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THE 1965 GENERAL ARBITRATION STATUTE OF TEXAS
by
Paul Carrington*

CONTENTS

I. BACKGROUND

II. THE NEW TEXAS ACT CONTRASTED WITH THE UNIFORM ACT OF 1956
   A. Court Jurisdiction
   B. Ancillary And Other Court Proceedings In Aid Of Arbitration
   C. Discovery Depositions
   D. Determinations In Arbitration "Without Regard To The Justiciable Character Of The Controversy"
   E. Defenses Based On A Statute Of Limitations
   F. Attorneys' Fees
   G. Waiver Of Right To Be Represented By An Attorney

III. THE UNFORTUNATE AMENDMENTS BY THE LEGISLATURE TO ARTICLE 224 OF THE BAR PROPOSAL
   A. The Requirement That For Every Party, There Must Be A Signatory Lawyer
   B. The Exemption Of The Construction Industry
   C. The Exemption Of The Insurance Industry

IV. THE COMMON LAW ARBITRATIONS OF TEXAS
   A. System Of Arbitration Alternative To 1846 Act
   B. System Of Arbitration Alternative To 1965 Act
   C. Making Common Law Arbitrations More Serviceable By Carefully Preparing Agreements To Arbitrate

V. EFFECT IN TEXAS OF THE FEDERAL ARBITRATION ACT
   A. To What Arbitration Agreements Does The Federal Act Apply?
   B. Problems As To Jurisdiction And Choice Of Law Under The Federal Arbitration Act

VI. THE EXTENT TO WHICH TEXAS STATE COURTS MAY APPLY THE FEDERAL ARBITRATION ACT OR THE ARBITRATION ACT OF ANOTHER STATE IN ACCORDANCE WITH THAT LAW CHOSEN BY THE PARTIES

VII. CONCLUSION

APPENDIX

Legislative History of the 1965 Arbitration Act

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The author acknowledges the substantial assistance of Mr. Bob Mow of the Dallas Bar.
"It shall be the duty of the Legislature to pass such laws as may be necessary and proper to decide differences by arbitration, when the parties shall elect that method of trial." Texas Constitution, Article 16, Section 13.

I. BACKGROUND

The above provision, or one similarly worded, has been a part of the Texas Constitution, beginning with the first constitution of the State of Texas in 1845. For many years, the Interpretive Commentary to the arbitration section has said:

Commercial arbitration was known to the desert caravans in Marco Polo's time, and was a common practice among Phoenician and Greek traders. Civil arbitration played an important role as early as the Homeric period for Homer records the fact that chiefs and elders held more or less regular sittings in places of assembly to settle the disputes of all persons who chose to appear before them.

Arbitration always played an important role in Roman law, and the Texas heritage of arbitration can be traced back to the Spanish influence rather than to the common law influence. Title III, Art. 178 of the Constitution of Coahuila and Texas, promulgated in 1827 stated:

Every inhabitant of the state shall be perfectly free to terminate his controversies, whatever be the state of the trial, by means of arbitrators. . . .

And in 1832 the legislature of the state of Coahuila and Texas passed a law placing a $50 penalty on arbitrators who failed to render decisions. . . .

Although the Constitution of the Republic made no reference to arbitration, it did declare that all laws of the Spanish-Mexican period not inconsistent with the constitution remained in force. . . . As the Congress of the Republic passed a number of acts regulating arbitration, this provision was interpreted to cover arbitration.

1 Prepared by Professor A. J. Thomas and Ann Thomas of Southern Methodist University.


3 See also the Preface by the Secretary of Commerce, Honorable John T. Connor, to the new book, The Potential of Commercial Arbitration (1965). (This book by a group of eight authors is a research project of Harvard Business School and is published by the American Management Association.) Mr. Connor commenced his preface with this paragraph:

Settling disputes by arbitration is as old as the submission of the quarrel.
In April, 1846, acting under the direction of the 1845 constitution, the Texas legislature enacted an arbitration statute which constituted for approximately one hundred and twenty years the Texas statute on all arbitrations other than those involving labor disputes. (Labor arbitration for many years has been, and still is, governed by the second chapter of title 10 of the Revised Civil Statutes of Texas.) However, the ancient law finally gave way when the new chapter 1 of title 10 became effective on January 1, 1966; it expressly repeals and supersedes the 1846 General Arbitration Act.

It seems surprising that the old 1846 act with its roots apparently in civil law survived so long. Although it served effectively during the early years of statehood, when Texas courts were few and their sessions relatively infrequent, the act fell into disuse when courts were sufficiently available.

Recent years have witnessed a phenomenal growth in the number and influence of trade associations. In the Southwest alone (Ariz., Ark., La., N. M., Okla., Tex.) the 1949 statistics of the U. S. Department of Commerce show that there were approximately fifteen hun-

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Among Aphrodite, Hera, and Athena to the judgment of Paris. Yet arbitration has also been thought fitting in the most modern commercial contexts, both domestic and international. The recent proposal by the World Bank for a convention on arbitration of investment disputes is an example of the new uses to which the technique may be put.

This writer, surprised to discover that there were practically no commercial arbitrations in Texas when he investigated this area shortly after entering practice in this state, wrote a law review article in 1926. Carrington, Commercial Arbitration in Texas, 4 TEXAS L. REV. 410 (1926). In this article the inadequacies of the Texas statutes were presented. This author there referred to the quite similar wording of the 1846 Texas statute and a much earlier Louisiana statute and commented that both “doubtless” were developments from the civil law. The possibilities of doubt as to their origins are now conceded in light of the arguments of Professor Joseph W. McKnight in his article, The Spanish Influence on the Texas Law of Civil Procedure, 38 TEXAS L. REV. 24, 41-45 (1959). Professor McKnight advances reasons for concluding that the Texas statute of 1840, which adopted the common law generally, superseded the Spanish form of arbitration provided for in an 1812 arbitration statute of Goshuila and Texas and for concluding that, in wording, the New Jersey arbitration statute of 1794 and the Texas General Arbitration Act of 1846, from which the Texas Act of 1846 was presumably derived, were strikingly similar. In fact the Virginia Act of 1793, the New York Act of 1791, the New Jersey Act of 1794 and others were all similar, each being also similar to the English Act of 1698: Brown, British Statutes in American Law, 209, 210 (1964); Pirsig, Some Comments on Arbitration Legislation and the Uniform Act, 10 VAND. L. REV. 685 (1957). Surely the points of similarity of the very early Louisiana statute and the yet earlier New Jersey statute indicate that both had comparable roots, perhaps in the much earlier Roman law of arbitration. However, it would seem far more likely that an actual Louisiana contact rather than a New Jersey one, as surmised by Professor McKnight, was of significance to the Texas legislature in 1846; for we do know that several of the earliest legislators of the State of Texas were former Louisianans and that many early statutes (whether this one or not) were patterned on Louisiana statutes.

See Carrington, supra note 3, at 434-16. When the primary reason for this early popularity of arbitration, the lack of available courts for adjudicating controversies, no longer existed, the use of arbitration in Texas was greatly reduced. The pressures to use arbitration, whether adequate or inadequate, were removed and the inadequacies of the arbitration statute of this state apparently became the controlling factor in the pattern of disuse. See note 19 infra.
Danz lists more than three hundred and fifty Texas trade and professional associations, for the most part only statewide associations. The Encyclopedia of Associations by the Research Co. of Detroit shows that as of the 1964 printing there were more than one hundred and ten nationwide associations with offices in Texas cities. The 1966-67 Texas Almanac states that "there were about 560 privately supported civic, commercial and similar non-profit organizations in Texas on June 1, 1965."

The growth in trade associations has resulted in increased use of arbitration. The number of arbitrations involving controversies between members of the same trade association is thought to exceed all other arbitrations each year. But there is really no way to estimate the number of those conducted privately, since the only way they come of record is when a judgment is sought on the award, and since the vast majority of the awards are honored. Records of institutions like the American Arbitration Association, the largest of such institutions, are, of course, carefully kept. Its arbitrations are at the rate currently of 11,500 per year. However, this does not include the much larger number of private cases not handled by the Association but conducted under agreements in which the rules of the Association are incorporated.

In 1952, Professor Soia Mentschikoff pointed out the impact of increased use of arbitration. She noted that if we lay aside government cases and accident cases, then the matters going to arbitration rather than to the courts represent seventy per cent or more of the total civil litigation. If the trend to arbitration is increasing, then we are now living through a more violent stage of judicial machinery than was present when equity emerged into conflict with common law courts.

It has been recently estimated that the number of arbitrations has been increasing at the rate of approximately twenty per cent per year. A recent survey has been conducted at the Harvard Business School by sending questionnaires to executives of trade associations. Sixty-one per cent of those replying said that the arbitration clause...
is used in all contracts. Furthermore, the number of areas of controversy in which arbitration is being used is rapidly increasing.\(^4\)

The types of controversies in which arbitration may be used appear to be almost limitless. A review of only the publications of the American Arbitration Association in the last ten years shows an amazing variety of such controversies.

The best overall reading in this area is the short (107 pages) book, *Commercial Arbitration*, by Dr. Martin Domke. He has discussed the five chief advantages to be gained from arbitration, viz., speed, economy, expertise of the arbitrator, privacy, and effectiveness. Of course, the general conclusions in so short a book need to be checked against the particular provisions of state statutes.

Discussions of specific areas of controversy which easily lend themselves to effective arbitration are found in the following references:


(b) *Negligence cases* are increasingly determined by arbitration; a strong reason has been the long delay in awaiting court trials of such cases in the larger cities. See, e.g., *Plan for Arbitration* Chicago Bar Ass’n (July 4, 1961), referring to the overload of 65,829 pending lawsuits in Cook County. See generally the pamphlet of the American Arbitration Association, *The Lawyer and Arbitration*.


(g) *Use of Arbitration in Decedents’ Estates*, Lawyers’ Arb. Letter (Feb. 15, 1965).

(i) 40th Anniversary Pamphlet of the American Arbitration Ass’n (1966) (professional fees, medical malpractice, discrimination, small business investment company arbitrations and show business arbitration).


(g) Gerald Aksen has suggested to the writer of this Article current uses of commercial arbitration in addition to those above mentioned, such as: purchase agreements, sales agreements, agreements for rendition of legal services, manufacturer dealer arbitrations, subrogations, state and municipal agencies, principals-agents, joint venture agreements, automation problems, lease agreements, rent for a period of extension under a lease contract. This list of the types of subject matters in which arbitration has been found to be appropriate, of
As expected, the increased use of arbitration has been accompanied by an ever expanding role of attorneys in such matters. The extent to which attorneys are used in arbitration conducted by the American Arbitration Association is shown in Professor Mentschikoff’s report:

In matters involving $500 or less, in 42%
In matters involving $501 to $3,000, in 59%
In matters involving $3,000 to $20,000, in 74%
In matters involving more than $20,000, in 100%

However, the report also shows that the use of attorneys was not favored by many trade associations. Out of five hundred and forty-seven industry-wide associations, thirty-four per cent used arbitration machinery of their own in conducting arbitration determining controversies between their own members, and twenty-nine per cent encouraged use of other arbitration offices such as the American Arbitration Association. Most of the thirty-four per cent reported that the use of attorneys in these arbitrations was discouraged and that disciplinary machinery of the association constituted a sufficient means for enforcement of its arbitration awards without recourse to the courts. Sixty-eight per cent of the associations reported that arbitration agreements between their members were on printed forms furnished by the Association.

