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Contracts—Agreements to Arbitrate

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be their agreement.² The writing need not be of a formal character; letters and telegrams are sufficient if the requisite intent is found.³ Since the court stated the letters evidenced a contract, the rule that any relevant testimony may be admitted to prove that the document was not adopted as an integration,⁴ does not apply. Evidence showing that no assent was made to a complete and accurate integration is still permitted under such circumstances,⁵ and in fact the letters exchanged between the parties in the instant case contained some variance. Some parol evidence may have been appropriate to show the surrounding circumstances out of which the agreement arose,⁶ if this would help clarify the meaning of the language used by the parties.

The court reinforced the rule that a seller is not restricted to tender the goods on any particular day, but may offer delivery at any time during the contract term,⁷ so long as the seller does not offer the goods at an unreasonable hour⁸ or under circumstances which may put the buyer in technical default.⁹ Nor does the buyer's later willingness to accept delivery aid him, since the breach of contract excuses the seller from further performance on his part.¹⁰

Agreements to Arbitrate

a. *In sales memorandum:* Since arbitration is an inexpensive, expeditious method of adjusting controversies, it is the policy of the courts to encourage and uphold arbitration.¹¹ However, the intent to arbitrate must be clearly shown.¹² For the second time in two years, the court was presented with the vexing problem of whether such an intention was sufficiently evidenced by the signing of an agreement which referred to rules of a trade association including among them a mandatory arbitration clause. The

2. *Friedman & Co. v. Newman*, 255 N. Y. 340, 174 N. E. 703 (1931); *Chapin v. Dobson*, 78 N. Y. 74 (1879); 3 WILLISTON, CONTRACTS § 633, (Rev. ed. 1936).

3. RESTATEMENT, CONTRACTS, § 228, Comment (a) Illus. 2; 3 CORBIN, *op. cit.*, § 588 (1951).

4. 3 CORBIN, *op. cit.*, § 577.

5. *Id.* § 582. See *Hale. The Parol Evidence Rule*, 4 OR. L. REV. 91 (1925).

6. *St. Regis Paper Co. v. Hubbs*, 235 N. Y. 30, 138 N. E. 495 (1923); 3 CORBIN, *op. cit.*, § 579.

7. *Curtiss v. Howell*, 39 N. Y. 211 (1868); *Rahnsen & Co. v. Leaf*, 203 App. Div. 618, 197 N. Y. Supp. 160 (1st Dep't 1922); 2 WILLISTON, SALES, § 451 (1948).

8. PERSONAL PROPERTY LAW § 124 (4).

9. *Manners & Co. v. Hershenhorn & Sons*, 280 App. Div. 711, 116 N. Y. S. 2d 532 (1st Dep't 1952).

10. *Jardine, Matheson & Co. v. Huguet Silk Co.*, 203 N. Y. 273, 96 N. E. 449 (1911); *Gourd v. Healy*, 206 N. Y. 423, 99 N. E. 1099 (1912).

11. *Feuer Transportation, Inc. v. Local Union No. 445*, 295 N. Y. 87, 65 N. E. 2d 178 (1946).

12. *Lehman v. Ostrowsky*, 264 N. Y. 130, 190 N. E. 208 (1934).

court, in *Riverdale Fabrics Corp. v. Tillinghast Stiles Co.*,¹³ held (4-3) that where a sales memorandum did not mention the settlement of disputes by arbitration, but merely contained recitation that, "This contract is also subject to the Cotton Yarn Rules of 1938 as amended," one of which rules contained an exclusive arbitration clause, no intention to proceed to arbitration was shown and a stay of arbitration was granted.¹⁴

Judge Van Voorhis distinguishing *Level Export Corp. v. Wolz Aiken & Co.*,¹⁵ stated that in the instant case the parties are not deemed necessarily to have contemplated anything more than that the cotton yarn rules should apply to the completion of sales under the agreement, whereas in the *Level* case there was an "incorporation clause" which indicated a blanket acceptance of the various trade association provisions. The clause in the instant case was found to be similar in import to that contained in the first case raising this issue in the New York Courts.¹⁶

The court indicated that draftsmanship such as that contained in the cotton yarn rules will be looked on with a wary eye because of their tendency to lead the unwitting into arbitration against their will.¹⁷ No particular form of words are necessary so long as the intention to arbitrate is demonstrated.¹⁸

Judge Desmond, a dissenter in *Level*, joined by Judge Dye in this case, feels that the court without overruling that case puts an opposite construction on language which has the same meaning as the language in the *Level* case.¹⁹ He points out that in none of the three contracts (*Gerseta*, *Level* and this case) was there any actual mention of arbitration and hence all three failed to include the "clear language" necessary to bind the parties to arbitration. He would make consent to arbitrate a matter of fact and not of law.

13. 306 N. Y. 288, 118 N. E. 2d 104 (1954).

14. C. P. A. §§ 1450, 1458 (2).

15. 305 N. Y. 82, 111 N. E. 2d 218 (1953). "This sales note is subject to the provisions of the Standard Cotton Textile sales note which, by reference, is incorporated as a part of this agreement and together herewith constitutes the entire contract between buyer and seller." (Held, parties must proceed to arbitrate).

16. *General Silk Importing Co. v. Gerseta Corp.*, 200 App. Div. 786, 194 N. Y. Supp. 15 (1st Dep't 1922), *aff'd* 234 N. Y. 513, 138 N. E. 427 (1922). "Sales are governed by raw silk rules adopted by the Silk Association of America." Held, no intention to arbitration shown.

