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Proposition of Law:

The proper standard of review for a Court of Appeals reviewing a decision of a trial court granting or denying a motion to compel arbitration under O.R.C. § 2711.02 where the party opposing the motion alleges unconscionability of the arbitration clause is “abuse of discretion.”

Certified Question:

Should an appellate court apply a “de novo” or “abuse of discretion” standard of review when reviewing a trial court’s decision granting or denying a motion to compel arbitration where it is alleged that the arbitration clause is unconscionable?

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I. STATEMENT OF THE FACTS

These consolidated appeals are before the Court upon discretionary review and upon a certified conflict pursuant to S. Ct. R. IV. In its Order dated December 27, 2006 in Case no. 06-1890, this Court granted discretionary review upon Appellant Taylor Building Corporation of America's ("Taylor") Proposition of Law No. 1. The Twelfth District Court of Appeals, Clermont County ("Appeals Court") certified a conflict between the appellate districts by order dated October 23, 2006. This Court accepted jurisdiction of the certified conflict in its order dated December 27, 2006 in Case No. 2006-2043.

The underlying dispute between the parties arises from a Construction Agreement dated July 3, 2002 ("Contract"). Taylor is owed money for work and materials already provided to Appellees. Appellees Marvin and Mary Ruth Benfield ("Appellees") are unhappy with various elements of the construction and wish to terminate the Contract.

A. Appellees' process of selecting Taylor as the builder.

Appellant Taylor is a private, family owned company based in Louisville, Kentucky. The Taylor family has been building homes in Kentucky, Ohio and other states in the Midwest for generations. The quality of Taylor's homes and service has been proven by time. Thousands of families live in Taylor homes.

Appellees own land in Clermont County, Ohio. Appellees decided to build a home on their land, and researched the many builders in the area. During their research, Appellants visited more than one Taylor model home and apparently spoke with various Taylor personnel. (*See Defendants' Response to Motion for Stay (docket no. 13), Supp. at 47 ("Appellees' Response")*). Appellees' Response reveals that they researched the details of construction, price, and the terms of an agreement for construction. (*Id.*)

At the conclusion of this process, Appellees decided that Taylor was their top choice among the many competitors in this field. Appellees informed Taylor of their wish to sign a contract for the construction of their home. (Id.) Appellees considered the terms of the Contract and discussed it in detail with a Taylor sales representative. (Id., Supp. at 45-6). Through these negotiations, Appellees were able to gain additional benefits through discounts and additional features. (*See e.g.* Appellees' Brief to Appeals Court at 2. (Docket no. 46))

B. The signing of the Contract.

Appellees visited a Taylor office where the parties discussed the terms of the Contract. (*See* Appellees' Response, Supp at 46-7). Appellees were given a copy of the proposed contract and were allowed an opportunity to review it. (Id.)

Appellees' state that after they had read the Contract, they addressed questions to Taylor about the terms. (Id.) Among the items specifically discussed was the arbitration clause. (Id.) Appellees understood the legal significance of this provision. (Appellees' Brief to Appeals Court at 14 (Docket no. 46)). As they stated in their Response, they hesitated and questioned whether they were willing to agree to this term. (*See* Appellees' Response, Supp at 46-7). Appellees do not claim that they didn't understand the arbitration provision or its meaning. Despite their initial misgivings, and after considering the benefits and costs of the Contract as a whole, Appellees agreed to arbitrate any disputes that might arise with Taylor. Appellees placed their initials in the blank next to the arbitration clause in the Contract, giving their specific consent to this provision. (*See* Contract, ¶ 15(b), Supp. at 30 ("Arbitration Clause")).

Appellees have never alleged that they were pressured to sign the Contract at that time, or that they were deprived of the opportunity to obtain the opinion of a lawyer or other professional. There is no evidence on the record as to whether Appellees in fact consulted with an attorney prior to signing. Appellees have never alleged that they attempted to negotiate for a Contract without an Arbitration Clause. Even the highly self-serving “affidavit” furnished by Appellees gives no indication that Appellees were provided with any false information concerning the legal effect of the Arbitration Clause.¹ Rather, Appellees allege only that at the time of the Contract, they were told that Taylor made service to its clients a top priority and that Taylor had a good record of resolving problems with its customers without need to resort to formal proceedings. (*See Appellees’ Response, Supp. at 45-6*).

C. The Contract dispute.

Appellees contracted with a third party for the initial clearing of the site where their home was to be constructed.² Taylor commenced construction of the foundation, performed the framing, installed the roof and windows, installed mechanical systems and drywall. Throughout the construction process, Taylor applied for and obtained all required inspections and approvals from the appropriate government agencies. Near the completion of the project, a dispute arose between the parties and Appellees refused to make the progress payment called for at completion of the drywall. Appellees subsequently

¹ Eight months after Appellees’ filing of the Response with the Trial Court, Appellees submitted an “affidavit” in support. The Affidavit recites not a single fact nor even asserts that it was based on the affiant’s personal knowledge. Rather, the affiant simply “adopted the allegations in the answer, affirmative defenses, counterclaims...and response.”

² Appellees retained a construction consultant who opined that the lack of positive grading around the foundation, for which Appellees bear sole responsibility, was channeling a large volume of surface water into the home.

informed Taylor in writing of their intent to terminate the Contract. Appellees notified Taylor personnel to stay off the property and demanded that the home, now more than 80% complete, be demolished, and all previous Contract payments be returned to them. After various attempts to resolve the dispute informally and a written demand for arbitration by Taylor, which Appellees refused, the action below was commenced.

D. The Trial Court's Decision

The Trial Court held a hearing on Taylor's Motion to Stay Judicial Proceedings ("Taylor's Motion"). In an 18 page written decision that gave thoughtful consideration to the facts and each argument raised by Appellees, the Trial Court granted Taylor's Motion ("Trial Court Decision"). As required by O.R.C. § 2711.02, the Trial Court first made an express determination as to the existence of an arbitration agreement and the applicability of the arbitration clause to the dispute. (Appx. at 19-21). The Trial Court then analyzed at length the arguments against enforcement offered by Appellees and rejected each of them in turn. At that time, Appellees did not argue that the Contract's arbitration clause imposed undue expense upon them, nor did they offer any proof of same. (*See Appellees' Response*).

The Trial Court concluded by staying the litigation pending mediation and arbitration of the dispute. The Trial Court Decision repeatedly recited the lack of evidence on the record which would allow the Court to find in favor of Appellees. (*See e.g.* Appx. at 31 (twice), 32 (twice), 33 ("nothing in the record allows..."), 34). The Trial Court's Decision was consistent with those of three other Ohio Courts of Common Pleas that had

previously granted motions by Taylor to enforce the same contract over claims of unconscionability.³

E. The Appeals Court's Decision

Appellees duly filed their Notice of Appeal of the Trial Court's Decision. In their brief to the Appeals Court, Appellees abandoned several arguments that had been offered to the Trial Court and limited their argument before the Appeals Court to unconscionability. For the first time, Appellees argued to the Appeals Court that the Arbitration Clause was unconscionable because of the alleged expense of conducting an arbitration. In support of this new argument, Appellees asserted facts by which they purported to show the cost of an arbitration proceeding. Appellees went so far as to attach new evidence, the American Arbitration Association rules, to their brief. Docket no. 41, Appendix A-3. Appellees' Brief also urged consideration by the court of other information to be found at various websites identified in the Brief including the AAA website and Taylor's website. *See* Appellees' Brief at 13, 15. This evidence was also not presented to the Trial Court nor contained within the record at that time.

After briefing and oral argument, the Appeals Court reversed the Trial Court's judgment. In order to reach its Decision, the Appeals Court relied heavily upon the evidence and arguments that were presented for the first time on appeal. *See* Decision, ¶ 41-2, Appx. at 14-15. In reaching its decision, the Appeals Court applied the "de novo"

³ *See Reid v. Taylor Building Corp. of America*, Champaign Cty. Ct. C.P., Case No. 2002-CV-0083 (decision of Judge Roger B. Wilson dated July 29, 2002); *see also Skeens v. Taylor Building Corp. of America*, Clark Cty. Ct. C.P., Case No. 01-CV-1125 (Decision of Judge Gerald F. Lorig dated April 16, 2002); *Taylor Building Corp. of America v. LaFollette*, Greene Cty. Ct. C.R., Case No. 2003CV0686 (Decision of Judge Campbell dated September 9, 2003, granting motion of Taylor staying litigation pending arbitration where Taylor commenced action in response to Notice to Commence Suit)

standard of review, contradicting its own holding in a prior case where it applied the “abuse of discretion” standard in considering a claim of unconscionability of an arbitration agreement. See McGuffey v. LensCrafters, Inc. (2001), 141 Ohio App. 3d 44.

III. ARGUMENT

Proposition of Law:

The proper standard of review for a Court of Appeals reviewing a decision of a trial court granting or denying a motion to compel arbitration under O.R.C. § 2711.02 where the party opposing the motion alleges unconscionability of the arbitration clause is “abuse of discretion.”

Certified Question:

Should an appellate court apply a “de novo” or “abuse of discretion” standard of review when reviewing a trial court’s decision granting or denying a motion to compel arbitration where it is alleged that the arbitration clause is unconscionable?

This Court should impose the “abuse of discretion” standard of review where a court of appeals reviews the decision of a trial court *granting* a motion to compel arbitration because to do so would be consistent with the intent and letter of the Ohio Arbitration Act, R.C. § 2711.01, et seq. (“OAA”) and the prior holdings of this Court. For the same reasons, this Court should impose the “de novo” standard of review where a court of appeals reviews the decision of a trial court *denying* a motion to compel arbitration.

- A. The standard of review imposed by this Court should reflect the intent and purpose of the OAA and therefore should serve to encourage arbitration where parties have agreed to it in writing.**
 - 1. The practical impact and public importance of the certified question and approved proposition of law.**

Because this case comes before the Court on a well defined discretionary grant of jurisdiction and a narrowly phrased certified conflict, one might assume that the Court’s

holding will affect only a small number of cases in which the particular circumstances arise. The case ostensibly presents a procedural question that need not have any effect on the law of the underlying subject matter of arbitration itself. Yet, this case has far reaching implications for contracts and interactions between people and entities in every part of Ohio.