The astounding increase in arbitration usage has led many states to modernize their existing statutes. Following the example of the 1920 Arbitration Act of New York, the first in this country to make a written agreement to arbitrate a future controversy irrevocable, and the Federal Arbitration Act of 1925, twenty-two states have now enacted arbitration statutes with such a provision. Of these Arizona, course, cannot approach completeness. The list is submitted here for the purpose of stirring the imagination of Texas lawyers as to the possibilities for use of the new 1965 Texas statute, whether amended or not.

The preliminary inquiry reported by Professor Mentschikoff in 1952 developed into The University of Chicago Research Project on Arbitration. As director of this, she made a report of the results of the research in her article entitled Commercial Arbitration, 61 Colum. L. Rev. 846 (1961). One interested in the contrast between the usual trade association arbitrations and those conducted by individual lawyers for their clients, or conducted by the American Arbitration Association, which encourages the use of attorneys by the parties to an arbitration proceeding, should read this article in its entirety.

The list of the states (with year of enactment) having such an arbitration statute for commercial arbitrations is as follows:

Florida, Illinois, Minnesota, Maryland, Massachusetts, Michigan, New York, Texas, and Wyoming have, with varying changes, followed the pattern of the 1955 Uniform Arbitration Act as amended and approved in 1956. This wholly superseded the earlier Uniform Arbitration Act of 1926, which did not contain a provision as to future disputes. (This earlier act, after having been enacted in three states, was then withdrawn.)

In spite of the impressive national and regional statistics on arbitrations, Texas nevertheless has taken a back seat. The Arbitration Act of 1846 has been completely inadequate to permit Texans to participate locally in the great expansion of commercial arbitration.19

The number of commercial arbitrations in the various offices of the American Arbitration Association has been rapidly increasing except in the Dallas office. It has been the view of the officials of this association that the retarded growth of commercial arbitration in Texas is attributable to its unfortunate 1846 statute, and it is the view of this writer that a very large number of arbitrations involving Texans have been conducted in other states because of the inadequacies of that statute.

In 1926 the picture was presented very briefly and incompletely in a law review article20 by this writer, by illustrating the striking contrast between the amount of litigation in commercial disputes in England, where the arbitration system had been well developed, and in Dallas County, Texas, where arbitration was then practically unknown. The article shows the development of English arbitration by indicating that the number of commercial cases in court in England was relatively small because of the disposition of most of such matters by conciliation or arbitration.

Many were the efforts from 1925 to the enactment of the new act in 1965 to persuade Texas lawmakers to enact a modern and effective statute on commercial arbitration. Full particulars on these efforts are referred to in the Appendix with the idea that the history of failures prior to 1965 and of the amendments in the legislature to article 224 of the 1965 version enacted in 1965 may serve as background material for any interpretation of the present act.

19 See Sturges, Arbitration Under the Arbitration Statutes of Texas, 31 Texas L. Rev. 833 (1953), for a definitive analysis of the inadequacies of both the 1846 Texas General Arbitration Law and the later Texas statute, and amendments, on arbitrations between employer and employee (ch. 2, tit. 10, Tex. Rev. Civ. Stat.). (Sturges was then Dean of Yale Law School and Chairman of the Board of the American Arbitration Ass’n.) In a recent setting, contrasting the 1846 statute with the desired revision then sponsored by the State Bar of Texas, there is a yet more persuasive presentation in Dougherty & Graf, Should Texas Revise its Arbitration Statute?, 41 Texas L. Rev. 229 (1962). See also note 4 supra.

Also, this history may help those who, it is hoped, will shortly devote strong efforts to the improvement of the Texas act by amendments to the new article 224.

II. The New Texas Act, Contrasted with the Uniform Arbitration Act of 1956

Contrasts between the 1962 bar-sponsored bill, the Uniform Act, and the 1846 act are fully explained in an article by Dougherty and Graf. The Texas drafting committee, when in the summer of 1962 it was drafting the proposed bill to be submitted to the legislature in 1963, had before it the new California Act of 1961 and the new act in New York of early 1962, both containing improvements over the Model Act. Most of the state court decisions relating to commercial arbitrations are cases in New York, with California being clearly second. In the following paragraphs it is explained why some major changes were made from the Uniform Act at this drafting stage of the bar-sponsored bill in Texas, and the background of those changes.

A. Court Jurisdiction

Section 17 of the Uniform Act of 1956, like the arbitration statutes then in effect generally, confers jurisdiction to determine issues determinable by a court, that arise under provisions of the act, upon application to "any court of competent jurisdiction of this state" and adds that the making of an agreement described in section 1 of the Uniform Act "providing for arbitration in this state" confers jurisdiction on any such court. In Section 7501 of the New York act of 1962, the words "in this state" were omitted. This apparently was

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21 The term "bar-sponsored bill" as used in this Article refers to the bill presented to the regular session of the legislature in January, 1963, based on the Uniform Arbitration Act with changes made by the Texas drafting committee. The term does not refer to changes made in that bill in the 1963 legislature or the bill in that form which was presented to the legislature by the State Bar of Texas at the commencement of the regular session of the 1965 legislature.

22 Dougherty and Graf, Should Texas Revise its Arbitration Statutes?, 41 Texas L. Rev. 229 (1962). Beginning on page 219, as an appendix to that article, there are presented in three parallel columns in their entirety (i) the General Arbitration Statute of Texas then in effect; (ii) the Uniform Arbitration Act; and (iii) the bar-sponsored bill, being the proposal by the State Bar of Texas for repeal of the Texas General Arbitration Act and replacing it.

23 Beginning in the fall of 1959 the board of directors of the State Bar of Texas created a new standing committee on Uniform State Laws (an earlier committee on that subject having expired some years before). The purposes and scope of work of this committee were defined, and accordingly, a subcommittee was named to make recommendations for the enactment of a modern arbitration law for Texas, based generally on the pattern of the Uniform Arbitration Act. This subcommittee during 1962 consisted of J. Chrys Dougherty, Chairman, W. Pat Camp, John Martin Davis, A. J. Folley, and this writer, who served as scribe for the subcommittee in the drafts and redrafts of sections of the bar-sponsored bill.
done in an effort to extend the jurisdiction of New York courts over persons of other states who had executed arbitration agreements providing for an arbitration, whether or not expressly providing that the arbitration should be in that state.

Members of the Texas drafting committee had had experience with Texans who, after an award had been rendered against them by default, had discovered that by signing an agreement to arbitrate in New York they had conferred jurisdiction on a New York court to enforce any award rendered against them and that in a suit in New York for a judgment on the award, they could be validly served by non-resident process in Texas. Obviously the deletion of the words "in this state" in the New York statute could have an even more surprising effect on Texans who agreed merely to arbitrate with a New York resident without specifying New York as the location for the proceedings.

The New York statute is so broad that it does not preclude the possibility of arbitrating (and hence conferring jurisdiction upon New York courts concerning) a dispute between two Texans even though the agreement does not expressly provide for a New York location for the arbitration. However, this possibility has been discussed by Mr. Raymond Falls, the chairman of the State Bar committee of New York State Legislation. Mr. Falls in effect concedes that an arbitration agreement between Texans, providing for the arbitration to be conducted in Texas, cannot constitutionally be construed as a consent to the jurisdiction of any New York court, despite the broad language of the new act in New York.

The Texas drafting committee, aware of the potential problems with the New York Act, felt that the conflict of laws questions could best be handled by broadening our provision. Thus it was decided to enlarge each of the two sentences of section 17 of the Uniform Act into separate sections of article 234 of the proposed Texas act. The language of section 17 of the Uniform Act, which confers jurisdiction on a state court by reason of an agreement which "provides for arbitration in this state..." was altered to read "provides for or authorizes an arbitration in this state..." This language in the view of the Texas drafting committee was preferable to the 1962 New York change, in that it requires that the arbitration agreement either provide for or authorize arbitration in Texas. Hence it seems from this language that if Texans expressly provide that the arbitration of their controversies shall not be in Texas, or that it

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shall be somewhere else, a Texas court may not seek to enforce it. But if an arbitration is provided for, the situs not being specific, then the Texas court should have jurisdiction to enforce the agreement.

B. Ancillary And Other Court Proceedings In Aid Of Arbitration

Harking back to the provisions in the Texas bill of 1931,88 the drafting committee in 1963 decided to insert provisions in the new arbitration bill calling for court proceedings in aid of arbitration. Such language had also been inserted in summary fashion in our 1961 bill.86 This 1963 revision, which placed more detailed provisions in proposed article 235, was of such importance that it was included in draft after draft.87

New York, in a parallel procedural statute separate from its arbitration statutes,89 had provided prior to 1962 for special court devices "in aid of arbitration." There was no such provision in the Uniform Act. Although the Texas drafting committee felt that the powers of equity probably were broad enough to aid arbitration without express provision, it followed the lead of the California Act of 1961 which spelled out numerous procedures whereby a court could be called upon to act in aid of arbitration. The result is seen in the detailed provisions of our new article 235.

C. Discovery Depositions

The committee felt that one of the hazards in arbitration of important matters, and a chief factor in making the results unpredictable, was the lack of provision for the taking of discovery depositions, especially those of the adversary. Thus it provided for them in article 230B, a unique provision in arbitration statutes.

85 Described in paragraph (c) of the Appendix.
86 See paragraph (h) of the Appendix.
87 Section A of article 235 provides for filing, as in any civil action, of an application praying for a judgment. Section B states four alternative venues—where the arbitration was to take place, where the adverse party (or one of them) resides, where the adverse party has a place of business, or in any county if no adverse party has a residence or place of business within Texas. Section B also provides that on motion of an adverse party, the venue may be changed to one of the places listed above. Section C provides that the court may be ordered to stay the action if it has been filed subsequently before another court. Section D states that this is a civil action and that jurisdiction over the subject matter is determined as in other civil actions. Section E lists what should be shown in an application and states that the filing party must be given an opportunity to amend if his application lacks one of the requirements. Section F provides that an application may be filed in advance of any arbitration proceeding. Section G states that prior to an arbitration proceeding, an application may be filed in order to invoke court jurisdiction and serve the adverse party, to invoke jurisdiction for a suit in rem, to enjoin the destruction of the subject matter of the controversy or books and records, to seek the appointment of an arbitrator, and to grant other relief. Section H provides for court orders to back up those made by the arbitrator. Section I states that the clerk shall issue process. Section J provides that the adverse party is deemed to have notice of future applications once he has been validly served.
88 N.Y. Civ. PrAc. §§ 1448-50 and §§ 1445-49.
D. Determinations In Arbitration “Without Regard To The Justiciable Character Of The Controversy”

To overcome some unfortunate court decisions that had limited the kinds of controversies that could be arbitrated in New York, broad language of the New York section provided that disputes are arbitrable “without regard to the justiciable character of the controversy.” Our committee felt that the New York cases referred to would not be followed in states adopting language of the 1956 Uniform Act (section 1) and hence did not vary the Texas version from the language of the Uniform Act.

