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ORAL EXTENSION OF WRITTEN ARBITRATION CLAUSE SUFFICIENT UNDER SECTION 1449 OF CIVIL PRACTICE ACT

In *Acadia Company v. Edlitz*,¹⁹ the Acadia Company, Edlitz's employer, brought an action at Special Term to compel arbitration and to stay an action instituted by defendant in the Municipal Court in the City of New York.

The facts of the case were undisputed and were as follows: Plaintiff employed defendant under a written agreement from July 22, 1957 to January 22, 1958. The agreement provided for arbitration of any question, difference, or controversy arising as to the interpretation or performance under the contract. Defendant conceded that prior to the expiration of the contract, the contract was orally renewed and defendant's employment extended six months. Subsequently, the employment was terminated and a dispute arose over whether the contract had been breached and as to wages due defendant.

The Supreme Court entered an order denying plaintiff's motion and the Appellate Division affirmed.²⁰ Plaintiff then appealed to the Court of Appeals and the Court of Appeals unanimously reversed with an order to grant plaintiff's motion.

Section 1449 of the New York Civil Practice Act provides: "A contract to arbitrate a controversy *thereafter arising* between the parties must be in writing. Every submission to arbitrate an *existing* controversy is void unless it . . . be in writing and subscribed by the party to be charged therewith . . ." (emphasis added).

The Court of Appeals had no trouble determining that the oral renewal was an adoption of the written contract with the only modification being the extension of the time of employment. Defendant had conceded that the contract had been orally renewed. This raised the presumption that the renewal was based on the original written agreement.²¹ This presumption is so strong that even when notice of termination is given, continued employment will be deemed to be on the terms and conditions of the original written contract of employment.²²

This determination, of course, satisfied the requirement of Section 1449 that a Contract to arbitrate a future controversy must be in writing but still left the court with the problem of the party's signatures.

In *In re Helen Whiting, Inc. (Trojan Textile Corp.)*,²³ defendant had agreed to purchase three kinds of cloth from plaintiff. Plaintiff sent defendant three contracts, one for each batch of cloth ordered. On the back of each contract was a written agreement to arbitrate any controversy arising under the contract. Defendant signed and sent to plaintiff one of the contracts but held the other two and informed plaintiff that it did not want the other two batches.

19. 7 N.Y.2d 348, 197 N.Y.S.2d 457 (1960).

20. 8 A.D.2d 807, 187 N.Y.S.2d 467 (1st Dep't 1959).

21. *Adams v. Fitzpatrick*, 125 N.Y. 124, 26 N.E. 143 (1891).

22. *Carter v. Bradlee*, 245 App. Div. 49, 280 N.Y. Supp. 368 (1st Dep't 1935).

23. 307 N.Y. 360, 121 N.E.2d 367 (1954).

The Court of Appeals affirmed an order compelling defendant to submit to arbitration all three contracts holding that Section 1449 was sufficiently complied with.

The Court ruled, as they did here, that the second part of Section 1449 requires that the writing be signed, but the first part of the Section—the part that deals with a contract to arbitrate a controversy thereafter arising—need only be in writing and does not need to be signed.

ARBITRATION AWARD OF SPECIFIC PERFORMANCE

On a motion to confirm an arbitration award of specific performance,²⁴ the Court of Appeals, in *Grayson-Robinson Stores, Inc. v. Iris Construction Co.*,²⁵ was faced with the following situation: defendant repudiated its promise to build a store for plaintiff in a proposed nine million dollar shopping center, giving as cause plaintiff's inordinate delay in approving final plans for the structure. The delay was alleged to have caused investors to regard the project as a poor risk (plaintiff was the largest tenant), thus making it impossible for defendant to obtain mortgage financing. The dispute was submitted, under the terms of the contract, to the American Arbitration Association for resolution.²⁶ The arbitrators found that plaintiff had acted in good faith in regard to the approval of building plans and, therefore, that defendant had no basis for repudiation; that mortgage financing was available, even if more costly and, therefore, that defendant could not plead impossibility of performance. The findings resulted in an award ordering defendant to proceed with construction.

In affirming decisions of Special Term²⁷ and the Appellate Division²⁸ confirming the arbitration award of specific performance, the Court of Appeals held that, assuming the Court could overturn an arbitration award of specific performance on the basis that it would have discretion to overturn a similar decree of equity, this award is neither inconsistent with the relief available in equity or an overreaching of the arbitrators' power, and should, therefore, be confirmed.

The Civil Practice Act, Sections 1462 and 1462-a clearly label the grounds upon which the court may vacate an arbitration award. Section 1462(4) provides that the award may be vacated "Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter was not made." Among the provisions this stands as the only one permitting an exercise of judicial discretion. The first question for the Court became, then, what is the measure of that discretion? Is it, as

24. N.Y. Civ. Prac. Act § 1461.

25. 8 N.Y.2d 133, 202 N.Y.S.2d 303 (1960).

26. The rules under which this body operates specifically provide that the arbitrators may grant specific performance as a remedy.

27. 9 Misc. 2d 796, 168 N.Y.S.2d 513 (Sup. Ct. 1958).

28. 7 A.D.2d 367, 183 N.Y.S.2d 695 (1st Dep't 1959).