The certified question and the approved proposition of law address only the issue of an appropriate “standard of review.” However, the standard of review is a critical policy tool available to this Court that has influence beyond its literal command. First, the standard provides direct guidance to the court of appeals as to the level of scrutiny to be applied in review of a given case. Once in place though, the standard is influential in defining the scope of considerations reviewed by that same court of appeals and also the process undertaken by the court of appeals in conducting the review. The review that the courts of appeals apply to trial court decisions will quickly shape the practices of Ohio’s trial courts. The conduct of Ohio’s citizens in signing contracts will follow closely behind.

Because the standard of review imposed by this Court will inevitably influence the administration of rights conferred by the OAA, the new standard should reflect the purpose and objectives of the statute itself. Therefore, in deciding upon a standard of review, this Court should consider the intent of the Ohio General Assembly in passing the OAA. The legislative intent may be gleaned from all parts of the OAA, including those that do not strictly involve the standard of review. Indeed, since the imposition of standards of review is traditionally the exclusive province of this Court, it stands to reason that the legislature did not directly address the subject. Therefore, legislative intent and purpose will have to

be discerned from the text and history of the statute itself and on legislative pronouncements on other areas of the law that do not directly involve standard of review.

2. Legislative and judicial approval of arbitration.

The legislative view of arbitration is not ambiguous: it is positive. Arbitration provisions are expressly made enforceable by act of the Ohio General Assembly. *See* R.C. § 2711.01(A). The General Assembly has further seen fit to provide the procedure by which a party to such a contract can remove such a case to arbitration and empowers a court to stay litigation proceedings pending resolution in arbitration. *See* R.C. § 2711.02(B). Beyond the passage of the original OAA, Ohio's General Assembly has taken further measures to encourage arbitration. In 1975, the legislature enacted amendments to the OAA that included R.C. §§ 2711.21, et seq., which provided for voluntary arbitration of medical malpractice cases. In 1991, the legislature enacted R.C. Chapter 2712 which gives legal force to international arbitration agreements and proceedings.

The decisions of this Court and the U.S. Supreme Court make clear that arbitration is favored by the common law of Ohio and the United States. Council of Smaller Enterprises v. Gates, McDonald & Co. (1998), 80 Ohio St.3d 661; Schaefer v. Allstate Ins. Co. (1992), 63 Ohio St.3d 708; Prima Paint Corp. v. Flood & Conklin Mfg. Co. (1967), 388 U.S. 395. Arbitration provisions in consumer contracts have also been consistently enforced by Ohio's courts, including this Court, even where there are collateral issues such as fraud in the inducement of a contract as a whole. *See* ABM Farms, Inc. v. Woods, 81 Ohio St.3d 498 (1998), Vincent v. Neyer, 139 Ohio App.3d 848 (2000). Arbitration has also been embraced by the lower courts of Ohio. Many courts of common pleas offer arbitration services through the auspices of the court itself.

Most importantly, the people of Ohio have approved of arbitration. As arbitration has become increasingly common, it has become trusted among all sectors of Ohio's population. People in Ohio have come to rely on the enforceability of arbitration decisions and agreements to arbitrate.

The reasons for the broad acceptance of arbitration as a means of dispute resolution are clear. For litigants, arbitration offers an alternative to the courts which can be quicker, less expensive, and more straightforward and understandable for the non-lawyer. For the judicial system, arbitration offers a relief valve for congested dockets. In arbitration, litigants save time and money, the courts save judicial resources, and the public as a whole reaps benefits from both.

The public policy permitting and favoring arbitration has always been supported by this Court. The standard of review imposed by this Court in this case thus should also reflect that policy and should favor efficient enforcement of arbitration agreements. For these reasons, this Court should impose a dual standard of review under which trial court decisions which grant a motion to compel arbitration should be reviewed under the "abuse of discretion" standard, while trial court decisions that deny a motion to compel should be reviewed under the "de novo" standard.

B. The intent and purpose of the Ohio General Assembly, as expressed through the OAA, support the imposition of a standard of review that favors the enforcement of written arbitration contracts.

The Ohio General Assembly has demonstrated its intent to limit the judicial role in enforcement of arbitration agreements and to provide an expedited procedure to refer arbitrable cases out of the courts. This legislative purpose counsels for a dual standard of review that will serve to encourage enforcement of written arbitration agreements.

1. The substance and structure of the OAA evidence a legislative intent to limit the need for judicial intervention in the enforcement of written arbitration contracts.

The clearest evidence of legislative intent underlying the OAA is the text and structure of the statute itself. The OAA is unequivocal in making enforceable all agreements to arbitrate. Yet, once that unambiguous pronouncement is made, the legislature set forth a straightforward and streamlined procedure for enforcement of arbitration agreements. When the OAA is considered practically, its text evidences the legislative purpose of limiting the need for judicial involvement at every point, including judicial review of trial court decisions enforcing arbitration agreements.

The statutory affirmation of arbitration is no recent development in Ohio law. The OAA was passed in 1953. In passing the OAA, the Ohio General Assembly directly endeavored to limit the role of the courts in the enforcement of arbitration contracts or provisions. Under § 2711.02, the legislature prescribed a narrow task for any court called upon to enforce such an agreement. Under that section, the court “shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement...” The inquiry to be made by the court in this circumstance is limited to “being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration.”

This statute sets forth clearly the role of the court: 1) make a finding of the existence of a written contract or clause providing for arbitration; and, 2) make a determination that the dispute falls within the scope of the arbitration contract or clause. Once these limited determinations are made, the OAA contemplates that the court

“shall...stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement.” R.C. § 2711.02.

A similar procedure is provided for under Section 2711.03 where a party is aggrieved by the failure of another to submit to arbitration. Under that section also, the task of the court is limited to “being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue.” Once the court has so satisfied itself, under 2711.03, the court “shall make an order directing the parties to proceed to arbitration in accordance with the agreement.” Id.

Having provided for a stay in pending litigation, and for an order directing the parties to arbitrate, the legislature there ended the work of the court and left all other questions to the arbitrator. Most pertinently, arguments concerning unconscionability of *other* clauses of a written agreement should be left to the arbitrator. When § 2711.02 and .03 are taken, as they must be, at face value, they instruct the court to consider solely whether or not the parties agreed to arbitrate a given dispute. Upon proof of this simple fact, the court is commanded unconditionally under the OAA to stay pending litigation and order the parties to arbitration.

The legislative purpose of providing for “expeditious and economical means” for referral of disputes to arbitration counsels for a deferential standard of review by appellate courts of trial court decisions that grant such relief. *C.f. Shaefer v. Allstate Ins. Co.* (1992), 63 3d 708, 712. Conversely, where a court refuses to give effect to a party’s right to arbitrate under the OAA, that party should have the right to a heightened standard of judicial review.

2. **The OAA's statutory limits upon judicial review evidence an intent to provide for expedited referral to arbitration, protection of the right to arbitrate, and a limit to appellate proceedings that may delay arbitration.**

The legislature's intent to strictly limit the participation of the judiciary in review of decisions enforcing arbitration clauses can be seen by the recent amendment to the OAA. The OAA was amended by the legislature in 2000. *The 2000 amendments actually eliminate the right to appeal of this question solely in the case where a motion to refer a case to arbitration is granted. On the other hand, when a motion to stay an action and refer to arbitration is denied, the right to appeal is preserved.* See R.C. 2711.02(D); see also Ohio Bill Analysis, 2000 H.B. 401. The legislature has by these amendments directly addressed the question of judicial review of a decision under § 2711.02. The mandate is clear: matters referred to arbitration by a court of common pleas should proceed to arbitration without delay, even without judicial review. On the other hand, the legislature has acted to allow recourse to persons whose efforts to secure compliance with an arbitration contract are unsuccessful.

When the two separate effects of the amendment are taken together, they demonstrate the legislative priority for the protection of right to arbitrate under the OAA. First, where a party has successfully enforced the right to arbitrate, that decision is non-appealable, and thus the goal of speedy and efficient dispute resolution is achieved. Second, where a party is deprived of the right to arbitrate, that decision is appealable, thus affording special protection to a contractual right to arbitrate.

Consistent in limiting the role of the courts and providing for expeditious and efficient referral to arbitration, the 2000 amendment also eliminated the right to a jury trial on the question of the existence of an arbitration clause and the arbitrability of the dispute in some circumstances. *See* O.R.C. 2711.03(C).

It is clear that the effect of the 2000 Amendment is limited in scope. The limitation on the right to appeal provided for in § 2711.02(D) and the elimination of the right to jury trial are only applicable under a “Commercial Construction Agreement” as defined in that section. Yet, these recent actions of the legislature speak volumes about the purpose of the OAA as a whole. From the 2000 amendment, the legislature’s desire to facilitate arbitration without lengthy judicial processes is clear. The 2000 amendment recognizes a fundamental truth about the OAA: the benefits of arbitration may only be reaped when arbitration can be had quickly and without excessive entanglement in the courts. Indeed, if a party were inclined to climb the judicial ladder presenting arguments to multiple courts concerning the interpretation of a contract, that party could just as easily try the underlying dispute to a court.

This Court should give effect to the intent of the legislature by applying a similar standard to appeals of decisions outside the category of Commercial Construction Contracts provided for by § 2711.02(D). In light of the 2000 Amendment, this Court should impose a dual standard: where a trial court **grants** a motion to stay and orders arbitration, the standard of review should be “abuse of discretion”; yet, where a trial court **denies** a motion under 2711.02, the standard of review on appeal should be “de novo.” By applying this dual standard, this Court would further the goal of providing for quick and

efficient access to alternative dispute resolution and would ensure the protection of the statutory right to enforcement of arbitration agreements.

3. This Court's precedents counsel for the imposition of a standard of review that favors the consistent and efficient enforcement of arbitration contracts.