E. Defenses Based On A Statute Of Limitations

The New York Act of 1962 gives a party the right to assert in a preliminary court hearing (or before the arbitrator) the defense of limitations. The committee chose instead to follow the pattern of the Uniform Act and the states that had adopted it. The defense of limitations, like a defense on any other issue, could not be decided by the arbitrators if the terms of the voluntary agreement carved it out from the matters to be decided by them; hence, article 224 authorizes a voluntary choice as to the arbitration of an issue or issues other than limitations, which choice might preserve the right to go to court on it.

F. Attorneys’ Fees

Without precedent under any prior arbitration law before the drafting committee, that body added the second sentence in article 233. Previously attorneys’ fees authorized by Texas statutes were recoverable in court proceedings but not in arbitrations. It was felt that this distinction might well create an important obstacle to the use of arbitrations in Texas.

G. Waiver Of Right To Be Represented By An Attorney

Section 66 of the Uniform Act was adopted verbatim in the new article 229, although not until after some alternatives were considered. One was the New York Act of 1962, article 7506(d), which provides that “this right may not be waived.” California had provided in 1961 (section 1282.4) that if a prior waiver of the right were unexpectedly revoked at a hearing, the adversary was automatically entitled to a postponement. The committee thought that under the Uniform Act such a postponement would usually occur

30 N.Y. Civ. Prac. § 7502(b).
without express provision to that effect and, moreover, that circumstances might be such as to make a mandatory postponement unfair. Hence, under the present article, the matter is left to the decision of the arbitrator.

There were other changes made in the Uniform Act to adapt it to Texas requirements, but they were of lesser significance than the modifications explained above. Numerous additional changes were considered and rejected, including many which are found in the New York and California statutes. The drafting committee’s general purpose was to conform the Texas act to the Uniform Act unless strong reason seemed to justify an exception. Substantial uniformity in this critical area of commercial law was the avowed primary object.

III. THE UNFORTUNATE AMENDMENTS BY THE LEGISLATURE TO ARTICLE 224 OF THE BAR PROPOSAL

When it finally succeeded in clearing the Texas Legislature, the bar-sponsored bill had been altered only in Article 224. Three important changes in this article are shown by italics in the enacted version.

As presented:

Art. 224.

Validity of Arbitration Agreements.—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. Provided, however, that none of the provisions of this Act shall apply to any labor union contract or to any arbitration agreements or to any arbitrations held pursuant to agreements between any employer and any employee of that employer or between their respective representatives, or any controversy thereunder.

As enacted:

Art. 224.

Validity of Arbitration Agreements. A written agreement concluded upon the advice of counsel to both parties as evidenced by counsels’ signatures thereto to submit any existing controversy to arbitration or a provision in a written contract concluded upon the advice of counsel to both parties as evidenced by counsels’ signatures thereto 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. Provided, however,
that none of the provisions of this Act shall apply to any labor union contract or to any arbitration agreements or to any arbitrations held pursuant to agreements between any employer and any employee of that employer or between their respective representatives, to any contract of insurance or any controversy thereunder, or to any construction contract, or any document relating thereto.

The deletion of the last four words in the bar's version was never mentioned, insofar as this writer is aware, as a proposed or intended change to any member of the State Bar committee. Probably this change was accidental and it is doubtless immaterial.

A. The Requirement That For Every Party, There Must Be A Signatory Lawyer

The first major change in article 224, the insertion of fifteen new words following the first three of the article, is by far the most important modification. These new words add a condition to the validity of every arbitration agreement covered by the new act. The language with reference to the insurance and construction industries that “none of the provisions of this act shall apply” to either, includes as one effect that the article providing for repeal of the 1846 statute has no application to either of these industries and that the provisions of that statute continue to apply to them. Thus the signatory requirement does not apply to them.

The new condition is one that is unique among all arbitration statutes. Standard modern practice is to require that an agreement be in writing of sufficient clarity that the parties may have the full opportunity of knowing the effect of the provisions. The 1846 Texas act went further, as did many of the earlier arbitration acts in this country, in requiring that the written agreement be signed by the parties. But for a statute to require as a condition to the validity of any written contract that it be signed by an attorney for each party is unprecedented. It would seem intolerable to Texans for the legislature to require as a condition to every written contract, that each party employ a lawyer to sign the contract before it becomes effective. The invalidity of such a statute under the terms of the Texas Constitution seems clear to this writer.

If there were no constitutional duty on the legislature to provide by statute a proper procedure for arbitrating civil controversies between Texans, it should be concluded, of course, that such a restriction could be imposed on arbitration by the legislature—for in the absence of a constitutional provision for it, there is no constitutionally inherent right to arbitrate. But since the provision of the Texas
Constitution quoted at the commencement of this article creates a constitutional right to arbitration, can the legislature restrict the right in this manner? If the legislature were repealing the only arbitration procedure made available to Texans by the Texas legislature, as a part of this act, it would be quite arguable that there is a constitutional question involved in the first change to article 224. However, since the legislature in effect created a statutory arbitration procedure by bringing into the Texas statutes the common law of arbitration, by the act of 1840, now article 1 of the Tex. Rev. Civ. Stat. Ann., that enactment should be enough to satisfy the obligation of the legislature to enact an arbitration law for Texans. It is this writer's view, accordingly, that it would probably be decided that article 224, as enacted, is constitutional.

Aside from the constitutional problem, the "attorney" condition in the new article 224 should, nevertheless, be repealed because it is unfair and unreasonable.

First, this is true because it requires the employment of an attorney for every party to every arbitration agreement. Even though the unwilling client is richly experienced in arbitrations and has complete knowledge of the usual form of agreement used in his own association, he must employ an attorney, no matter how minor the controversy. It is unfair to deprive a principal party to such an agreement of the right to determine for himself that he wants his controversy settled with the speed, economy, and privacy, which the particular kind of arbitration within his knowledge would afford.

It is unfair, moreover, because an attorney should be selected by a client only if the client wants an attorney; no statute should force an individual to hire an attorney to draw his will or render any other service when the individual prefers, no matter how foolishly, to "do-it-yourself." The Supreme Court has not yet insisted that a criminal must have an attorney, even though he be charged with a capital crime, when he, at all stages and after all proper warnings, insists that he does not want an attorney. Yet the Texan who wants his own agreement to arbitrate is told by our legislature that he must have an attorney and that he must obtain the signature of that attorney (although this may be beyond his control) to the arbitration agreement.

A third reason the condition is unfair to Texans is that it is unique. The day will soon arrive when all other states have a modern arbitration act, all similar in substance; Texas alone would not. Indeed, with the exception of Texas, every state with a large volume of business and necessarily a large number of business con-
In the 1960s, Texas had such a modern statute before 1965. So detrimental and limiting a condition is this one, imposed in Texas alone, that it will destroy the desired uniformity in arbitration laws of the various states. That destruction will be to the disadvantage of the Texans who want to arbitrate.

Can it be expected that the hundreds of Texans now members of their own trade associations, most of them statewide or local, will either stop arbitrating their differences between themselves or will in each instance hire a lawyer to sign the agreement forms? What public good will be accomplished if they cease to arbitrate their numerous minor and routine intra-trade disputes and go to our courts? What public good will be accomplished if in each such matter a lawyer is hired solely to sign the agreement form? A greater danger, however, is that the statewide or local associations will tend to become affiliates of or be swallowed by interstate associations with standard arbitration forms providing for arbitration proceedings in some other state. Routine controversies might be conducted informally, even by correspondence, but important controversies will be handled formally, and will take place a long way from home for the Texan.

How is the public good served by this condition to the validity of arbitration agreements as applied to controversies between Texans who are not both members of some trade association? Some individual legislators expressed fears that “fine-print, printed forms” would be used under the new act to the great disadvantage of many Texans, unless they were protected against themselves by this clause. There are strong replies to such a contention.

The “printed form” fears which apparently seized some legislators lack merit because the use of printed forms is an important and integral part of the transaction of modern business. What is wrong with making a deposit in a bank under conditions printed on the bank book? What is wrong with the printed sales order as executed by practically every manufacturer? What is wrong with printed forms of sales agreements, including warranties, submitted on the purchase of automobiles and other equipment? Or with printed forms for insurance policies or for oil leases or for countless other written agreements? The more complicated the terms and provisions of an agreement, the wiser is a policy of developing a printed form to which each of the parties can become accustomed in repetitive transactions of the same sort. Specific tailor-made insertions in all such printed forms, deleting or changing clauses, are considered by the parties and are made in hundreds of Texas business transactions daily. There are possibilities for imposition if one of the parties does
not read and understand the printed portions of his contract. But the law has carefully worked out rules and remedies in such situations in all other fields of business activity. Why not in arbitration agreements? Articles 236 and 237 of the 1965 statute have express provisions to protect the Texan from court confirmation of any award “procured by corruption, fraud or undue means.” Finally, those expressing “printed form” fears should take note of the research concerning the wide-spread use of printed forms in arbitration agreements.\(^{31}\)

It is to the lasting credit of the legal profession that the Model Act, as sponsored by the Commissioners on Uniform State Laws and approved by the American Bar Association, did not contain any clause in section 1 (the one comparable to article 224 of the 1965 Texas act) requiring either approval of an attorney or the signature of an attorney as a condition to validity of an agreement to arbitrate. It is to the lasting credit of the State Bar of Texas that the bar-sponsored bill that it urged upon the legislature in 1963 contained no such clause. In 1962 the State Bar subcommittee (with reference to an arbitration law), the standing committee of the State Bar on Uniform State Laws, the legislative committee of the State Bar, and, on recommendation of all of these, the board of directors of the State Bar, all voted unanimously to propose article 224 in a form based on Section 1 of the Uniform Act. All this was evidence of sound judgment by the leaders of the bar of Texas as well as of the bar of America. The legal profession would suffer were it to sponsor or were it suspected of sponsoring legislation requiring the employment of lawyers when their services are not wanted. In fact, the lawyers of Texas would enjoy a real benefit from arbitrations conducted in Texas between Texans, but will never benefit from arbitrations between Texans sent to other states merely in order to avoid the signatory requirement. The approval in 1964 by the committees and board of directors of the State Bar of Texas of a proposal for a new general arbitration act was on the basis not of the bar-sponsored bill of 1962 but with the changes therein which had meanwhile been made in article 224 by the House of Representatives in 1963.

