statute, will encourage resort to the courts, where previously there has been none, or has been very little.

Now, of course, New York is an important State, and we are all familiar with the things that have happened to the New York statute and the Arbitration Statute in New York, but I know of several other States, among which Pennsylvania is one, where there are arbitration statutes. The Pennsylvania statute is an imperfect statute, but it is patterned along the general lines of the one now in controversy.

So far as I know, because of that statute, there has not been any incitement to the parties to run to the courts. I think that those of us here who have any familiarity with the Pennsylvania law—and I see quite a few of you who do—will immediately concede that the difficulty with litigating the very rare cases in Pennsylvania which arise as a result of an arbitration award, or of an arbitration clause in the contract,—the difficulty that the lawyer finds is that there aren't any cases. The fact is, in Pennsylvania, at least, and I suspect in those other States where there are arbitration statutes of one kind or another, that they have not, as a matter of fact, incited resort to the courts, and you will find that the overwhelming majority of arbitration cases end with the award, whether or not there is satisfaction with it.

CHAIRMAN SMITH: It would be interesting to have some kind of a study made—maybe one has been made—as to what the impact on that is, whether there is an increasing tendency to resort to the courts in New York.

DEAN PIRSIG: On that specific point, I have it on hearsay, that an intensive study which is being made in the University of Chicago Law School on arbitration, including a study of this very point, to what extent are parties going to court under the New York Act, has shown that just in the most exceptional, infinitesimal portion of the cases, has there been any resort at all. That will tend to verify the point that has been made.

FREDERICK H. BULLEN: We have had an experience during the last year, which I think is directly on this point, which may interest some of you.

We attempted to negotiate a long-term contract with two unions, we representing an association, in a State where there is no arbitration act. We are unable to get a no-strike provision in that contract. They have not had one for many years, never had one, in fact. We were unable to get a no-strike provision in the contract, because the union said they had no other remedy except a strike to enforce an arbitration award. They recognized that they might, through the State courts, attempt to enforce the award through common law processes, but they felt it was too cumbersome for them and they were agreeable to signing a no-strike provision if there was some method in the State courts, some reasonable method of enforcing the award.

This was a peculiar situation, because it involved approximately seventy employers in the association, many of whom were, of course, irresponsible employers, but some of whom were not. The more responsible group within the association was very much in favor of having an act of some type in the State because they felt it would enable the unions to force, through court actions, rather than strike, those employers who did not go along with the procedure to enter into it and to abide by it. I think that in this case the more responsible elements in the association were damaged considerably through their inability to get a long-term contract with a no-strike provision.

A. HOWARD MYERS: It seems to me that all of the discussion and all of the writings on the subject assume that the result of the statute will be solely to provide an instrument whereby management may be able to obstruct arbitration by use of the resources that the statute would provide by way of access to courts.

There is another side to this problem. I find a great many situations where this kind of statute might put some pressure on unions to arbitrate situations where, for instance, the direct action boys who submit themselves to arbitration sometimes, do not want a piece rate set by an arbitrator, because they are happier working under the contract in the absence of a piece rate; or where they don't want to go to arbitration on an employer's request for an increase in work loads, because they are happier with four machines rather than seven; or they don't want to accept the arbitrator's award after he has ruled some change in economic conditions.

It seems to me—I am not making any arguments for or against the statute—but it seems to me our discussion ought to approach it in the

broader sense than that this merely provides an instrument whereby employers may obstruct arbitration.

I think, to be perfectly honest about the problem, the unions, too, ought to think a little more about it in this direction. Some of them are supporting statutory action, and they also recognize the fact that it may be used very often by employers to promote arbitration which, in terms of our organization here, is a major consideration that may have been overlooked.