The view espoused herein of a narrow scope of inquiry by a court considering enforcement of arbitration contract is consistent also with the precedents of this Court. From its earliest history through its recent opinions, this Court has consistently proclaimed its approval of enforcement of agreements to arbitrate. *E.g.* Campbell v. Automatic Die & Products Co. (1954), 162 Ohio St. 321, 329; Corrigan v. Rockefeller (1902), 67 Ohio St. 354, 367; Council of Smaller Enterprises v. Gates, McDonald & Co. (1998), 80 Ohio St.3d 661, 666. However, at least two cases warrant discussion here.

i. ABM Farms v. Woods, Inc.

In ABM Farms v. Woods, Inc. (1998), 81 Ohio St.3d 498, this Court made two critical observations on this subject that bear directly on the question of the standard of review. This Court should apply the holdings of ABM to the present case in announcing the correct standard of review.

First, the ABM court observed that the OAA provides for severability of arbitration clauses within larger contracts. This Court held that the language of Section 2711.02 was unambiguous in requiring a trial by a court only when the consent to the arbitration clause is specifically contested by a party. Id. at 501. This Court elaborated, explaining that an arbitration clause is “in effect, a contract within a contract.” Id. at 502. As such, revocation of an arbitration clause requires a legal basis applicable specifically to that clause.

This Court thus set forth the rule that where a party claims fraudulent inducement of an arbitration clause, it must show specific proof that arbitration was the subject of the misrepresentation. This Court expressly barred judicial consideration of extraneous materials and directed the courts of this State to focus the inquiry upon the making of the arbitration agreement. In so holding, this Court set forth a rule that commands a narrow judicial role for enforcement of arbitration clauses.

By the ABM decision, this Court narrowed the scope of inquiry of a trial court in considering a motion under § 2711.02, and limited judicial participation in the ADR process overall. A more limited appellate role is thus consistent with ABM and with this Court's prior interpretation of the OAA.

The logical application of ABM to the present case would require that a court limit its consideration of an unconscionability defense to such evidence that might be presented as to the unconscionability of the arbitration clause specifically. In the present case, the Appeals Court's finding of unconscionability relied on a much broader review. The Appeals Court considered nearly every paragraph of the highly detailed Contract, despite the fact that many of the provisions that the Appeals Court found objectionable have nothing at all to do with the arbitration clause.

The application of a "de novo" standard of review in this circumstance invites unduly close examination of proceedings which were intended by the legislature to be summary in nature. The straightforward and mechanical procedures set forth by R.C. §§ 2711.02 and 03 make for a simple inquiry that can be quickly completed by any trial judge, consistent with the spirit of the OAA. Indeed, the simplicity of the inquiry required by §§ 2711.02 and 03 should provide reason for this Court to place broad discretion in the hands

of a court that may grant such a motion and to require deference of an appeals court that reviews such a decision.

a. The Trial Court's Decision was consistent with ABM and the OAA.

The Trial Court Decision evidences consideration by the court consistent with the precedent and the spirit of the OAA. Although the Trial Court gave extensive and thoughtful consideration to Appellees' arguments opposing arbitration, it focused on the question of the agreement to arbitrate. The Trial Court first determined the existence of a written agreement, and noted that the Appellees specifically offered their consent to the arbitration provision by initialing next to it. Appx. at 21-2, 33. The Court also made an independent determination that the arbitration provision was applicable to the instant dispute. Appx. at 21-2.

The Trial Court then considered the defenses to arbitration offered by Appellees. In doing so, the Trial Court limited the enforcement of the Contract, consistent with ABM. The Trial Court noted the venue selection provision in the Arbitration Clause which identified Louisville, Kentucky as the venue for arbitration. The Trial Court noted that the provision was inconsistent with R.C. § 4113.62. Yet, rather than find the entirety of the Contract unconscionable, the Trial Court noted the severability of provisions (*See* Contract, Supp at 9, ¶ 18), and resolved to give effect to the intent of the parties by enforcing the Contract according to Ohio law, without the venue provision. Appx. at 31. The Trial Court's enforcement of the Contract was consistent with the command of this Court in ABM.

b. The Appeals Court's Decision violates this Court's holding in ABM and is inconsistent with the OAA.

The instant case illustrates clearly the folly of allowing “de novo” review of a decision referring a case to arbitration. The Appeals Court reconsidered each of the same factors considered by the Trial Court, and reached the opposite conclusions. The Appeals Court’s conclusion contradicts not only the Trial Court, but three other Ohio courts who have previously enforced the same Contract. The Appeals Court’s decision flies in the face of ABM by finding the Arbitration Clause unconscionable based a wide variety of provisions, many of which never became applicable to these parties, and most of which have nothing at all to do with the question of arbitration.

For example, the Appeals Court found objectionable a clause in the Contract by which Appellees promised not to move in to the completed home until they had paid in full. Appx at 12, ¶30. The Appeals Court provided no explanation as to why the Benfields should be allowed to evade paying for construction of the home before taking up residence, but apparently felt that for Taylor to actually collect money owed was per se unconscionable as a matter of law. The Appeals Court made no effort to relate this finding to the enforcement of the independent and severable arbitration clause.

The Appeals Court also cited as objectionable a provision under which Appellees agreed to pay an additional processing fee *if* they obtained financing from certain identified publicly funded lenders. Appx at 12, ¶34. The Appeals Court made no attempt to connect this provision logically to its analysis of the question of arbitration, nor did it inquire about the clause during oral argument. So unrelated is this provision to the subject of the lawsuit that it never occurred to Appellees to make reference to the clause, and there is no evidence on the record to indicate whether Appellees actually financed through any of the named lenders or paid the fee. If it had given any real consideration to the purpose

of this clause, the Appeals Court might have recognized that some publicly funded lenders, such as the Federal Housing Administration, require exhaustive documentation from a builder prior to disbursement of funds. Private lenders typically have minimal requirements by comparison. The result is higher overhead cost to the builder on a job financed by public lenders, as compared to a job financed by a private lender. Therefore, it is imminently reasonable that a builder would accordingly charge a higher price for the increased work. The Appeals Court apparently seeks to impose its jurisdiction not only over the legal effect of the Contract, but over the prices that Taylor is permitted to charge for its services.

The Appeals Court also found objectionable a provision by which Taylor reserved its rights to mechanic's liens. The Appeals Court again made no attempt to draw any relationship between this provision and the Arbitration Clause. On this subject, the Appeals Court deems unconscionable Taylor's mere mention of rights that the Ohio General Assembly expressly conferred on Taylor and all other builders through R.C. §1311.01, *et seq.* How the assertion of statutory rights could be unconscionable was not explained. The provision was simply identified as "heavily skewed in favor of [Taylor]."

In a closely related point, the Appeals Court cited an attorneys fees provision in the Contract as unconscionable. At oral argument it was noted that the Ohio's mechanic's lien statute specifically confers upon homebuilders the right to recover attorney's fees from a homeowner. *See* R.C. § 1311.16. Taylor in fact holds a mechanic's lien against the property, and its claim enforcing the lien was asserted in the Complaint. (*See* Supplement at 4). Thus, the absurd result of the Appeals Court's Decision is that Appellees have been

relieved of the prospect of recovery of attorneys fees under the Contract, and are instead subjected to recovery of the same attorneys fees under the statute.

The Appeals Court also found objectionable a prescient clause of the Contract that attempts to make provision for the prospect of judicial invalidation of the Arbitration Clause. (Decision at ¶ 48, Appx. p. 16). The Appeals Court thus punishes Taylor for its correct recognition of the prospect for inconsistent judicial action. Clearly, at the time of the making of the Contract, the clause was entirely superfluous. The Contract had never been deemed unenforceable; to the contrary, it has thrice been enforced by different Ohio courts. Yet, the Appeals Court held that the Arbitration Clause is unenforceable because there is another clause where the parties have agreed on what to do if the Arbitration Clause is deemed unenforceable.

The Appeals Court did not constrain itself to review of those matters that had actually been presented to and decided by the Trial Court. Incredibly, the Appeals Court determined that it was entitled to go beyond the record to consider new evidence and arguments that were not raised before the Trial Court. The Appeals Court accepted the new evidence attached to Appellees' Brief, and then cited the new arguments concerning the cost of arbitration in the Decision. Appx. at 14-5, ¶ 41-2. In light of this plain error, this Court should remand the decision to the Appeals Court with instructions to affirm the Trial Court's decision no matter what standard of review this Court imposes.

It is clear that under the "de novo" standard of review, the Appeals Court felt empowered to conduct an inquiry far more broad than what was conducted by the Trial Court, even to the point where it would violate the most fundamental rule of appellate procedure by admitting and relying on evidence not within the record. The permissive "de

novo” standard allowed this duplicative and counterproductive process to be undertaken. Only by imposing the more restrictive “abuse of discretion” to review of a decision enforcing an arbitration contract can this Court prevent such counterproductive proceedings.

Consistent with this Court’s decision in ABM, this Court should impose a standard of review that narrowly focuses the appellate court’s review on matters that relate specifically to the arbitration clause itself, and should encourage arbitration by vesting discretion in courts to enforce arbitration contracts, while allowing more detailed review of decisions refusing to enforce arbitration clauses.

iii. Williams v. Aetna Finance Company

Appellees will surely offer the case of Williams v. Aetna Finance Co. (1998), 83 Ohio St.3d 464, as authority on this point. However, the Williams decision offers no real guidance on the question before the Court in this case, nor on arbitrability in general. This is true because of the convoluted proceedings that landed Williams before this Court.

This Court’s affirmance in Williams of the non-enforcement of an arbitration clause was strongly influenced by the fact that the case had already once been through the appeals process, including briefing and argument to this Court. On its second arrival before this Court, a jury trial had already been concluded and affirmed on appeal. This Court specifically stated that the decision concerning the arbitration clause and the affirmance of that decision were the result of the “confusion” of the trial court. Id. at 471-2. This Court went on to say that the decision of the appeals court affirming the non-enforcement could not be reconciled with the law as expressed by this Court and the U.S. Supreme Court. Id. at 472. In the end, this Court concluded that courts below had

mishandled the question of the arbitrability of the dispute and could only content itself that the outcome overall was satisfactory and that to remand the case would be futile. Id. at 473.