The requirement of a signatory attorney obviously discriminates between two methods of resolving differences: the courthouse method and the arbitration “method of trial,” as it is described in the Texas Constitution. A Texan can sign a consent to a judgment against him

\(^{31}\) See note 15 supra. Note also the Lazarus study, supra note 13, which revealed that 63% of those replying classified their arbitration contracts as “general” rather than “tailored.”
by a court or sign his own pleadings in a court proceeding; he can appear for himself at any hearing; and he can testify freely in civil matters (at the risk that he may not be fully understanding the effect of all that is said and done by him or by others) — he can do any and all of these things without hiring a lawyer to advise him, to act for him, or to sign anything. Why then burden the arbitration method and not the courthouse method? If the requirement is so meritorious and so beneficial to Texans, why exempt the insurance and construction industries from the requirement of a signatory attorney?

As has been well stated recently, this requirement in operation may not even achieve the worthwhile protection sought, i.e., protection from the hazards of unequal bargaining power and the use of form contracts. This requirement imposed by the legislature is unreasonable and should be repealed.

B. Exemption Of The Construction Industry

The second change relates to the construction industry, one which has not been enslaved or handicapped by the wide use of printed forms in its contracts. Nor are the members of this industry underprivileged in terms of relative bargaining power.

In no other state insofar as this writer has learned, has the construction industry ever sought an exemption from the provisions of an arbitration statute patterned upon or similar to the Uniform Act. This is for the simple reason that the Uniform Act or a similar statute is as beneficial to the construction industry as to other industries. Hopefully, the construction industry in Texas before long will so conclude.

The grounds on which the construction industry requested this exemption were recently restated. The reasoning (viz., that the construction contract contemplates future subcontractors unknown at the time, and hence that it is unreasonable to require initially arbitration of all disputes involving subcontractors) demonstrates a lack of appreciation of the operation and effect of the Uniform Act as proposed by the bar. Broad provisions in the act made the use of arbitration under it purely voluntary, with nothing imposed on the construction industry or any member of it. No contractor would have been forced to bind himself to arbitrate with any subcontractor, those he then had or those to be chosen in the future; or to provide that subcontractors could be bound by any arbitration. Only to

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\[\text{Note, 44 Texas L. Rev. 372 (1965).}^{32}\]
\[\text{None of the arbitration statutes in the states listed in note 18 supra has such an exemption.}^{33}\]
\[\text{Note, supra note 32, at 374 n.14.}^{34}\]
the extent desired would all or any of such future disputes have been subject to arbitration. Moreover, if it were to adopt a form contract to recommend to its members, the industry would have had the privilege of choosing whether future disagreements between the owner and the contractor would be arbitrated, whether future disagreements between the contractor and all or any of his subcontractors would be arbitrated, or whether future disagreements of subcontractors would be arbitrated. The form adopted by the industry under the new act as proposed by the bar, could negative any or all of these feared commitments to arbitrate. Other industries are not required by the terms of the act to make any such commitment.

C. Exemption Of The Insurance Industry

The reasons for the third change adopted by the legislature to article 224 differ substantially from those underlying the construction industry change. There is a strong public interest in protecting Texas insureds. Although there also is a public interest to protect individual laborers and materialmen, these groups are otherwise well protected by our constitution and statutes. No one argued that the construction industry exemption was needed for their account. As to voluntary arbitration in the insurance industry, perhaps more of a public interest was involved.

Officials of the State of Texas promulgate the forms of Texas insurance policies to be used for several types of insurance. If and to the extent the legislature deems this appropriate, it could extend the power to promulgate forms for other types of insurance. When the form is determined by a state official, the terms and provisions of an arbitration clause in that printed form are explicitly within the discretion of the state official. In such a situation it seems doubtful to this writer that there is need for an exemption as to any type of insurance from the provisions of article 224.

Such an exemption has been inserted in a small minority of states, as was pointed out to the legislative committee considering this matter. The arguments for this exemption are well presented in a recently published note. However, the third change made by the legislature refers to all insurance as if there were a single "insurance industry" in this state. Actually there is no such single industry. Rather, there is the life insurance industry, the fire insurance industry, the casualty insurance industry and the surety industry. A provision in the statute that is appropriate in the field of life insurance will not apply identically in the field of fire insurance or in the surety

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36 Id. at 373, nn.12 & 13.
field or in the casualty field. It is in the casualty field especially that other states have made valuable use of arbitration, particularly in disputes involving uninsured motorist controversies, negligent collision controversies, subrogation controversies, and others.\textsuperscript{36} Arbitration has been found to be a very effective remedy for the parties in such matters, and it has greatly curtailed the expense of many additional courts. Accordingly, it is hoped that upon further study and in the light of experience with this third change in article 224 it, too, will be repealed or at least amended so that the scope of the exemption will be substantially reduced.

It is important to note that Texas lawyers, except in construction or insurance matters, are just as free under the new 1965 act to use arbitration, whenever needed for the benefit of their clients, as they would have been if the amendments to article 224 had not been added by the legislature. Furthermore, Texas lawyers are fully as free in their drafting of contracts with arbitration provisions, pursuant to the statute as enacted, as they would have been had there been no such amendments, except in the two exempted industries.\textsuperscript{37}

IV. Common Law Arbitrations in Texas

A. System Of Arbitration Alternative To 1846 Act

The 1846 Texas statute expressly provided: \textsuperscript{38} “Nothing herein shall be construed as affecting the existing right of parties to arbitrate their differences in such mode as they elect.”

The right thus expressly preserved, was the common law of England, adopted in Texas in only the most general language. The Constitution of the Republic of Texas had directed the Congress to enact the common law with such exceptions as it thought proper,\textsuperscript{39} and the act of the Texas Congress in 1840 had adopted the common law of England at that time in the broadest possible language, with a few specific exceptions that are immaterial here.\textsuperscript{40} This 1840 statute has since been carried as a part of the statutory foundations of our Texas law.\textsuperscript{41} Thus common law arbitration, strongly in the minds of the founders of Texas, was preserved expressly as an alternative to any statutory arbitration and has been continued as an alternative at least until the 1965 act became effective this year.

\textsuperscript{36} See paragraphs (a), (b) and (p) of note 14 supra.
\textsuperscript{38} TEx. REV. CIV. STAT. ANN. art. 238 (1959).
\textsuperscript{39} REP. OF TEx. CONST., art. IV, § 13 (1836).
\textsuperscript{40} Acts of Fourth Congress, 1839-40, art. 707, § 1; as contained in I SAYLES, EARLY LAWS OF TExAS §§ 1731-1836, at 334 (1888).
\textsuperscript{41} TEx. REV. CIV. STAT. ANN. art. 1 (1959).
Dean Sturges in 1953 made an able analysis of common law arbitrations as reflected in Texas Court decisions, and it need not here be supplemented. The more important features of this common law arbitration, as the same has been recognized in Texas decisions, are portrayed in the following tabulation; it emphasizes some of the advantages and disadvantages of the common law:

<table>
<thead>
<tr>
<th>Common Law</th>
<th>1846 Statute</th>
<th>1965 Statute</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. May either party revoke the agreement to arbitrate at any time up to the award?</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>2. If one party is in default, may the other party require arbitration by court decree of specific performance?</td>
<td>no</td>
<td>no</td>
</tr>
<tr>
<td>3. Must one obtaining an award seek a judgment on it in a new suit, if not voluntarily complied with?</td>
<td>yes</td>
<td>no, award filed in court for judgment.</td>
</tr>
<tr>
<td>4. If during pendency of a suit parties agree to submit issues to arbitration and one defaults, may other party obtain a dismissal or stay of the suit?</td>
<td>yes</td>
<td>yes</td>
</tr>
<tr>
<td>5. If parties to an arbitration agreement have agreed to arbitrate a specific issue, may one party nonetheless file suit on that issue, terminating arbitration?</td>
<td>yes</td>
<td>no, suit may be stayed if dispute existed at time of agreement.</td>
</tr>
<tr>
<td>6. If the arbitration agreement fails to name the arbitrator or arbitrators, or one resigns or dies, may a court appoint an arbitrator to fill the vacancy, the agreement not expressly so providing?</td>
<td>no</td>
<td>yes</td>
</tr>
<tr>
<td>7. May the arbitrators or the court, in aid of arbitration, issue subpoenas, arrange for depositions and obtain other court processes?</td>
<td>no</td>
<td>subpoenas for arbitration hearing only.</td>
</tr>
<tr>
<td>8. Were there an error in an award, could the arbitrators or a court correct the errors?</td>
<td>no</td>
<td>yes, on specified conditions.</td>
</tr>
</tbody>
</table>

42 STURGES, supra note 19.

43 This follows in form a tabulation prepared by Professor Kagel, outlining the common law of arbitration in California, as a part of his report to the Recommendation of the California Law Revision Commission, December, 1960, G-25, G-29.
B. System Of Arbitration Alternative To 1965 Act

The enacting clause of the 1965 act referring to the first chapter of title 10 of the Texas arbitration statutes (the 1846 Act) says that the same is "revised and amended to read as follows": new articles in lieu of articles 225 through 238 are then set forth. This wording repealed all of the earlier articles including article 238, which had expressly preserved all common law and other arbitrations not provided for in the 1846 act. The 1846 act was thus expressly repealed in its entirety, but in the 1965 Act there was no express repeal or limitation of article 1 of Tex. Rev. Civ. Stat. (the act of 1840), the Texas adoption of the common law and with it common law arbitrations. Nor should it be said that there was an implied repeal of the common law arbitrations preserved by article 1.

In a 1953 California case it was decided that the 1927 California arbitration statute had covered the law on arbitrations so completely that it by implication had repealed the system of common law arbitrations in California. Whether that decision is now the California law or not, the general rule clearly has been and is as stated by Dean Sturges:

Nearly every American jurisdiction permits at least two general systems of arbitration. These systems are commonly designated as common law arbitrations and statutory arbitrations. The arbitration statutes of the different states are regarded as merely cumulative. Parties may choose either method.

