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Arbitration—Arbitration Clause Regarding Breach of Contract Strictly Interpreted By Court

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arbitration agreement contained specific rights concerning them. And therefore, under the authority of *Hudak v. Hornell*,[5] it asserted the employees could bring a direct action against the employer. However, that case is distinguishable. It involved a situation where the union-employer agreement almost specifically referred to, and was made for, the benefit of four specific employees. Thus, it therefore correctly could be concluded that these employees were true third party beneficiaries. Here the situation is different. The employees are not specifically designated but are rather mere members of a large and changing group.

The present decision seems sound although the status of an employee's right to attack or intervene in arbitration proceedings has of late become a field of somewhat changing concepts.[6]

ARBITRATION CLAUSE REGARDING BREACH OF CONTRACTS STRICTLY INTERPRETED BY COURT

This action was brought by a subcontractor, against the contractor, to foreclose two mechanic's lien for work allegedly performed under their contract. Performance by the subcontractor stopped when the contractor refused to allow the subcontractor to go on with the job and failed to make certain progress payments. The contractor on appeal was seeking to stay further legal prosecution pending arbitration, pursuant to a clause of the contract which provided that "all questions that may arise under this contract and in the performance of the work thereunder" were to be arbitrated. The subcontractor alleged breach and repudiation asking for damages for such breach, contending the controversy and question were not in "recognition" of the contract and therefore not arbitrable. The two lower courts agreed with plaintiff in his contention and denied the motion to stay.[7]

The general rule is that where there is a broad arbitration clause, any dispute arising thereafter is for the arbitrators and not for the Court.[8] In *DeLillo Construction Co., Inc. v. Lizza & Sons, Inc.*[9] the Court of Appeals felt, however, that the matter of *consequential* damages was for the court and not for the arbitrators. The Court distinguished between damages flowing immediately form the breach and those arising indirectly. The latter would only go to the arbitrators under a clause providing that all disputes arising "out of" (or any such all-inclusive words) the contract be submitted to arbitration. The Court concluded that the plaintiff should not be allowed to conclusively frame the issue in terms of breach and repudiation to thereby escape arbitration, for

5. 304 N.Y. 207, 106 N.E.2d 609 (1952).
6. See cases cited in In re Soto, supra note 3.
7. 2 A.D.2d 828, 182 N.Y.S.2d 297 (1st Dep't 1959).
8. In re Lippman, 289 N.Y. 76, 43 N.E.2d 817 (1942).
9. 7 N.Y.2d 102, 195 N.Y.S.2d 825 (1959).

to be able to do so would render the arbitration agreement meaningless. Thus the lower courts were reversed, granting the motion to stay.[10]

At common law, arbitration agreements as to future disputes were unenforceable because they took away a right to seek redress in the courts.[11] Later such agreements to arbitrate future disputes were enforced but the provisions were strictly construed.[12] Today there is a tendency toward more liberal construction, as evidenced by a survey of the cases; but nevertheless parties will not be compelled to arbitrate unless they have agreed to do so in clear language.[13] An agreement to submit "any and all controversies growing out of the contract" to arbitration will not only give the arbitrators authority to adjudicate a breach but also to assess the damages.[14]

The decision in the case at bar seems to be substantially in line with the decision in *In re Arbitration Between Terminal Auxiliar Mari v. Winkler Credit Co.*[15] where "any dispute (arising) under . . ." the contract was to be submitted to arbitration. There the plaintiff was not allowed to term the breach a termination; the Court saying: "the so-called termination . . . was nothing more or less than a 'termination' of a contract for an alleged breach or non-performance of its terms. That does not put an end to the right to arbitrate claims accruing prior thereto, for, if it did, an arbitration clause could rarely, if ever, be carried out."[16]

When there is an agreement to arbitrate, in writing,[17] entered into in New York, there is deemed to be an automatic submission to the jurisdiction of the Supreme Court of this state. That court may enforce such agreement according to the interpretation of the arbitration clause they find to be correct.[18]

It appears clear that to provide for questions arising "under" the contract to be submitted to arbitration will not allow a party to escape arbitration by terming the dispute a breach. Yet, while the court holds that such wording will not allow avoidance of arbitration, the issue of consequential damages is for the court. Should not the issue of consequential damages also go to the arbitrators when such a broad construction is given to the words arising "under" the contract? To date the courts have said that the clause must provide "all issues and disputes in *connection* with the contract" are to be submitted to arbitration (or words similarly all inclusive) to give the arbitrators the power to assess consequential damages, presumably, because, although they are direct, they are not immediately consequential upon the default.

10. N.Y. Civ. Prac. Act § 1451.
11. Whiting v. Trojan Textile Corp., 307 N.Y. 360, 121 N.E.2d 367 (1954).
12. In re General Silk Importing Co., 200 App. Div. 786, 194 N.Y. Supp. 15 (1st Dep't 1922), aff'd 234 N.Y. 513, 138 N.E. 427 (1922); N.Y. Civ. Prac. Act § 1448.
13. Riverdale Fabrics Corp. v. Tillinghast Stiles Co., 306 N.Y. 288, 188 N.E.2d 104 (1954); N.Y. Civ. Prac. Act § 1449.
14. Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 169 N.E. 386 (1929).
15. 6 N.Y.2d 294, 189 N.Y.S.2d 655 (1959).
16. Id. at 298, 189 N.Y.S.2d 658.
17. N.Y. Civ. Prac. Act § 1449.
18. N.Y. Civ. Prac. Act § 1450.