The only commonality between Williams and this case is the manifest lack of a consistent approach among the courts of this state to enforcement of arbitration clauses. Flexibility in the law on this subject leaves any two courts (trial, then appeals) a likelihood of reaching two different conclusions based on the same evidence under a “de novo” standard of review. If anything, Williams is the poster child for the delay and expense of litigation and appeals that the legislature and the public hoped to avoid by passage of the OAA.

C. A standard of review that encourages efficient referral of cases to arbitration is consistent with the intent of Congress as expressed in the Federal Arbitration Act, 9 U.S.C. § 1, et seq.

In passing the OAA, the General Assembly enacted a statutory scheme that was nearly identical to the Federal Arbitration Act, 9 U.S.C. 1, et seq. (“FAA”). Nearly every section of the OAA has a counterpart in the FAA. *Compare e.g.* R.C. § 2711.01 to 9 U.S.C. 2; *compare also* R.C. § 2711.02 to 9 U.S.C. 3; *compare also* R.C. § 2711.10 to 9 U.S.C. 10. For this reason, this Court may look to the intent of Congress in passing the FAA as persuasive authority that may properly provide guidance in interpreting the OAA.⁴

Identical in structure and nearly identical in its terms to the OAA, the text of the FAA itself provides ample evidence of Congressional intent to allow private parties to reap the benefits of arbitration without excessive entanglement in the courts. The FAA’s

⁴ Indeed, where any provision of state law contradicts the FAA, it is preempted by the federal law. *See Great Earth Cos. v. Simons* (6th Cir. 2002), 288 F.3d 878, 888.

provisions set forth a expedited procedure for enforcement of arbitration clauses that is mirrored by the OAA. However, in the case of the FAA, the legislative historical materials provide useful background.

In a report of the Judiciary Committee of the House of Representatives at the time of original passage of the FAA, it was noted that the FAA served the purpose of ensuring that:

[a] party willing to perform his contract for arbitration is not subject to the delay and cost of litigation. Machinery is provided for the prompt determination of his claim for arbitration and the arbitration proceeds without interference by the court.

H.R. Report No. 96, 68th Congress,
1st Session (1924) at 2, Appx. at 60

The committee similarly describes the above described “machinery” as being a “summary trial” on the limited question of the existence of the arbitration agreement. Id. The committee further notes that “It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration...” Id.

The Senate Judiciary Committee made similar findings:

The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase.

...

In contrast with the long time required by the courts with their congested calendars...the records of [The Arbitration Society of America] show that the average arbitration required but a single hearing, and occupied but a few hours of the time of disputants, counsel, and witnesses. The cost to the disputants was said to be trifling as compared with the cost of litigation.

U.S. Senate Report No. 536
68th Congress, 1st Session (1924) at p. 3, Appx. at 63.

The committee reports show that the paramount concern for the Congress in passing the FAA was the avoidance of expense and delay in litigation. This intent bears directly on the question of appellate review. Just as the Congress intended to provide an alternative to litigation, it also intended to provide “a simple method for securing the performance of an arbitration agreement.” *Id.* A corollary to the provision of expedited proceedings for compelling arbitration is a limit to appellate proceedings on the same issue. It stands to reason that where the Congress sought expediency in a “summary” proceeding to secure performance, it would eschew plenary review by a court of appeals of a trial court decision ordering arbitration.

This Court must wonder what would be the reaction of the respective Judiciary Committees to learn that Ohio’s application of the law may ensure that any party who changes its mind about arbitration is entitled to the most permissive review of the “summary” proceeding, even where one court has already determined the existence and applicability of an arbitration provision. The foregone conclusion of unduly expansive review is to ensure that the “costliness and delay” of litigation will be incurred before any arbitration can even begin.

The FAA is the direct ancestor of the OAA. The objectives of the Congress were adopted in wholesale fashion by the Ohio General Assembly when it passed the OAA which was so closely modeled upon the FAA. The principal concern of the Congress was to allow parties who consent to do so to avoid expense and delay and proceed without undue burden to alternative dispute resolution. This Court should give effect to the intent of the Congress and the Ohio General Assembly by imposing a standard of review that affords the highest degree of deference to a court that grants a motion to refer a case to

arbitration but allows “de novo” review of decisions that deny a motion to compel arbitration.

D. Basic utilitarian analysis favors the imposition of a standard of review applicable to motions under R.C. § 2711.02 that encourages arbitration.

A simple utilitarian cost/benefit analysis of judicial review of arbitration decisions counsels for the dual standard previously set forth. This is true because no harm or even inconvenience is imposed when a party is compelled to arbitrate. In the worst case scenario of an improper decision by a trial court, the party opposing arbitration is simply referred to an arbitration forum governed by the OAA which provides ample protection for the rights of both parties. Yet, when a party is deprived of the statutory right to arbitrate, the cost to the party, the judiciary and society as a whole is high.

It is relevant that the situation in which these cases arise can only occur where a party has signed their name to a written contract in which they expressly agree to arbitrate. Under any set of circumstances, a party who wishes to take back their written word should bear a heavy burden in order to do so. Accordingly, the standard of review should not serve to encourage the people of Ohio to break their promises.

It is consistently unclear among parties opposing arbitration exactly what is to be feared from arbitration of disputes. Arbitration is a well established institution in Ohio. When such parties finally arrive in arbitration, kicking and screaming after a hearing and an appeal on the question of arbitrability, they find a forum where they receive a fair hearing consistent with due process.

Decisions from courts in all parts of the United States and Ohio recognize the basic trustworthiness of arbitration as a means of dispute resolution. *E.g. Gilmer v. Interstate*

(1991), 500 U.S. 20, 29-32. This Court has itself resolved “to favor the regularity and integrity of the arbitrator’s acts.” Brennan v. Brennan (1955), 164 Ohio St.2d 29, 36. State legislatures and the U.S. Congress have offered the same recognition whether expressly or by enacting laws like the FAA and OAA.

In addition to this basic trustworthiness, litigants enjoy statutory protections of their rights to due process. Both the OAA and the FAA provide basic procedural guidance to ensure fair hearings. Under the OAA, arbitrators have general supervisory powers over the proceedings, and have authority to issue subpoenas to compel the appearance of witnesses or production of evidence, and to direct the taking of depositions. *See* R.C. § 2711.06, 07. Under the OAA, the decision of the arbitrator must be in writing, signed by the arbitrator and must be served upon the parties. *See* R.C. § 2711.08. The OAA provides arbitrators with the tools and powers necessary to conduct a fair hearing. Furthermore, parties are free to agree to make use only of arbitrators or arbitral fora that have in place their own rules of procedure.

Beyond these procedural protections that ensure the soundness of the arbitral process, the legislature also provided ample protection against potential abuse of powers by the arbitrators. Under 2711.10, a party to an arbitration has the right to have vacated the decision of arbitrators who exceed their powers, commit fraud or collusion, or other misconduct. Under Section 2711.11, a party to an arbitration has the right to have an arbitration decision modified by a court where clerical errors or other imperfections are present. A prevailing party in an arbitration has the right to have the award confirmed, but not without approval by a court. *See* 2711.09. However, the non-prevailing party has the right to appeal any such confirmation by the court. *See* R.C. 2711.15. In short, the OAA

provides numerous protections that ensure basic due process. Based on these safeguards, Ohio's courts may proceed confidently in facilitating arbitration where the parties have freely contracted for it.

On the other side of the coin, the cost to litigants, the judiciary and the public from excessive judicial review is high. First, there is the public cost of use of the judiciary and the additional burden to the judicial system as a whole from the additional caseload. Second, there is the cost and delay to the parties of additional proceedings affirming the simple existence of a contract to arbitrate. Both these costs are essentially dead weight on both the system and the parties. This is true because when the judicial review is at an end, no matter what the decision, no progress has been made toward resolution of the underlying dispute. The only question that is answered is whether a case will be arbitrated or litigated. The cost therefore of an overly permissive standard of review or one that encourages excessive judicial review is high. It is in effect the complete undermining of the statutory objective of the OAA.

This Court should act to allow the citizens of Ohio to proceed with confidence in agreements to arbitrate. In the present legal climate, no arbitration agreement can be assumed to be enforceable. In this uncertain environment, citizens will eventually choose the path of certainty and simply litigate. Any possible benefits of the OAA are then lost.

Because there are basic statutory protections governing the process of arbitration and ensuring against basic unfairness in the outcome, this Court should impose a standard of review that encourages arbitration consistent with the purpose of the OAA. The standard best suited to do so is one that subjects a decision granting a motion to compel

arbitration to the “abuse of discretion” standard and subjects a decision denying a motion to compel arbitration to the “de novo” standard.

E. Consideration of the unconscionability defense to enforcement of arbitration contracts is inconsistent with the clear mandate of R.C. § 2711.01.

The legislature’s limitation of the role of the courts in enforcing arbitration is consistent with the overall intent of the OAA. Conversely, the common law defense of unconscionability to enforcement of an arbitration contract is fundamentally inconsistent with the basic command of the OAA. This Court should employ the standard of review to preclude consideration by a court of any defense that fundamentally contradicts the mandate of the OAA. This is accomplished by imposing heightened scrutiny to decisions that find simple arbitration agreements to be unconscionable.

The OAA in § 2711.01 sets forth a substantive provision of contract law. Quite simply, the legislature has decreed that a contract to arbitrate is “valid, irrevocable and enforceable...” With the passage of the OAA, the legislature abrogated any common law rule that would limit the enforcement of an arbitration agreement on substantive grounds. Yet, to prove unconscionability of a contract, a party must prove that the contract is both procedurally and substantively unconscionable. Substantive unconscionability pertains to the contract itself without consideration of the contracting parties. *See Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834. This requires a determination of the reasonableness of the contract terms. Id.

Proof of substantive unconscionability requires a qualitative analysis of a contract term yielding the conclusion that the particular term is unfair and oppressive. Yet, § 2711.01 establishes by legislative act that an agreement to arbitrate is reasonable per se.