Texas courts should follow this general rule. They should adopt the principle that the intent of the parties to arbitrate shall control and then apply that principle to Texas arbitration agreements. Thus Texas rules of common law arbitrations may be applicable in those situations in which the new statute has specified requirements for the validity of an agreement under its terms but in which those conditions have not been met. Moreover, the California rationale (if discarding the general rule in Texas were being considered) cannot be used to determine that there was a repeal by implication in the 1965 act of all the common law of arbitrations, since that act cannot be considered all-inclusive. The exclusion of labor arbitrations may or may not be enough alone to justify the retention of common law arbitrations because historically in Texas arbitrations other than labor

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45 STURGES op. cit. supra note 2, at 2, and cases cited therein.
arbitrations have been a separate subject. But when coupled with the exemptions of the construction and insurance industries, the 1965 Act clearly does not cover the subject completely, and there is no justification for the contention that common law arbitrations are repealed.

There is abundant authority for each of the foregoing conclusions in column one, in general language in the literature of the common law as it has developed in the several states. Apparently it would be difficult indeed to obtain a different conclusion from any expressed in the "common law column," even if the parties to an arbitration agreement for an adequate consideration and a sound business purpose, were expressly to provide that an opposite effect should be given to their agreement. Based primarily on the aversion of early British judges to arbitrations, on the theory that they would oust the judges of their own rightful jurisdiction to determine controversies, in the foregoing tabulation, particularly 1, 2, and 5, the conclusions were embedded into the common law of that time. This led in the seventeenth century (1698) to an arbitration statute in England under which the results were generally as set forth in the 1846 column in the above tabulation. Concededly, in 1840 the English common law, if the term is to be used in the sense of distinguishing the law in England preceding any of its statutes from that after its statutory enactments as to arbitrations, was along the lines of column 1. It seems to this writer that the laws of England on arbitration existing in 1840, including the statutory provisions of the arbitration statutes of England (which had been in effect then for a century and a half), may fairly be argued to be a part of the "common law" of England in the sense of the Texas Act of 1840; this is suggested as a possible development in Texas, even though arbitrations such as existed in England prior to the English statute of 1698 have been referred to in Texas and in other jurisdictions in the United States as "common law arbitrations."

C. Making Common Law Arbitrations More Serviceable

In Texas By Carefully Preparing Agreements To Arbitrate

In the nineteenth century (1889), England completely revised its arbitration statute. The results thereupon were largely as set forth in the third column of the tabulation. The Texas Act of 1840, adopts generally as law in Texas the "common law of England." However, the common law adopted in Texas was not static but was a growing and dynamic system of law.

It has been clearly established that the Texas Act of 1840, adopting
the common law of England, referred to a rule of decision consistent with the conditions and circumstances of the people of Texas. The leading opinion to this effect\textsuperscript{4} was rendered in 1913 by Chief Justice Brown for a unanimous Supreme Court of Texas. In that opinion it is made clear that common law marriages were a part of the law of this state even though the English common law providing for them had been repealed by act of Parliament in 1823, seventeen years before Texas adopted the common law. The rules of decision in various states of the United States were analyzed, and that particular rule of decision as to the common law was then adopted as the one consistent with the conditions and circumstances of the people of Texas. Hence the needs of the people of Texas under the conditions and circumstances of 1965 are more pertinent to a determination of what "common law arbitrations" are today than the circumstances and needs of the people of Texas in 1840, or of England prior to 1698, or any other jurisdiction at any distant time or under greatly variant circumstances. This being so, a re-definition of "common law arbitrations" in Texas should be carefully considered because of urgencies created by article 224 of the 1965 statute.

If everyone affected by controversies with the construction and insurance industries in Texas are long to depend upon the arbitration laws of today (\textit{i.e.}, the new statute as it now stands and the Texas common law) for whatever arbitrations they may have, it may reasonably be predicted that attempts will be made to change the conclusions reflected in column 1 and that some of these attempts may succeed.

As a matter of common law and equity, and without the aid of any arbitration statute, this writer suggests that carefully prepared arbitration agreements could help increase the use of common law arbitrations. Such agreements should be for adequate consideration and with sound reasons explaining the choices by the parties of their provisions as to arbitration. In some instances at least, exceptions by stipulation of the parties ought to be carved out of conclusions 1, 2 and 5 in column 1, and maybe others too.

If an arbitration agreement concerns the rights of the parties relating to Blackacre, spelling out the unique qualities of that tract of land as a part of the future planning of both parties, if it is specified that both parties want a panel of experts named by them to resolve any issue of fact that might develop into a controversy between them in connection with their respective rights; if the agreement specifically covers the areas of possible fact controversies to which any arbi-

\textsuperscript{4} Grigsby v. Reib, 105 Tex. 597 (1913).
tration would refer and gives a termination date after which there would be no agreement to arbitrate; and if the agreement specifies that the parties agree irrevocably to an arbitration of any controversy within the areas specified; then there is present the type of situation which may cause a growth of "common law" arbitration theories. Under such circumstances, this writer believes that a Texas court should and would apply ordinary principles of law and equity to award specific performance of that agreement, just as the courts would with contracts generally." Since 1840, Texas courts have greatly modified the limits of the common law and of equity in other fields, without the intercession of statutes requiring that it be done. Now in the field of common law arbitrations Texas courts may properly take the lead in making arbitration more serviceable than it has been in Texas.

To what extent the Texas courts will follow the broad statement by Dean Sturges of the general rule that statutes of arbitration are cumulative of the common law, and to what extent an enlarged conception of common law arbitration may be adopted in Texas, cannot now be stated. This writer urges both.

V. EFFECT IN TEXAS OF THE FEDERAL ARBITRATION ACT

A. To What Arbitration Agreements Does The Federal Arbitration Act Apply?

The Federal Arbitration Act (herein referred to as FAA) specifies that its provisions shall apply only if there is a voluntary agreement (a "written one" without a requirement of any signature) between the parties relating to "any maritime transaction" or "a transaction involving commerce." The breadth of the words "any maritime transaction" will not be considered here. The scope of the words "a transaction involving commerce," is at the threshold of several current problems to be dealt with in the remainder of this Article.

One may assume that the "commerce" contemplated is the same as that referred to in article I, section 8 of our federal Constitution, in which Congress is vested with the power "To Regulate Commerce with Foreign Nations, and among the Several States and with Indian Tribes." Practically this same definition is found in section 1, FAA. The vital part of "commerce" with which this article deals, is inter-state "commerce." The United States Supreme Court, in deciding

47 See, e.g., the substantially different treatment of specific performance as to contracts generally, and as to arbitration agreements, 1 WILLISTON, CONTRACTS, § 1418, at 3951 (Rev. ed. 1937), compared with the comments in § 1421, at 3967.
whether an employment contract involved interstate commerce in the FAA sense, used the following language:

There is no showing that petitioner while performing his duties under the employment contract was working "in" commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions.49

That statement appears to be as nearly a definitive statement of the test as to what constitutes "commerce" under the FAA from the interstate aspect as we shall have for many years.

An interesting phrasing of this same idea was given recently in a concurring opinion by Chief Judge Lumbard of the U. S. Court of Appeals for the Second Circuit, the court which doubtless has passed upon more cases involving the FAA than any other appellate court. He said the jurisdictional requirements of the FAA were met if, when making the agreement to arbitrate, the parties "contemplated substantial interstate activity."50

It is felt that the meaning of these interpretations of "interstate commerce" under the FAA is clearly that the Act will apply to an agreement whenever it has a substantial effect or impact on interstate commerce, even though the specific activities of the parties do not in fact involve the crossing of state lines.51 Such an interpretation of the extent of "interstate commerce" (under the National Labor Relations Act, the federal Fair Labor Standards Act, and other federal acts) in business activities long thought to be local has for some time been applied to many different industries in Texas, including the construction industry.52 The concept is no longer novel that a building may be "in commerce," so as to be covered by federal legislation.

The federal arbitration statute seems destined to have a greater effect than has been apparent in the decided cases. Where, as in the

49 Bernhardt v. Polygraphic Co. of America, Inc., 310 U.S. 198, 200-01 (1940). Since there were no prior decisions under FAA defining "commerce" and since the Court cited no earlier decisions to be used as guidelines, it must be presumed that the Court intended that the traditional commerce power definition be used under the FAA and, in referring to its own earlier decisions, to have had in mind its earlier decisions under such other "commerce" statutes.


state of New York, the federal statute and the state statute are basically similar concerning the validity of arbitration agreements, in that they cover existing and future controversies arising under the agreement, it has not yet seemed important under which statute the validity of the agreement was established.\textsuperscript{3} By 1963 this similarity in statutes was found in all the states having a great volume of commercial or industrial development and of business controversies, excepting only Texas. Now, because of the 1965 amendments made by the legislature to article 224, it seems that in Texas—if not in other states—it will be of great importance whether the FAA may be or must be applicable to our arbitration agreements.

B. Problems As To Jurisdiction And Choice Of Law Under The Federal Arbitration Act

Section 4 of the FAA provides that if a party to an agreement for arbitration, valid under section 2 of that act, is aggrieved by a failure to proceed to arbitration, he "may petition any court of the United States which, save for such agreement, would have jurisdiction." The italicized words were first held by Judge Learned Hand\textsuperscript{4} to make the congressional intent clear that the FAA shall not be one of the federal laws "which furnish an independent basis of federal jurisdiction." This permits federal courts to determine issues under arbitration agreements covered by the FAA only in cases which otherwise would be in the federal court, that is, cases involving diversity of citizenship or some other independent ground of federal jurisdiction.

A serious problem may underlie the application of the FAA to diversity cases. This problem, if it arises, will develop out of the case of \textit{Bernhardt v. Polygraphic Co. of America, Inc.}\textsuperscript{5} There the plaintiff sued in a Vermont state court, and the defendant removed to the Federal District Court for Vermont on the basis of diversity of citizenship. The contract in question contained an arbitration clause,

\textsuperscript{3} See O'Meara v. Texas Gas Transmission Corp., 230 F. Supp. 788 (N.D. Ill. 1964), where a court found that under both Louisiana law and FAA, "whichever is applicable," an arbitration agreement was enforceable. See also Lummus Co. v. Commonwealth Oil Ref. Co., 297 F.2d 80, 89 (2d Cir. 1961), \textit{cert. denied}; Dawson v. Lummus Co., 368 U.S. 986 (1962), where the Second Circuit took a "what's the difference" attitude as between FAA and the New York Act, although the First Circuit had already ruled that because of express contract provisions, the New York law was to apply. See Lummus Co. v. Commonwealth Oil Ref. Co., 280 F.2d 915 (1st Cir.), \textit{cert. denied}, 364 U.S. 911 (1960). See discussion at text accompanying note 62 infra.