17. *Cf. Philip Export Corp. v. Leatherstone, Inc.*, 275 App. Div. 102, 87 N. Y. S. 2d 665 (1st Dep't 1949).

18. *Lehman v. Ostrovsky*, *supra* note 12.

19. The history of the instant case in the courts below indicates that not only businessmen, but the courts also have difficulty in differentiating between the permissible and the impermissible in this field. See 3 *BFL*O. L. REV. at 87 (1953).

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Judge Froessel, in a memorandum opinion, believes that the words—"This contract," since they are far broader than—"Sales" used in *Gersetta* brings this case within the holding of the *Level* case.

There is some authority even prior to the *Level* case for the proposition that where an arbitration clause is incorporated by reference, even though not specifically mentioned, it will suffice to indicate an intention to arbitrate.²⁰ The law has not been modified since, so as to protect those who intend to have arbitration handled by their particular trade association from a unilateral breach of this agreement. In most cases both parties are members of the same association, or at least are thoroughly familiar with its rules.

b. Signing the agreement: At common law, while even oral contracts to arbitrate an existing dispute were enforceable, unless in contravention of the Statute of Frauds,²¹ all agreements to arbitrate a future dispute were unenforceable.²² New York statute law has substantially changed the common law rules. Now every submission of a present dispute to arbitration must be evidenced by a written contract.²³

In *Helen Whiting, Inc. v. Trojan Textile Corp.*,²⁴ a buyer orally agreed to purchase over 80,000 yards of various goods from a textile manufacturer. On the same day, the textile firm sent written contracts to their buyer covering the entire transaction and including provisions for arbitration. Three days later invoices were sent to the buyer and the following day, the buyer requested and got delivery of five yards against each of the contracts. Two days later, the buyer informed the textile firm that it could only use one kind of the merchandise and signed and sent back only one of the three contracts. The buyer moved for a stay of arbitration. The Court of Appeals held, Judge Froessel and Van Voorhis dissenting, that all three contracts were accepted, that part performance took them out of the Statute of Frauds and that a binding agreement to arbitrate is present, even as to the two contracts not signed.

The court indicated that the oral agreements of the parties clearly demonstrated that a binding agreement had been made between the parties. Further proof, if any were needed, was furnished by the fact that the buyer retained the contracts for

20. *Hines v. Ziegfeld*, 222 App. Div. 543, 226 N. Y. Supp. 562 (1st Dep't 1928).

21. *French v. New*, 28 N. Y. 147 (1863).

22. *Hurst v. Litchfield*, 39 N. Y. 377 (1868).

23. C. P. A. § 1449.

24. 307 N. Y. 360, 121 N. E. 2d 367 (1954).

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six days,²⁵ and in the meantime, accepted invoices for some of the goods and received actual delivery of part of the goods.

This latter delivery satisfied the Statute of Frauds,²⁶ since it was found that the goods were not sent for approval and were not merely samples of the subject matter of the sale.²⁷

The finding of an agreement to arbitrate was also supported by the fact of the retention of the contracts and by the buyer never objecting to their inclusion, and indeed, by his signing one of the three contracts containing this provision.²⁸ The fact that the buyer had never signed two of the contracts, although it was found to have accepted them, was found to be without legal effect, since the statute, in terms merely provides that an agreement to arbitrate a future controversy must be contained in a written contract, which as shown above, may in certain circumstances be accepted without signing it.²⁹

The dissenters felt that since no mention of arbitration was made at the original meeting, the "contracts" containing an arbitration clause were not acknowledgments of a contract, but were counter-offers adding a provision for arbitration.

The interpretation of the arbitration statute seems to be sound, since the court declined to go farther than the Legislature provided when it modified the common law rule. Arbitration by entrapment need not be feared, because the instances of finding an acceptance of a written contract without a signing of same are rare.

Conditions Precedent

The liability of a party to perform his promise is frequently made dependent upon a condition precedent, and, generally, unless such a condition precedent is performed no liability attaches

25. "A party by receiving and retaining under certain circumstances a written agreement signed by another party may be bound by the terms of such writing, though his signature does not appear thereon." *Murray v. Cunard Steamship Co.*, 235 N. Y. 162, 167, 139 N. E. 226, 228 (1923). See *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 35 (1873); *Schnurr v. Quinn*, 83 App. Div. 70, 82 N. Y. Supp. 468 (2d Dep't 1903); 1 WILLISTON, CONTRACTS, § 90A (Rev. ed. 1936).

26. PERSONAL PROPERTY LAW § 85.

27. Samples are never regarded as part of the subject matter of the sale. *Cleveland Worsted Mills Co. v. J. C. Brownstone & Co.*, 190 N. Y. Supp. 601 (Sup. Ct. 1921).

28. The court mentioned that its own experience proves that arbitration clauses are commonly used in the textile industry.

29. *Japan Cotton Trading Co. v. Farber*, 233 App. Div. 354, 253 N. Y. Supp. 290 (1st Dep't 1931); *Exeter Mfg. Co. v. Narrus*, 254 App. Div. 496, 5 N. Y. S. 2d 438 (1st Dep't 1938) reached this result in interpreting the statute on similar facts. The Court of Appeals indicated that it favored this rule in *Gantt v. Felipe y Carlos Hurtado & Cia*, 297 N. Y. 433, 79 N. E. 2d 815 (1948), but declined, at that time, to expressly so hold.