Therefore, as a matter of substantive law, the fundamental question of whether the bare agreement to arbitrate can be unconscionable has already been answered by the legislature: it cannot. By passage of § 2711.01, the legislature has barred the defense of unconscionability of an arbitration clause. While a court can and should intervene to strip an arbitration contract of such unfair or oppressive terms that may apply to the place, time or process of arbitration, if parties have simply provided mutually to arbitrate, then that provision cannot be unconscionable under § 2711.01. This is precisely how the Trial Court prudently decided in this case.

Appellees will surely argue that proof of unconscionability is permitted under 2711.01 and its proviso for such defenses to enforcement “that exist at law or in equity for the revocation of any contract.” Yet, this construction would produce an exception that consumes the rule. The proviso for defenses has a clear application in many circumstances. For example, if a party has been fraudulently induced to execute a contract containing an arbitration clause, proof of the inducement would provide a defense to enforcement of the clause. The same is true of failure of a condition precedent or waiver of the right to arbitrate. Yet, when a party knowingly executes an arbitration contract, and then attempts to escape the obligation by claiming unconscionability, that party is attacking arbitration on the most basic level. The unconscionability defense requires that the party prove essential unfairness. But § 2711.01(A) states definitively that a promise to arbitrate is not unfair nor unenforceable; it abrogates the unconscionability defense.

The unconscionability defense flies in the face of the direct command of § 2711.01, and its inconsistent application by Ohio’s courts has served to undermine public confidence in the law. Contractors in Ohio must scratch their heads pensively

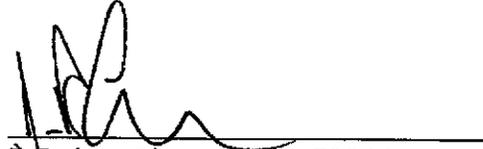
contemplating which is the law of Ohio; the doctrine of unconscionability or § 2711.01? So long as the OAA remains in effect in Ohio, any court that finds an arbitration clause unconscionable is simply refusing to enforce the law of this State. This Court therefore should adopt a standard of review that subjects to “de novo” review any trial court decision finding that an arbitration clause is substantively unconscionable.

IV. CONCLUSION

This Court should adopt a dual standard of review applicable to courts of appeal that review decisions of trial courts granting or denying motions to stay litigation and refer cases to arbitration under R.C. § 2711.02. This Court should impose the “abuse of discretion” standard of review where a court of appeals reviews the decision of a trial court *granting* a motion to compel arbitration. This Court should impose the “de novo” standard of review where a court of appeals reviews the decision of a trial court *denying* a motion to compel arbitration.

Without regard for this Court’s holding on the certified question and proposition of law, in light of the plain error committed by the Appeals Court in admitting and relying on new evidence, this Court should reverse the Appeals Court’s Decision and remand the case with instructions to affirm the Trial Court Decision.

Respectfully submitted,



J. Robert Linneman (0073846)
C. Gregory Schmidt (0006069)
Santen & Hughes
600 Vine St., Suite 2700
Cincinnati, OH 45202
(513) 721-4450
*Attorneys for Appellant
Taylor Building Corporation of
America*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was sent via ordinary United States mail this 5th day of March, 2007 to the following:

Donald W. White, Esq.
Nichols, Speidel & Nichols
237 Main Street
Batavia, OH 45103
*Attorney for
Marvin and Mary Ruth Benfield*



J. Robert Linneman

312252.1

IN THE SUPREME COURT
OF THE STATE OF OHIO

TAYLOR BUILDING
CORPORATION OF AMERICA,

Appellant,

vs.

MARVIN BENFIELD, et al.,

Appellees.

Supreme Court Case No.:

06-1890

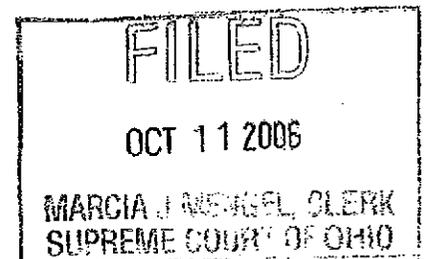
On Appeal from the Clermont County
Court of Appeals, 12th Appellate District

Court of Appeals
Case No. CA2005-09-083

NOTICE OF APPEAL OF APPELLANT
TAYLOR BUILDING CORPORATION OF AMERICA

J. Robert Linneman (0073846)
C. Gregory Schmidt (0006069)
Santen & Hughes
312 Walnut Street, Suite 3100
Cincinnati, OH 45202
(513) 721-4450 (ph)
(513) 721-0109 (fax)
JRL@Santen-Hughes.com
Counsel for Appellant,
Taylor Building Corporation of America

Donald W. White (0005630)
Nichols, Speidel & Nichols
237 Main Street
Batavia, OH 45103
(513) 732-1420 (ph)
(513) 732-0357(fax)
Counsel for Appellees,
Marvin and Mary Ruth Benfield



NOTICE OF APPEAL

Notice is given that Taylor Building Corporation of America, the Appellee and Plaintiff below ("Taylor"), hereby appeals to the Supreme Court of Ohio from the Judgment of the Court of Appeals of Clermont County, Twelfth Appellate District in Court of Appeals case no. CA2005-09-083, dated August 28, 2006. Taylor submits that the case is one of public and great general interest..

Respectfully submitted,

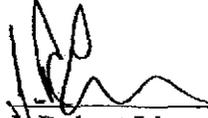


J. Robert Linneman (0073846)
C. Gregory Schmidt (0006069)
SANTEN & HUGHES
312 Walnut Street, Ste. 3100
Cincinnati, Ohio 45202
(513) 721-4450
*Attorneys for Appellant
Taylor Building Corp. of America*

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing Notice of Appeal was served by ordinary United States mail this 11th day of October, 2006 upon:

Donald W. White
Nichols, Speidel & Nichols
237 Main Street
Batavia, OH 45103



J. Robert Linneman

303812.1

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

TAYLOR BUILDING CORP. OF AMERICA,

Plaintiff-Appellee,

- vs -

MARVIN BENFIELD, et al.,

Defendants-Appellants.

CASE NO. CA2005-09-083

JUDGMENT ENTRY

The assignment of error properly before this court having been ruled upon, it is the order of this court that the judgment or final order appealed from be, and the same hereby is, reversed and this cause is remanded for further proceedings according to law and consistent with the Opinion filed the same date as this Judgment Entry.

It is further ordered that a mandate be sent to the Clermont County Court of Common Pleas for execution upon this judgment and that a certified copy of this Judgment Entry shall constitute the mandate pursuant to App.R. 27.

Costs to be taxed in compliance with App.R. 24.

COURT OF APPEALS
FILED
AUG 28 2006
BARBARA A. WIEDENBEIN
CLERK
CLERMONT COUNTY, OH

Stephen W. Powell
Stephen W. Powell, Presiding Judge

James E. Walsh
James E. Walsh, Judge

H.J. Bressler
H.J. Bressler, Judge



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IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
CLERMONT COUNTY

TAYLOR BUILDING CORP. OF AMERICA, :

Plaintiff-Appellee, :

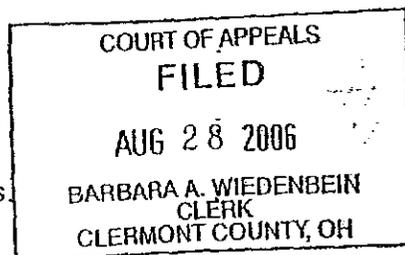
CASE NO. CA2005-09-083

- vs -

MARVIN BENFIELD, et al.,

Defendants-Appellants.

OPINION
8/28/2006



CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 03-CVE-1565

Santen & Hughes, J. Robert Linneman, C. Gregory Schmidt, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202, for plaintiff-appellee

Nichols, Speidel & Nichols, Donald W. White, 237 Main Street, Batavia, Ohio 45103, for defendants-appellants, Marvin and Mary Ruth Benfield

BRESSLER, J.

{¶1} Defendants-appellants, Marvin and Mary Ruth Benfield, appeal from a decision of the Clermont County Court of Common Pleas, granting the motion of plaintiff-appellee, Taylor Building Corporation of America, to stay judicial proceedings pending mediation and/or arbitration.

{¶2} Appellee is a Kentucky corporation whose principal place of business is in Louisville, Kentucky. Appellee is engaged in the business of constructing residential houses.



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Appellants are a married couple who reside in Cincinnati, Ohio and own real estate in Clermont County, Ohio.

{13} On July 3, 2002, appellee entered into an agreement with appellants, whereby appellee agreed to construct a residential home for appellants on their property in Clermont County for \$89,977. After commencing work, appellee sent invoices to appellants requesting progress payments as called for under the terms of the parties' construction contract. Appellants, being dissatisfied with appellee's work, refused to pay the invoices.

{14} In July 2003, appellants sent appellee a "Stop Work" letter, and ordered appellee to leave the premises and not return. As of July 31, 2003, appellants allegedly owed appellee \$18,145.40 for materials and labor that appellee had furnished with respect to the parties' construction contract. In September 2003, appellee filed a mechanic's lien against appellants' Clermont County property.

{15} On November 26, 2003, appellee filed a complaint in foreclosure against appellants in the Clermont County Court of Common Pleas, raising claims of breach of contract, unjust enrichment, and quantum meruit. Appellee's complaint also sought foreclosure on the mechanic's lien that it had filed against appellants' property.

{16} At the same time it filed its complaint in foreclosure, appellee moved to stay the proceedings pending mediation and/or arbitration. Appellee based its motion on the mediation and arbitration clauses in the parties' construction agreement that required any claims or disputes arising under the agreement to be submitted to mediation, and upon failure of mediation, then to binding arbitration.

{17} On December 23, 2003, appellants filed an answer to appellee's complaint, denying the material allegations directed against them. Appellants also brought a counterclaim, alleging, among other things, that appellee: (1) had engaged in acts and practices in violation of the Ohio Consumer Sales Practices Act ("CSPA"), (2) had breached

its contractual obligations under the parties' contract, and (3) had made fraudulent misrepresentations to appellants regarding their competency as home builders.