\textsuperscript{5} 350 U.S. 198 (1916).
but it was not a contract involving interstate commerce. The defendant sought to have the district court stay proceedings and compel arbitration, relying upon section 3 of the FAA which states:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

The district court refused to stay its proceedings and compel arbitration; the court of appeals reversed. On certiorari, the Supreme Court reversed the court of appeals. In an opinion for the majority by Justice Douglas it was held that (1) on the basis of *Erie R. R. Co. v. Tompkins* and its progeny, Congress could not by section 3 of the FAA constitutionally create federal law to be applied in a district court sitting in diversity when the contract involved was not concerned with interstate commerce, and (2) apart from the FAA, the enforcement or non-enforcement of an arbitration clause would so affect the outcome of litigation as to be "substantive" within the meaning of *Erie* (and thus Vermont law must be applied). The majority opinion in *Bernhardt* left open the question of whether the FAA is applicable in a federal court sitting purely in diversity when there is involved a contract concerning interstate commerce.

Justice Frankfurter, in his concurring opinion in *Bernhardt*, went beyond the facts to comment that the FAA is inapplicable to a mere diversity case, even if a contract involving interstate commerce be involved. It was his point that Congress intended only to exercise its powers under Article III (relating to the judiciary) when the FAA was enacted and merely sought to remove the old common law fear that arbitration would oust courts of their jurisdiction over controversies. Therefore according to this Frankfurter thesis, on the basis of *Erie*, a federal court in a diversity case must apply the state law of arbitration.

Judge Harold Medina, speaking for the Second Circuit in *Robert Lawrence Co., Inc. v. Devonshire Fabrics, Inc.*, rejected the Frankfurter proposition. Judge Medina found that section 2 of the FAA was based not only on article III but also expressly on the congressional power over commerce. Hence it was decided, quite properly in the

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58 304 U.S. 64 (1938).
59 271 F.2d 402 (2d Cir. 1959).
opinion of this writer, that the *Erie* objection did not prevail and that in diversity cases, in which the arbitration agreements related to "commerce," the FAA was applicable in full in the sense of article I, section 8 of the Constitution. The Supreme Court granted certiorari in the *Lawrence-Devonshire* case, but it was later dismissed by stipulation while still pending. No indication appears in the grant of the writ of certiorari or in the order of dismissal that the Court desired to consider the case in light of the views expressed in the concurring opinion of Justice Frankfurter in *Bernhardt* in 1956. Hence no cloud should be deemed to rest over the Medina opinion on that point. Since it clearly stated the intent of Congress as it appears on the face of the FAA, *Lawrence-Devonshire*, on this fundamental point, should be and currently is being followed.

This line of decisions leads logically to the conclusion that agreements for arbitration in contracts providing substantial interstate activity (surely, if the parties to the agreement have not specified some other law) must be determined as to their validity by FAA provisions, no matter what court is called upon to make that determination. Judge Medina in his *Lawrence-Devonshire* opinion said just this, in a dictum: "This is a declaration of national law, equally applicable in state or federal courts." That case involved the issue of whether the validity of an agreement to arbitrate was to be tested according to the provisions of section 2 of the FAA. The court held with respect to the question of validity that the FAA creates a substantive right and that the statute does not provide merely a remedy or procedure by which parties may seek enforcement of rights under their contract.

In American decisions under arbitration statutes prior to the modern ones all rights of both parties were held to be merely procedural. Whether rights of a party under an agreement to arbitrate were "substantive" or "procedural" was of great practical importance. So long as they were only procedural a very important defect was inherent in an arbitration agreement, namely that each of the parties could shop among various jurisdictions to find one that would

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40 For discussions of these earlier American cases and reasons not to follow them as to arbitration statutes like the New York Act of 1920 see Heilman, *Arbitration Agreements and the Conflict of Laws*, 38 Yale L.J. 617 (1929), and Lorenzen, *Commercial Arbitration—International and Interstate Aspects*, 43 Yale L.J. 716 (1934).
give the most desirable determinations for the controversies; races had become common between adversaries to invoke the jurisdiction of one state rather than another. If as to all problems under an arbitration agreement such a shopping were to be permitted, arbitration could not develop meaningfully. The FAA seems to this writer to create substantive rights granted to the parties. Section 2 provides that the contract, if made in accordance with the provisions of that section and under conditions so as to be controlled by it, “shall be” enforceable. Section 3 provides that if an adversary party to such an enforceable agreement is proceeding with litigation in violation of the agreement, the court “shall” stay the trial of the action, under circumstances specified in the section. Similarly, if under the circumstances described in section 4 an order directing that the arbitration proceed is needed, it is provided that the court “shall” enter such an order. And in section 9, if an award has been obtained and the parties in their agreement have provided that a judgment shall be entered thereon, it is provided that (except for certain conditions not here material) “the court must grant an order of confirmation of the award.” It is submitted that in these respects and perhaps in others, parties to an arbitration agreement meeting the conditions of these sections have substantive rights under the FAA, which are now clearly established under the current rule of decision.

In this connection it should be noted that in England the earlier rule that rights of the parties under the former English arbitration statute were procedural, was replaced by a rule that the rights of the parties under the English Act of 1889 were substantive.\(^1\) It is also clear on the face of the FAA, however, that it expressly permits the parties to agree to the procedure to be taken during their arbitration. In section 1 the provision as to validity relates to the validity of what the parties have agreed to; in section 3, the stay order is to be made upon the determination of the court that there should be arbitration “under such an agreement”; in section 4, the order provided for is that the “arbitration proceed in the manner provided for in such agreement”; and in section 9 it is clear that the court is to act in accordance with the direction of the parties “in their agreement.” Thus, it is submitted that the provisions of the agreement which are intended to be substantive should so specify. Certainly it is specific in the statute that all other rights of the parties, though they may be procedural, may be specified in their agreement, and if they are, that the agreement shall control.

\(^1\) Hamlyn & Co. v. Talisker Distillery, A.C. 202 (1894); Spurier v. La. Cloche, A.C. 446 (1902).
Under authorities hereinafter cited it is submitted that the trend of decisions, if not the clearly established majority rule, is that an arbitration agreement may set forth provisions defining the rights of the parties under the arbitration agreement in such a way as to control the action of the courts in determining its validity or in enforcing it, and that this right of the parties to define the rights that they agree upon includes the right of the parties to express a choice of law that will control certain aspects of their arbitration. A problem as to agreed choice of law (discussed more fully in the next section) is whether, in lieu of substantive rights under the FAA, rights under some law other than the FAA may be specified by the parties. But it is clear under the FAA that parties may agree specifically that the procedural law of Texas or of some other state shall control, such an agreement of the parties being invited by the FAA.

In Texas, now that we have no provision in our state statute relating to the validity of the agreement to compare with section 2 of the FAA (by virtue of the amendments to article 224 of the new Texas act by the legislature as discussed in section III of this article), parties may insert arbitration agreements in their contracts providing: (i) that the FAA shall control as to the provisions in section 2 thereof on the validity of the agreement, and on any other substantive rights on which the FAA is controlling as a matter of law; but (ii) that in all other respects, the provisions of the new Texas act, article 225, et seq., shall control. Since we have within these last mentioned articles of our Texas act the best of provisions relating to arbitration agreements, it appears to the writer that this suggested provision will be most appropriate for Texans contemplating an arbitration agreement which they expect to be subject to the terms of the FAA.

Under well-known and usually accepted principles applied to contracts generally, the agreement of the parties as to choice of law should be followed in the federal courts in their enforcement and interpretation of agreements of arbitration. The problem is considered fully in the related Lummus Company cases in the First and Second Circuits. It was determined in the first of these and approved in the second that any issue as to the validity of the arbitration agreement depended on New York law, in view of the agreement to arbitrate in New York, and must be determined by the arbitrators; but this did not follow, as the issue of whether the agreement to arbitrate was fraudulently induced.

Under the FAA the federal courts had previously determined,
under a doctrine of separability, that the court should first determine
the issue of fraud, whereas under the New York arbitration statute
that issue was to be submitted to the arbitrators. Not on the basis of
whether a substantive or procedural right was involved but on the
basis that the agreed choice of law by the parties was controlling, the
First Circuit entered an order that the parties proceed to the arbitra-
tion according to the New York law, with the arbitrators, not the
court, to pass upon the issue of fraud. The Second Circuit in the later
appeal before it, concurred in this. It seems to this writer that this
result is reached with the recognition that the right of such a deter-
mination of the preliminary issue by the court rather than by the
arbitrators is one of the substantive rights under section 2 of the
FAA.

But whether it is decided in the Lummus cases, that as to such
substantive rights the parties may agree on their own choice of law,
this has been expressly determined by the Court of Appeals for the
Ninth Circuit in Ross v. Twentieth Century-Fox Film Corp. In
that case the parties had incorporated in their contract the California
arbitration statutes. Although the court decided that the FAA con-
trolled since the agreement was "in commerce," it nonetheless con-
cluded that the agreed choice of law was controlling and that the
agreement was valid for use with the provisions of the California
statute. Judge Medina in Lawrence-Devonshire says that he considers
Ross wrong in this respect. Since there was no indication in the
Lawrence-Devonshire opinion that the parties in their arbitration
agreement had exercised any comparable choice of law of any state
statute as they had in Ross, this comment of Judge Medina is con-
sidered dictum.

In accordance with that dictum and contrary to Ross and Lummus
(if, according to the views of this writer, substantive and not pro-
cedural rights were involved in Lummus) some other court deci-
sions have been to the effect that when an arbitration agreement is
governed by federal law, the FAA has pre-empted the field as to
the validity of the agreement to arbitrate and as to other substantive
rights of the parties specified in the FAA. According to these deci-

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64 See cases cited Lummus Co., 297 F.2d 80.
65 Ross v. Twentieth Century-Fox Film Corp., 236 F.2d 632 (9th Cir. 1956).
66 271 F.2d at 409 n.7.
sions no other law can govern such matters even though so specified by the parties in their agreement.

For reasons set forth in the next section of the article, this writer is of the view that on substantive rights specified in the FAA, as well as on procedural matters, the parties should be held to have the right to specify in their agreement their own choice of law. Such a position would not be in derogation of the FAA or contrary to the recognized supremacy of a federal statute, but rather it would give effect to the FAA provisions which direct the court to give effect to the agreement of the parties. The federal decisions as to arbitration agreements with reference to which the FAA is held to be controlling since the agreements are "in commerce," must deal with and give effect to the terms of the agreements of the parties being enforced, and not merely the terms of the FAA itself. The federal courts in interpreting the FAA must consider as a part of their law, as all other courts must, their own decisions respectively on conflict of laws, and on choice of laws by the parties to an agreement.

There are recognized uncertainties as to whether this principle of Ross and Lummus will apply to the substantive provisions of the FAA, and hence the recommendation of this writer has been that Texans preparing arbitration agreements to be controlled by the provisions of the FAA expressly provide that it shall control as to the substantive provisions. It is to be noted that the suggestion is also made that Texas law shall control in other respects, especially if it is the desire of the parties that their arbitration proceedings be held in Texas. For the mere incorporation of an expression indicating that the parties expect or provide that the arbitration shall be held in New York, may be the equivalent of an express agreement that the provisions of the statute of that state shall apply.68

VI. THE EXTENT TO WHICH TEXAS STATE COURTS MAY APPLY THE FEDERAL ARBITRATION ACT OR THE ARBITRATION ACT OF ANOTHER STATE IN ACCORDANCE WITH THAT LAW CHOSEN BY THE PARTIES

Long recognized uncertainties in the field of conflict of laws, as to the laws of what jurisdiction shall control the determination of the validity of a contract, have not been resolved. Professor Joseph H. Beale of Harvard Law School undertook to analyze all of the decided

68 For a typical arbitration agreement which was held to show that it was intended by the parties that the arbitration law of New York shall control, see opinion of Judge Aldrich in the Lummus Co. case before the First Circuit, 280 F.2d 915 (1st Cir.), cert. denied, 364 U.S. 911 (1960) Note 28 supra, and especially 918 n.1. See for comparable application of law of Pennsylvania, Monte v. Southern Dela. County Auth., 321 F.2d 870 (3d Cir. 1963).
cases on the subject in 1910 in his article "What Law Governs the Validity of a Contract." In his treatise on the conflict of laws in 1935, he said: "No topic of the conflicts of law is more confused." Professor George W. Stumberg of the University of Texas Law School in his article in 1932, "Conflict of Laws—Validity of Contracts," found the Texas cases equally confused. In its Restatement of Conflict of Laws the American Law Institute in 1934, adopting the theories preferred by its Reporter, Professor Beale, provided that the law of the place of contracting usually determines the validity of such a contract (section 332) and gave but passing reference to the possibility that pursuant to an intent of the parties otherwise, they may specify the law of some other jurisdiction (sections 343-4).

One of the views contrary to that preferred by Professor Beale was a view that the intent of the parties should control, where clearly expressed or implied. In a number of jurisdictions this has been developed by court decisions to be a controlling rule. It has been said that:

An exception to the rule that the law governing a contract is determined by the place where made and performed is that if the parties, either expressly or by necessary implication, agree that the contract is to be governed by the law of a particular state, then that intention prevails.

In the light of continuing confusion in the decided cases and the increasing emphasis on the right of the parties to choose in their agreement the law that shall apply, the American Law Institute has undertaken and still has pending a Restatement of the Law of Conflict of Laws (Second), the initial draft of which was presented to the membership of the American Law Institute in 1960. It was a dramatic moment when, Professor Beale having died, Professor Austin W. Scott of the Harvard Law School, the Associate Reporter on this Restatement, said: "Now I feel very strongly here that the Reporter has managed to steer a nice course between what Mr. Beale used to do, which was very satisfactory as a dialectic, but simply was not followed by the courts, and pure chaos." This was at the conclusion of the sessions of the A.L.I. at which the initial draft of the

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68 Stumberg, Conflict of Laws—Validity of Contracts—Texas Cases, 10 Texas L. Rev. 163 (1932).
71 Proceedings 37th Annual Meeting of the American Law Institute, at 366.
Second Restatement had been presented, discussed at length, and approved in principle. The basic provisions of this, which in the view of this writer represent the best general statement of the majority view of the courts on this troublesome question, were:

Section 322—Law Governing Validity of Contract

(1) The validity of a contract is determined by the local law of the state with which the contract has its most significant relationship, except in the case of usury.

(2) The state of most significant relationship is the state chosen by the parties, if there has been a compliance with the requirements of Rule 332(a), and otherwise the state selected by application of the rule of 332(b).

Section 332(a)—The validity of a contract is determined by the local law of the state chosen by the parties for the purposes unless

(a) The choice of law was obtained by unfair means or was the result of mistake, or

(b) The contract has no substantial relationship with the chosen state and there is no other reasonable basis for the parties' choice, or

(c) Application of the chosen law would be contrary to fundamental policy of the state which would be the state of the governing law in the absence of an effective choice of the parties.

The new section 332(b) related to a choice of law by the court in the absence of an effective choice of law by the parties.

In the comments accompanying this new restatement were included:

Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives can best be attained in multi-state transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby.7

In May of the following year there was presented a revision of part of this tentative draft No. 6, which proposed no change in the foregoing but which added a new topic to the subject of Contracts, viz., "Commercial Arbitration." The Reporter, Professor Willis L. Reece of Columbia University, added in connection with this new topic a note that "it is felt that commercial arbitration is of sufficient importance to warrant consideration in the Restatement." It is said in the comment submitted with reference to the statements proposed:

To permit the local law of the forum to decide whether or not resort to the courts is precluded by the existence of an arbitration agreement would be contrary to one of the most basic purposes of Conflict of Laws,

7 Restatement, Conflict of Laws 17 (2d ed. 1960) (tentative draft no. 6).
namely, that rights arising out of a transaction should not vary from state to state but rather should be governed by a single law. . . . The rules for ascertaining the law governing the validity of arbitration agreements and the rights created thereby are the same as found throughout the entire field of contracts. An arbitration agreement is governed by the local law of the state selected by application of the rules of sections 332-332(b).\footnote{\textit{Op. cit. supra} note 74, at 215-17.}

The restatement to which that note and that comment referred was as follows:

Section 354(h)—Validity and effect of arbitration agreements
(1) The validity of an arbitration agreement and the rights created thereby are determined by the law selected by application of the rules of sections 332-332(b).

(2) When the arbitration agreement is one provision of a contract, the law governing the validity of the agreement and the rights created thereby is the law which governs the validity of the contract as a whole rules of 332-332(b).

(3) The law governing the validity of an arbitration agreement determines whether a judicial action brought in violation of its terms can be maintained.

Section 354(i)—Method of Enforcement of arbitration agreements
(1) The method of enforcement of an arbitration agreement is determined by the law of the forum.

Section 354(j)—Enforcement of a foreign arbitration award. A foreign arbitration award will be enforced in other states provided
(1) The arbitration is enforceable in the state of rendition and was rendered in accordance with the terms of the arbitration agreement by an arbitration tribunal which had personal jurisdiction over the defendant and afforded him reasonable notice of the proceeding and a reasonable opportunity to be heard, and

(2) The forum has judicial jurisdiction over either the defendant or his property and the cause of action on which the award was based is not contrary to the strong public policy of the forum.

As indicated heretofore in this Article, the views of this writer are that the clearly expressed intent of the parties should be followed (as would be the result under the proposed Restatement on the subject of the validity of an arbitration agreement) whatever law may be provided for by the parties. This would be as a matter of conflict of laws and hence a part of the law of the forum in giving effect to the agreement for arbitration itself.

The Second Restatement has not been finally adopted by the A.L.I., however; nor when adopted, is it the law of Texas. Hence the law of Texas does remain somewhat uncertain, though tending to give effect to the intent of the parties on all aspects of an arbitration agreement.
All things considered it is the view of this writer that when Texans are entering into an arbitration agreement they should be able to choose to apply the provisions of FAA section 2 as to the validity of that agreement and all other substantive provisions which, as a part of the FAA, are directions to a court with reference to an arbitration agreement controlled by it. However, as invited by the terms of the FAA itself, the agreement should provide that in all other respects (to the extent not otherwise required by the FAA) the provisions of the new Texas law, articles 225, et. seq., shall control. This should be a valid and effective provision not only under federal law as to agreements covered by the FAA but also under Texas law as to all other arbitration agreements. The conflicts rule would give effect to the choice of law of the parties.

The views of this writer as to the rules of decision that Texas courts should follow in passing on contracts which seek to provide for better arbitrations may accordingly be summarized by the following conclusions:

1. When an arbitration agreement falls under the terms of the FAA and the parties are before a Texas state court for enforcement or other relief, its validity should be determined (absent an express provision in the agreement as to any choice of law) according to the provisions of FAA section 2 and not Texas article 224.

2. All other arbitration agreements before Texas state courts for enforcement or other relief should be determined to be valid or not according to the provisions of that law (FAA, common law, or statute of any state) which all of the parties to the agreement have specified to be controlling and not according to any conflicting provisions of Texas article 224 (and with this same result also, any such agreements with such express provision for another law to be controlling, as are referred to above, in paragraph 1).

3. As to all arbitration agreements which do not fall under the terms of the FAA, and in which the parties fail to specify which law shall govern their arbitrations, Texas state courts, in deciding upon the enforcement or other relief sought, should determine the validity of the agreement according to the provisions of that law (either (i) Texas article 224, or as to the construction and insurance industries, the common law, or (ii) the law of some other state) which is selected by the application of usual conflict-of-law rules.\footnote{Query as to this, whether there is any public policy of Texas expressed in the three exceptions in article 224 that might deter such a decision. As to the construction and insurance industries, it is submitted that the answer is clearly “no”; this for the reasons presented in sections III and IV of this Article. As to the subscribing attorney exception, again, query.}

\footnote{See note 76 supra.}
4. When considering what relief to grant in aid of enforcing a valid arbitration agreement, Texas state courts should give full effect to whatever directions the parties have inserted in the agreement for arbitration. Thus, all procedures and rules under which the arbitration is to be conducted and all requirements as to the court relief to be available in aid of enforcement, would be so determined first on the basis of the direction of the parties. Such provisions should be considered adequate if they incorporate by reference all or any portion of the statutory provisions of any state or of the rules of procedure of an established institution like the American Arbitration Association.\(^7\)

5. When considering what relief to grant in aid of a valid arbitration agreement that does not fully spell out what forms of relief are to be available, Texas state courts should look to the law by which the arbitration agreement has been held valid (whether this be FAA, the common law, or the arbitration law of some state) for whatever procedural details that law and ensuing court decisions have specified. Then, to the extent that there remain questions not expressly covered by such law, Texas courts should follow the applicable procedure and rules set forth in articles 225 to 238-6, inclusive, of the 1965 Texas act.

VII. Conclusion

It is the view of this writer that, pending the needed improvements in Texas section 224, three workable systems of arbitration (not including any provided for by the law of any other state) should be considered by Texans planning to enter into an agreement for arbitration of a civil, non-labor controversy. Moreover, except for reasonably clear limitations on their choice, they should be entitled to choose which of such laws and procedures of arbitration should control their own agreement. At least, the effort of this writer in this Article has been to make any limitations on that choice clear.

\(^7\) See note 76 supra.
APPENDIX

LEGISLATIVE HISTORY OF THE 1965 ARBITRATION ACT

(a) The first effort to amend or revise the 1846 General Arbitration Act apparently began with the publication by A. H. McKnight in 1924 of a proposed modern arbitration act which had just been recommended by a committee of the American Bar Association and which was similar to a bill then pending in Congress for a federal arbitration act. This proposed bill, published in full in Mr. McKnight's article, provided for the arbitration of future disputes. In 1925 the bill was introduced in the legislature of Texas at his request. Although during that year the bill pending in Congress was enacted, no serious attention appears to have been given to the bill introduced in the Texas legislature. On inquiries as to its fate, Dallas legislators who were then serving told this writer some four years later that there had not even been a committee hearing or a committee recommendation on this bill. It was in this same year that the discussions were indeed heated between advocates of two types of arbitration statutes, as for example at the Detroit convention of the American Bar Association (50 Reports of ABA 135 (1925). The conflict was as between those advocating a measure such as was proposed by Mr. McKnight and others advocating a measure which would not apply to future disputes. Though such general discussions may have had something to do with the demise of this first effort, the writer has no knowledge as to this.