{¶18} On December 24, 2003, appellants moved to dismiss Taylor's motion to stay judicial proceedings pending mediation and/or arbitration. Appellants argued, among other things, that several provisions of the parties' construction contract, including its mediation and arbitration clause, were "unconscionable" and, therefore, unenforceable.

{¶19} The trial court held a hearing on appellee's motion to stay judicial proceedings pending mediation and/or arbitration. The only evidence submitted in the case was an affidavit from one of the appellants, Mary Ruth Benfield. In her affidavit, Mary Ruth adopted the allegations in appellants' answer, affirmative defenses, counterclaim, and response to appellee's motion to stay the proceedings pending mediation and/or arbitration.

{¶10} On August 17, 2005, the trial court issued a decision and entry finding that a provision in the mediation and arbitration clauses requiring that the mediation and/or arbitration take place in Kentucky was "substantively unconscionable" because it violated R.C. 4113.62. As a result, the trial court ordered that the mediation and/or arbitration proceedings must take place in Clermont County, Ohio. The trial court found that the remaining terms of the mediation and arbitration clauses and the construction contract, itself, are not unconscionable or otherwise unenforceable. Consequently, the trial court granted appellee's motion to stay the proceedings pending mediation and/or arbitration.

{¶11} Appellants now appeal, raising the following assignment of error:

{¶12} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE ARBITRATION CLAUSE IS ENFORCEABLE."

{¶13} Appellants argue that the trial court erred in finding the mediation/arbitration clauses in the parties' contract to be enforceable, because the clause is unconscionable as a matter of law. We agree with appellants' argument.

{¶14} Generally, appellate courts review a trial court's disposition of a motion to stay proceedings and compel arbitration under an "abuse of discretion" standard of review. See, e.g., *Yessenow v. Aue Design Studio, Inc.*, 165 Ohio App.3d 757, 2006-Ohio-1202, ¶11; *McGuffey v. LensCrafters, Inc.* (2001), 141 Ohio App.3d 44, 49.

{¶15} However, when an appellate court is presented with a purely legal question, the appropriate standard of appellate review is "de novo." *Eagle v. Fred Martin Motor Co.*, 157 Ohio App.3d 150, 2004-Ohio-829, ¶11. Under a de novo standard of review, an appellate court does not defer to a trial court's decision. *Id.* On questions of law, a trial court does not exercise discretion, and the appellate court's review is plenary. *Id.* at ¶12, citing *McGee v. Ohio State Bd. Of Psychology* (1993), 82 Ohio App.3d 301, 305.

{¶16} The determination as to whether a provision in a contract is unconscionable is a question of law. *Ins. Co. of N. America v. Automatic Sprinkler Corp.* (1981), 67 Ohio St.2d 91, 98. Therefore, in reviewing the trial court's ruling on the question of unconscionability, we apply a "de novo," rather than an "abuse of discretion" standard of review. See *Eagle*, 2004-Ohio-829 at ¶13; *Dunkelman v. Cincinnati Bengals, Inc.*, 158 Ohio App.3d 604, 2004-Ohio-6425, ¶19-20; *Vanyo v. Clear Channel Worldwide*, 156 Ohio App.3d 706, 2004-Ohio-1793, ¶8.

{¶17} In Ohio, "arbitration is encouraged as a method to settle disputes. [Citations omitted.] A presumption favoring arbitration arises when the claim in dispute falls within the scope of the arbitration provision. An arbitration clause in a contract is generally viewed as an expression that the parties agree to arbitrate disagreements within the scope of the arbitration clause, and, with limited exceptions, an arbitration clause is to be upheld just as any other provision in a contract should be respected." *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 471, 1998-Ohio-294.

{¶18} An arbitration clause may be unenforceable "upon grounds that exist at law or in

equity for the revocation of any contract." R.C. 2711.01(A). One such ground is "unconscionability." See *Eagle*, 2004-Ohio-829 at ¶16; *Porpora v. Gatliff Building Co.*, 160 Ohio App.3d 843, 2005-Ohio-2410, ¶6. "Unconscionability is generally recognized to include an absence of meaningful choice on the part of one of the parties to a contract, combined with contract terms that are unreasonably favorable to the other party." *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834.

{¶19} An arbitration clause is unconscionable where the clause is "so one-sided as to oppress or unfairly surprise [a] party." *Neubrandner v. Dean Witter Reynolds, Inc.* (1992), 81 Ohio App.3d 308, 311-312, quoting *Black's Law Dictionary* (5th Ed.Rev.1979) 1367. "The party seeking to establish that an arbitration clause is unconscionable must show that the provision is both procedurally and substantively unconscionable." *Porpora*, 2005-Ohio-2410 at ¶6.

{¶20} Procedural unconscionability concerns the formation of the agreement and occurs when no voluntary meeting of the minds is possible. *Id.* at ¶7. To determine whether a contract provision is procedurally unconscionable, courts consider the following factors: (1) the relative bargaining positions of the parties; (2) whether the terms of the provision were explained to the weaker party; and (3) whether the party claiming that the provision is unconscionable was represented by counsel at the time the contract was executed. *Id.*

{¶21} Additionally, when "there are strong indications that the contract at issue is an adhesion contract, and the arbitration clause itself appears to be adhesive in nature," there is "considerable doubt that any true agreement ever existed to submit disputes to arbitration." *Williams v. Aetna Finance Co.*, 83 Ohio St.3d 464, 473, 1998-Ohio-294. *Black's Law Dictionary* (8th Ed.2004) 342, defines an adhesion contract as a "standard-form contract prepared by one party, to be signed by the party in a weaker position, usu[ally] a consumer, who adheres to the contract with little choice about the terms."

{¶22} Substantive unconscionability refers to the actual terms of the agreement. *Porpora*, 2005-Ohio-2410 at ¶8. Contract terms are substantively unconscionable if they are unfair and commercially unreasonable. *Dorsey v. Contemporary Obstetrics & Gynecology, Inc.* (1996), 113 Ohio App.3d 75, 80. "Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability. However, courts examining whether a particular * * * clause is substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability." *Collins*, 86 Ohio App.3d at 834.

{¶23} "In order to determine whether a given contract provision is unconscionable, courts must examine the particular facts and circumstances surrounding the agreement." *Porpora* at ¶9. After a de novo review of the evidence in this case, we find abundant evidence in the record to show that the contractual provisions at issue in this case are both procedurally and substantively unconscionable.

{¶24} In its decision, the trial court found that there was no evidence that appellee presented the construction contract with the mediation/arbitration clauses to appellants on a "take it or leave it" basis. However, according to Mary Ruth Benfield's affidavit, she states that appellee's agent advised them that appellee "would not sign a contract without the arbitration/mediation clause[.]" The fact that appellee refused to negotiate this provision is a fact that weighs in favor of a finding of procedural unconscionability. See *Porpora* at ¶12.

{¶25} Furthermore, appellants were not represented by counsel. This is another factor that tends to demonstrate procedural unconscionability. See *Porpora* at ¶12; *Eagle*, 2004-Ohio-829 at ¶59. While the record indicates that appellants knew about the mediation and arbitration clauses, Mary Ruth Benfield's affidavit indicates that appellee's agent minimized

the importance of the clause, stating that, while appellee would not enter into an agreement without the clause, the clause was "not necessary since [appellee] never had any disputes over the quality of their product and workmanship * * * [and appellee] did not see the arbitration/mediation [clauses] as being a factor since [appellee was] concerned about keeping [its] customers happy."

{¶26} In appellee's favor, we note that appellants were unable to demonstrate that they could not have their house constructed by a builder other than appellee. As the trial court noted, "[t]here are a multitude of homebuilders in the local area." Furthermore, the trial court was permitted to take judicial notice of this fact since it is a fact "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Evid.R. 201(B).

{¶27} The fact that there are many other homebuilders in the area shows that there were "alternative sources of supply" for the goods and services in question. Hence, this fact weighs against a finding of procedural unconscionability. See *Collins*, 86 Ohio App.3d at 834. However, the weight of this fact is weakened by the representations made by appellee's sales representative in inducing appellants into entering into the agreement by minimizing the importance and effect of the mediation/arbitration clauses.

{¶28} Also, we note that the written agreement presented to appellants was a pre-printed form contract, prepared by appellee, with many clauses that were not subject to negotiation. Accordingly, we find that this contract is a clear example of an adhesion contract. Balancing the factors described above, we find that the mediation/arbitration clauses are procedurally unconscionable.

{¶29} With respect to the issue of substantive unconscionability, the contract in question contains numerous clauses that are notably unfair, including the following:

{¶30} "6. (a) "That [appellants have] no right of possession of the real estate and improvements until full and final payment including any additional amounts due as a result of Change Orders has been paid to [appellee]. [Appellants] further [agree] that notwithstanding the provisions for liquidated damages, in the event of a breach of the conditions of this Paragraph 6 of the Agreement, [appellee] will not have adequate remedy at law, and accordingly to prevent [appellants], or its successors in interest from occupying or causing others to occupy the real estate improvements prior to said full and final payment, that [appellee] may have a temporary restraining order, temporary and perpetual injunction restraining and enjoying the occupancy until said final payment is made.

{¶31} "(b) [Appellants] further [agree] that in addition to the equitable remedies provided for in Subparagraph (a) above upon violation of the terms of this Paragraph 6, [appellee] shall be entitled to recover as liquidated damages and not as a penalty \$950.00 for the initial moving in, occupancy, or storing of furniture in the housing unit, garage, or basement and \$60.00 per housing unit for each day the violation continues.

{¶32} "7. To pay reasonable legal costs for the enforcement of [appellee's] rights under this contract, including attorney's fees, court costs, fees and expenses.

{¶33} "9. * * * In the event of default by [appellants] it is agreed that in addition to or in lieu of its remedies for breach of contract, [appellee] may enforce its lien as liens against real estate are enforced.

{¶34} "10. To pay \$1,000.00 in addition to the amount shown on this contract if funding is provided by an institution using FHA, VA, FMHA, or STATE BONDED FUNDS or if any loan is insured by the parties referred to herein; or, if [appellants'] construction lender requires individual subcontractor affidavits/lien waivers.

{¶35} "12. * * * [Appellants] further [agree] that it has no right to interrupt construction for any reason whatsoever.

{136} "15. * * * (b) Arbitration—In the event the issues cannot be resolved by mediation, then any claims or disputes arising out of this Construction Agreement or the alleged breach thereunder shall be settled by mandatory and binding arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association unless both parties mutually agree otherwise. (This position shall not affect [appellee's] right to secure a mechanic's lien and to pursue those remedies described in Sections 6 and 9 hereof.) Notices of the demand for arbitration shall be filed with a copy of this Construction Agreement with the American Arbitration Association and the other party to this Agreement. The site for the arbitration proceedings shall be Louisville, Kentucky (Jefferson County).

{137} "16. That in the event any of the provisions of this Agreement as to mediation, arbitration or [appellee] buy back, are deemed unenforceable, or in the event of an action initiated by [appellee] pursuant to Paragraph 6 and 9 of this Agreement, both parties agree that any and all legal actions arising out of this Construction Agreement or the alleged breach thereunder shall be tried by a judge sitting without a jury and both parties do hereby Knowingly, Voluntarily and Intentionally waive any right to a jury trial. The site for the aforementioned action shall be Louisville, Kentucky (Jefferson County). Nothing herein is intended or shall be construed to limit or prevent [appellee] from pursuing and performing any mechanic's lien upon the Real Estate and Improvements for sums unpaid under this Agreement. The provisions in this paragraph are a material inducement for [appellee] to enter into this Construction Agreement." (Emphasis sic.)

{138} The clauses referenced above are heavily skewed in favor of appellee, imposing significant restrictions on appellants alone. For example, according to the terms of this agreement, appellants are prohibited from interrupting construction under any circumstances and are prohibited from possession of their own property, even in the event of a breach on the

part of appellee. These clauses force appellants to wait until completion of construction before seeking relief, preventing appellants from mitigating damages in the event of a breach of contract. See *Propora*, 2005-Ohio-2410 at ¶16. In fact, these clauses prevented appellants from being able to correct building code violations before the Clermont County Building Inspector ordered that all construction cease.

{¶39} Furthermore, by entering into this agreement, appellants are required not only to waive their right to a jury trial, but to assume complete responsibility for paying appellee's "reasonable legal costs for the enforcement" of appellee's rights under the construction contract, including appellee's "attorney's fees, court costs, fees and expenses." Appellees, on the other hand, are not burdened with a similar responsibility to pay all reasonable costs, including attorney's fees, for the enforcement of appellants' rights under the contract.

{¶40} We note that this agreement, including its mediation and arbitration clause, cannot be deemed unconscionable merely because both parties to the contract do not have to pay the other's attorney fees for the enforcement of their rights under the agreement. See *Robbins v. Country Club Retirement Center IV, Inc.*, Belmont App. No. 04 BE 43, 2005-Ohio-1338, ¶25-26 (merely because an arbitration agreement can be read as being more favorable to one party does not invalidate the agreement as lacking mutuality of obligation, because the concept of "mutuality of obligations" in contract law does not mean that each party must have the exact same obligations). However, this provision is but one of multiple examples of the substantive unfairness of the terms in this contract.

{¶41} Moreover, the agreement does not disclose the costs of alternative dispute resolution, or the fact that those costs are often substantially higher than the costs associated with court proceedings. These clauses, which impose significant undisclosed costs on appellants, are comparable to those found substantively unconscionable in *Eagle*, 2004-Ohio-829 at ¶37-51, and *Propora* at ¶16.

{¶42} The provisions discussed above are troubling because they create a chilling effect, and are most certainly appellee's attempt to avoid potential liability for a breach of contract, should one occur. In the event of such a breach, appellants are unable to stop construction until completion. Then, to bring a claim against appellee, appellants are required to pay for and submit to out-of-state alternative dispute resolution, and in the event that any litigation arises out of the agreement and/or alternative dispute resolution, appellants are subject to out-of state litigation and are responsible for all court costs as well as both parties' legal fees. We find this to be substantively unconscionable.

{¶43} In addition, portions of the contract are in violation of R.C. 4113.62(D), which provides:

{¶44} "(1) Any provision of a construction contract, agreement, understanding, or specification or other document or documentation that is made a part of a construction contract, subcontract, agreement, or understanding for an improvement, or portion thereof, to real estate in this state that makes the construction contract or subcontract, agreement, or other understanding subject to the laws of another state is void and unenforceable as against public policy.

{¶45} "(2) Any provision of a construction contract, agreement, understanding, specification, or other document or documentation that is made a part of a construction contract, subcontract, agreement, or understanding for an improvement, or portion thereof, to real estate in this state that requires any litigation, arbitration, or other dispute resolution process provided for in the construction contract, subcontract, agreement, or understanding to occur in another state is void and unenforceable as against public policy. Any litigation, arbitration, or other dispute resolution process provided for in the construction contract, subcontract, agreement, or understanding shall take place in the county or counties in which the improvement to real estate is located or at another location within this state mutually

agreed upon by the parties."

{¶46} The trial court correctly found that the portion of the mediation/arbitration clauses requiring alternative dispute resolution to take place in Kentucky violates R.C. 4113.62. However, paragraph 16 of the agreement requires all litigation arising from the contract to take place in Kentucky, which also violates R.C. 4113.62.

{¶47} The litigation clause in the agreement presents an additional problem. "'For a dispute resolution procedure to be classified as "arbitration," the decision rendered must be final, binding, and without any qualifications or conditions as to the finality of an award.' An arbitration award may be challenged only through the procedure set forth in R.C. 2711.13 and on the grounds enumerated in R.C. 2711.10 and 2711.11. 'The jurisdiction of the courts to review arbitration awards is thus statutorily restricted; it is narrow and it is limited.'" (Internal citations omitted.) *Miller v. Gunckle*, 96 Ohio St.3d 359, 2002-Ohio-4932, ¶10. "By permitting a trial de novo in some instances, [an arbitration] provision unnecessarily subjects the parties to multiple proceedings in a variety of forums, increases costs, extends the time consumed in ultimately resolving a dispute, and eviscerates any advantage of unburdening crowded court dockets." *Schaefer v. Allstate Ins. Co.* (1992), 63 Ohio St.3d 708, 716. Accordingly, where an arbitration clause is not a provision providing for true arbitration, the entire arbitration clause is unenforceable. *Id.*

{¶48} As referenced above in paragraph 16, the agreement provides for judicial review in the event that the mediation and/or arbitration clauses are declared unenforceable. Accordingly, the mediation/arbitration clauses at issue do not provide for a final and binding decision. This is an additional reason for finding the mediation/arbitration clauses to be unenforceable.

{¶49} While mutuality of obligation in contract law does not mean that each party must have identical obligations, there is ample evidence in the record and in the contract itself

indicating that the parties' bargaining power in this case was so unfairly one-sided as to render the mediation/arbitration clauses unconscionable. In viewing the factors de novo to determine whether the clauses at issues are unconscionable, those factors weigh heavily in favor of finding these provisions to be procedurally and substantively unconscionable.

{¶50} The unconscionability of the mediation/arbitration clauses, and other unduly oppressive clauses discussed above demonstrate the complete lack of meaningful choice and ability to negotiate on appellants' part in entering into this agreement. Such unfairness permeates this contract to the extent that we find it void and unenforceable in its entirety.¹ Accordingly we sustain appellants' assignment of error.

{¶51} The trial court's judgment is reversed, and this cause is remanded for further proceedings consistent with this opinion.

POWELL, P.J., and WALSH, J., concur.

This opinion or decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at: <http://www.sconet.state.oh.us/ROD/documents/>. Final versions of decisions are also available on the Twelfth District's web site at: <http://www.twelfth.courts.state.oh.us/search.asp>

1. Since the issue of the enforceability of the entire contract was raised in the trial court and touched upon an appellant's brief, we find no application of the dicta in *State v. 1981 Dodge Ram Van* (1988), 36 Ohio St.3d 168.

AUG 22 2005

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BARBARA A. WIEDENBEIN
CLERK OF COMMON PLEAS COURT
CLERMONT COUNTY, OH

TAYLOR BUILDING CORP.
OF AMERICA

Plaintiff

vs.

MARVIN BENFIELD, et. al.

Defendants

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CASE NO. 2003 CVE 01565

DECISION/ENTRY

Santen & Hughes, J. Robert Linneman and C. Gregory Schmidt, for the plaintiff Taylor Building Corp. of America, 312 Walnut Street, Suite 3100, Cincinnati, Ohio 45202

Nichols, Speidel & Nichols, Donald W. White, for the defendants Marvin and Mary Ruth Benfield, 237 Main Street, Batavia, Ohio 45103

This cause is before the court on a motion to stay judicial proceedings pending mediation and/or arbitration filed by the plaintiff Taylor Building Corp. of America ("Taylor Building Corp."). The motion was filed on November 26, 2004, on the same day that Taylor Building Corp. filed its complaint in this case.

In its complaint, Taylor Building Corp. seeks judgment against the defendants Marvin Benfield and Mary Ruth Benfield for work performed in building a home for the Benfields. The causes of action alleged in the complaint are breach of contract, unjust enrichment, and quantum meruit.



In its complaint, Taylor Building Corp. also seeks to foreclose on a mechanic's lien which was filed against the defendants' property.

In addition to filing an answer denying the essential allegations of the plaintiff's complaint, the defendants raise the following affirmative defenses: 1) waiver of the mediation and arbitration clauses of the contract and 2) failure to include all necessary parties.

In their counterclaim, the defendants assert the following causes of action: 1) deceptive and unconscionable consumer sales practices under the Ohio Consumer Sales Practices Act, 2) breach of contract, 3) failure to construct in a workmanlike manner, 4) fraudulent inducement to enter into the contract, 5) fraudulent inducement to enter into the arbitration agreement, and 6) unconscionability.

In its motion for stay of proceedings, the plaintiff Taylor Building Corp. asserts that the proceeding should be stayed until the case can be mediated or arbitrated in accordance with the terms of the contract entered into by the parties.