(b) Four years later, with the federal arbitration act having been enacted and under the impetus of views expressed in his article this writer, accompanied by two other Dallas lawyers, appeared before a committee to urge the enactment of the same bill that Mr. McKnight had proposed four years before. The measure was left to succeed on its own merits following that hearing and in due course it was learned that there had been no committee report on it.

(c) Two years later, in 1931, a bill, better tailored to Texas court proceedings in several ways than the earlier bill had been, was drafted by this writer. It was submitted to Professor Wesley Sturges of Yale Law School, the author of the treatise on Commercial Arbitrations and Awards. (After inquiries in New York he was understood to be the outstanding authority in the field.) Graciously he polished the Texas draft submitted to him; it contained provisions for ancillary court proceedings to tie down properties pending the completion of an arbitration, procedures in aid of enforcing an arbitration award, and other provisions for court procedures in aid of arbitration. The bill which he approved was introduced in both houses of the legislature, and Professor Sturges and the writer appeared before a committee in each house. No opposition having been heard, they left Austin optimistic as to the results, but again the legislature adjourned without the bill's being reported back from committee in either house.

(d) The fourth effort, in 1933, met with similar results. A number of prominent Texans wrote letters to legislators in support of the 1931 bill.

1 McKnight, Arbitration, 2 Texas L. Rev. 331 (1924).
2 Carrington, Commercial Arbitration in Texas, 4 Texas L. Rev. 430 (1926).
3 Supra Appendix note 2.
The Dallas Purchasing Agents Association, the Interstate Cotton Seed Crushers Association, and the Texas Society of Certified Public Accountants urged enactment. Resolutions in support of it were given wide distribution. Also, for the first time there were appearances at the hearing in opposition to the bill. Many of the legislators who were lawyers were opposed on the theory that the bill was aimed primarily at the practice of law. The vocal opposition was wholly on this ground. No committee report resulted from the hearings on this bill.

(e) A fifth effort, in the 1947 legislature, for the enactment of the 1931 bill was equally unsuccessful. Mr. George Waverly Briggs of Dallas, acting on behalf of the Texas Bankers Association, took the lead. Resolutions in support of the bill had been obtained from the Dallas Bar Association, the Dallas, Houston and other chambers of commerce over the state, and from many state and local professional associations.

(f) From the fall of 1954 until the fall of 1957 this writer served as one of the officers of the ABA Section of Corporation, Banking and Business Law. As the newest of the three officers of the section he was instrumental, in the fall of 1954, in the formation of a committee in that section on Commercial Arbitration. That committee worked diligently for three years, formally and informally, with many others in the formation of the new Uniform Arbitration Act. The old Uniform Act of 1925 was withdrawn. Committees of the American Arbitration Association, the C.I.O., and New York state and city bars also worked with a committee of the Commissioners on Uniform State Laws. A proposed act was revised again and again and, although many objections were still unresolved, was finally adopted by the Commissioners and by the House of Delegates of the ABA in August, 1955. The July Report of the committee of the section on Commercial Arbitration was most informative. The Labor Law Section of the ABA and the Corporation, Banking and Business Law Section were still unhappy, especially about section 12 of the act. All this was worked over with the committee of the Commissioners and all others interested in participating during the ensuing year, and an agreement was reached by almost everyone on a revised form of section 12 of the act as adopted in August, 1956.

In Dallas, in August of 1956, the Commissioners approved this amendment and then it was approved as the final act of the section during the chairmanship of this writer; the following week, the House of Delegates approved it. As thus amended it became the Uniform Act of 1956 (81 Reports of ABA 145 (1956)). The organized bar for the first time was urging upon the legislature of every state, and the Commissioners of Uniform State Laws of every state were urging upon the legislatures of their respective states, a modern arbitration act covering future disputes as well as existing disputes. This writer was then on record in support of the new Uniform Act. A real educational effort among lawyers and legislators of Texas was now far more practical than before. In 1957 and again in 1959 this writer caused to be introduced in the Texas legislature bills tracking almost ver-

4 10 Bus. Law. 53 (July 1955).
batim the Uniform Act of 1956, and these bills were used as bases for enlisting support for such a law. These bills included labor as well as all other arbitrations, and labor representatives in Texas were among the opponents of the bills for that reason. Opponents prevented a recommendation of the bill by a committee of either house.

(g) In November, 1959, this writer presented to the Board of Directors of the State Bar of Texas a proposal (1) that a Committee on Uniform State Laws (there having been no such committee of the State Bar for a number of years) be reactivated; (2) that this new committee learn from the former Commissioners of Uniform State Laws from Texas all such measures that had not been adopted in Texas and that they felt should be; and (3) that for each of these some local bar be enlisted to study the measure closely and make recommendations for or against its adoption. All this was done.

Fortunately, the Uniform Arbitration Act, one of those recommended by the Texas Commissioners, was assigned to the Houston Bar. Tom Martin Davis, a member of the Commissioners' Committee that had worked so long in the formation of this act, served as chairman of the Houston bar committee on this project. A strong recommendation assured the selection of the Uniform Arbitration Act to be sponsored in the 1961 legislature by the State Bar, and accordingly it was sponsored. The last of these references is to The Proposed Uniform Arbitration Act, an excellent explanation of the proposed bill by the chairman of the subcommittee in charge, William R. Choate. It was one of three uniform acts then sponsored. This one was not introduced early enough, really, for committee hearings and enactment, were serious opposition to develop. The Texas representatives of organized labor were no longer in opposition, but their shift of position developed a concern by numerous legislators who feared that the measure must be pro-labor. Hence this seventh legislative effort failed.

(h) In preparation for the 1963 legislature a new subcommittee on commercial arbitration of the State Bar committee was formed consisting of J. Chrys Dougherty of Austin, Tom M. Davis of Houston, A. J. Folley of Amarillo, W. Pat Camp of San Antonio, and this writer, who served as scribe in drafting and redrafting the several changes from the Uniform Act that were discussed in correspondence among members of this subcommittee. The changes discussed were designed to tailor the act better to Texas court procedures. Views of counsel for the American Arbitration Association and of lawyers in general practice in various states experienced in arbitration were obtained as to these drafts. The proposed 1963 act was then printed and distributed widely among those active in the State Bar. In due course it received the unanimous approval of the legislative committee of the State Bar and of the Board of Directors. For the Committee on Uniform State Laws, an article was published by J. Chrys Dougherty with reference to the act. In the Texas Law Review article by J. Chrys Dougherty and Don Graf in December, 1962 (which was widely distributed among legislators and lawyers of Texas in advance of the 1963 legislature) many reasons for revising the 1846 statute were excellently presented, and in parallel columns, with a clear

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9 Supra Appendix note 1.
explanation of the differences between them, appeared (i) the old Texas statute, (ii) the Uniform Act of 1956, and (iii) the bar-sponsored bill.

This bill was introduced in both houses at the beginning of the session, and an early hearing was held before the house committee. This hearing was deemed most favorable. Under the generalship of Mr. Dougherty, the chairman and members of the committees of each chamber to which the bill had been referred were frequently contacted throughout the session. It was decided that there would be no committee hearing in the senate until after the bill passed the house. Opposition developed strongly from three directions. Members of the construction industry wanted to be exempted from the bill, indicating that they strongly preferred the 1846 act for their industry. The members of the insurance industry took a similar position. Also members of the house committee and other legislators were concerned with those provisions of the proposed article 224 which would enforce arbitration provisions in printed form contracts, "fine print, usually." Three amendments for the proposed article 224 were formulated in the house committee. The bar committee, hoping for improvement of this article in the senate and despairing of any other committee action in the house, did not actively oppose passage of the measure by the house as thus amended. It reached the senate, however, too late in the 1963 session to get a favorable report of the bill either as introduced under bar sponsorship or as thus amended in the house. Thus the eighth legislative effort failed.

(i) Before January, 1965, the same steps of approval of the proposed bill that had been taken in the fall of 1962 were repeated in the State Bar. In the light of the amendments in the House of Representatives in 1962 to the proposed Article 224 it was the recommendation of the Drafting Committee that the bill as submitted to the Legislature be in the form that passed the House of Representatives in 1963. The reason for this recommendation (and the reason for the approval of the measure in that form at each other step taken with reference to the measure in the State Bar in the fall of 1964) was that the 1965 Legislature was to have before it an unprecedentedly heavy burden of important legislation, including the Revised Code of Criminal Procedure and the Uniform Commercial Code, both being very bulky and very important measures on which the State Bar wished to place major emphasis. Other measures to be sponsored by the State Bar were also of importance, and it was known that there would be very heavy pressures on the Legislature from a volume of other important legislation. It was concluded that the arbitration bill which passed the House after lengthy consideration in 1963, could probably be adopted as presented; whereas, submission of the measure in the form originally proposed in 1963, it was thought, would make it controversial and would result in its being lost in the heavy agenda before the 1965 Legislature. This recommendation was not on the basis that the amendments to article 224 by the 1963 House were pleasing to the Bar, but on the basis that the Bar would rather have the entire measure, with that article amended, than not to have it at all. It was on this basis that the Committee on Uniform State Laws unanimously approved the measure in the amended form for submission to the 1965 Legislature, that the Legislative Committee in accordance with that recommendation unanimously agreed to keep the arbitration bill on the State Bar agenda, and that the board of directors unani-
Thus the measure introduced at the beginning of the legislative session in January, 1965, in both the House and the Senate was in the form approved by the House in 1963. In legislative hearings in the House it was again amended so as to change the requirement added to Section 224 in 1963 (that the written agreement be concluded on the advice of counsel to both parties) by the addition there to of the words: “as evidenced by counsels’ signatures thereto” and, as indicated in the second paragraph of section II of the text of this Article, by the accidental and immaterial omission of the last four words of article 224.

Pursuant to this committee decision of the House, the measure was passed by the House rather early in the session. There seemed a possibility that if the measure passed the Senate without the same language in Section 224 there might develop a possibility of a conference committee for reconsidering anew all of the changes in the language of section 224 as initially submitted. These hopes were lost, however, when the Senate did not pass the measure until the last few days of the legislative session, and even then in the form which had passed the House. Thus the ninth effort for a new arbitration statute in Texas was successful in part; as to article 224 it was unsuccessful in the three respects emphasized in section III of the text of this Article.

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