The court scheduled and held a hearing on the plaintiff's motion. At the conclusion of the hearing, the court took the motion under advisement.

Upon consideration of the plaintiff's motion, the record of the proceeding, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

The validity of arbitration provisions has been codified by the General Assembly.

R.C. 2711.01 provides in part:

"(A) A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or

out of the refusal to perform the whole or any part of the contract, * * * shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract."

R.C. 2711.03 states that a party aggrieved by the failure of another to submit to arbitration may petition a common pleas court for an order directing that arbitration proceed in the manner provided for by a written agreement.

R.C. 2711.02 then provides:

"If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement * * *."

As an initial matter, it must be noted that public policy in Ohio encourages the resolution of disputes through arbitration.¹ A presumption favoring arbitration arises when the claim in dispute falls within the scope of the arbitration provision.²

Furthermore, any uncertainty regarding the applicability of an arbitration clause should be resolved in favor of coverage.³ An arbitration clause should not be denied effect unless it can be determined to a high degree of certainty that the clause does

¹*Stehli v. Action Custom Homes, Inc.* (Sept. 24, 1999), 11th Dist. No. 98-G-2189, citing *Kelm v. Kelm* (1993), 68 Ohio St.3d 26, 27, 623 N.E.2d 39; *Youghiogheny & Ohio Coal Co. v. Oszust* (1986), 23 Ohio St.3d 39, 41, 491 N.E.2d 298; *Dayton Teachers Assn. v. Dayton Bd. of Edn.* (1975), 41 Ohio St.2d 127, 132-133, 323 N.E.2d 714.

²*Vincent v. Neyer* (2000), 139 Ohio App.3d 848, 851, 745 N.E.2d 1127 citing *Williams v. Aetna Fin. Co.* (1998), 83 Ohio St.3d 464, 471, 700 N.E.2d 859.

³*Stehli, supra.*

not cover the asserted dispute.⁴

The contract between the parties in the case sub judice reads:

"15 (a) Mediation- That in the event of **any** dispute between First Party and Second Party as to the quality of construction, quality of materials, contract disputes or similar disputes as to the construction, the parties shall endeavor to settle the dispute in an amicable manner by mediation administered by the American Arbitration Association under its construction industry mediation rules. Notices of the demand for mediation shall be filed with a copy of this Construction Agreement with the American Arbitration Association and to the other party to this agreement. The site for the mediation shall be Louisville, Kentucky (Jefferson County) arbitration.

(b) Arbitration- In the event the issues cannot be resolved by mediation, then any claims or disputes arising out of this Construction Agreement or the alleged breach thereunder shall be settled by **mandatory and binding** arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association unless both parties mutually agree otherwise. (This position shall not affect First Party's right to secure a mechanic's lien and to pursue those remedies described in Sections 6 and 9 hereof.) Notices of the demand for arbitration shall be filed with a copy of this Construction Agreement with the American Arbitration Association and the other party to this Agreement. The site for the arbitration proceeding shall be Louisville, Kentucky (Jefferson County)."

Both the mediation and arbitration clauses contained in the contract are very broad in their scope and would cover all the claims asserted by the parties in this case.

The defendants make several arguments as to why they should not be forced to

⁴ *Stehli*, citing *Grcar v. Lanmark Homes, Inc.* (June 12, 1992), 11th Dist. No. 91-L-128; see, also, *Independence Bank v. Erin Mechanical* (1988), 49 Ohio App.3d 17, 18, 550 N.E.2d 198; *Gibbons-Grable Co. v. Gilbane Bldg. Co.* (1986), 34 Ohio App.3d 170, 173, 517 N.E.2d 559.

undergo arbitration.

First, the defendants argue that their claims brought under the Consumer Sales Practice Act (CSPA) are not arbitrable where they are seeking rescission of the contract.

With regard to this first argument, nothing in the CSPA precludes arbitration clauses in consumer sales contracts.⁵ This is true even when a party is seeking rescission of the contract.⁶

R.C. 1345.04 provides:

"The courts of common pleas, and municipal or county courts within their respective monetary jurisdiction, have jurisdiction over any supplier with respect to any act or practice in this state covered by sections 1345.01 to 1345.13 of the Revised Code, or with respect to any claim arising from a consumer transaction subject to such sections."⁷

However, this statute's grant of jurisdiction to common pleas, municipal, and county courts does not concomitantly act as a prohibition against arbitration.⁸ While R.C. 1345.04 obviously does confer jurisdiction on courts to hear actions based on R.C. Chapter 1345, there is nothing in the statute to suggest that parties to a consumer transaction covered by the CSPA cannot agree to arbitrate such matters.⁹

Indeed, there is no reason why parties to a contract can not arbitrate legal claims

⁵See *Vincent*, supra, citing *Smith v. Whitlatch & Co.* (2000), 137 Ohio App.3d 682, 685, 739 N.E.2d 857.

⁶See *Vincent*; see, also, *Karamol v. Continental Estates, Inc.* (Sept. 22, 2000), 6th Dist. No. WD-00-21; *Haga v. Martin Homes, Inc.* (Apr. 19, 1999), 5th Dist. No. 1998AP050086.

⁷R.C. 1345.04.

⁸*Stehli*, supra.

⁹*Stehli*, citing *Zalecki v. Terminix Internatl., Inc.* (Feb. 23, 1996), 6th Dist. No. L-95-156.

arising under the CSPA in the same manner that numerous other statutory claims are resolved through some form of alternative dispute resolution.¹⁰

Additionally, R.C. 2711.01(B) and (C) set forth those controversies to which the arbitration statutes do not apply, and controversies arising out of the CSPA are not listed therein.¹¹

Finally, there is nothing in Ohio law which would specifically prohibit an arbitrator from awarding treble damages and attorney fees to a consumer who prevails on a claim arising under the CSPA.¹² Likewise, there is no provision of law that would preclude the arbitrator from rescinding the contract.

As a result, the court finds that the respective claims which are brought by the parties in this case are arbitrable under the terms of the agreement entered into by the parties.

The defendants' second argument is that the plaintiff waived the right to arbitrate when it filed a lawsuit seeking foreclosure of a mechanic's lien.

Notwithstanding the preference for enforcement of agreements to arbitrate, it is well-settled that either party to an arbitration agreement may waive it.¹³ For example, "a plaintiff's waiver may be effected by filing suit."¹⁴

While a party to an arbitration agreement may waive the right to proceed with

¹⁰*Stehli*.

¹¹*Vincent, supra*.

¹²*Stehli*, citing *Smith v. Ohio State Home Services, Inc.* (May 25, 1994), 9th Dist. Nos. 16441 and 16445.

¹³*Peridia, Inc. v. Showe Construction Co., Inc.* (Mar. 14, 2003), 6th Dist. No. OT-02-027. 2003-Ohio-1415, at ¶ 14, citing *Mills v. Jaguar-Cleveland Motors, Inc.* (1980), 69 Ohio App.2d 111, 113, 430 N.E.2d 965.

¹⁴*Peridia*, at ¶ 15; see, also, *Rock v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1992), 79 Ohio App.3d 126, 128, 606 N.E.2d 1054.

arbitration, the defendants are not correct in their argument that the filing of suit always constitutes such a waiver.¹⁵ In order to prove that a defending party waived its right to arbitration pursuant to R.C. 2711.02, "the complainant is required to demonstrate that the defending party 'knew of an existing right to arbitration * * * and acted inconsistently with that right to arbitrate' "¹⁶

Such a determination must be made by the trial court "based on the totality of the circumstances."¹⁷ When viewing the "totality of the circumstances," the court must consider the following factors: (1) whether the party seeking arbitration invoked the jurisdiction of the court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of the proceedings; (2) the delay, if any, by the party seeking arbitration to request a stay of the judicial proceedings, or an order compelling arbitration; (3) the extent to which the party seeking arbitration has participated in the litigation, including a determination of the status of discovery, dispositive motions, and the trial date; and (4) whether the nonmoving party would be prejudiced by the moving party's prior inconsistent actions.¹⁸

In considering the totality of the circumstances in the case sub judice, the fact the contract provided for arbitration did not preclude the plaintiff from protecting its legal interest by filing a mechanic's lien prior to any arbitration.¹⁹ Although the plaintiff then filed suit, it did so only in response to the defendants' R.C. 1311.11 notification, and

15 See *Baker-Henning Productions, Inc. v. Jaffe* (Nov. 7, 2000), 10th Dist. No. 00AP-36.

16 *Peridia, Inc.*, at ¶ 15, citing and quoting *Harsco Corp. v. Crane Carrier Co.* (1997), 122 Ohio App.3d 406, 413, 701 N.E.2d 1040, quoting *Phillips v. Lee Homes, Inc.* (Feb. 17, 1994), 8th Dist. No. 64353.

17 *Peridia, Inc.*, citing *Harsco Corp.* at 413- 414.

18 *Id.*

19 *R.L. Bates Co. v. Schmidt* (Dec. 29, 1998), 5th Dist. No. 98CAE07031.

immediately thereafter moved the trial court for a stay of the proceedings.²⁰

The defendants argue that the contract does not permit the plaintiff to both file an action seeking foreclosure of its mechanic lien and to seek arbitration. However, the defendants are incorrect. As indicated above, the arbitration clause itself contains language that permits the plaintiff to pursue other remedies as set forth in sections 6 and 9 of the contract. Section 9 of the contract then expressly states: "In the event of default by Second Party [the defendants], it is agreed that in addition to or in lieu of its remedies for breach of contract, the First Party [the plaintiff] may enforce its [mechanic's] lien as liens against real estate are enforced."

In Ohio, if the various clauses of a contract are severable from one another, the contract will be enforced to the extent possible.²¹ The court may not rewrite or revise the contract, and should enforce a contract to the extent that it is legal and enforceable.²²

Courts must look to the intention of the parties.²³ The intention of the parties is discovered by use of the rules of construction, the language of the contract, the subject matter of the contract, the parties' respective situations, the circumstances surrounding the transaction that is the subject of the contract, and the conduct of the parties that demonstrates the construction they themselves placed upon the contract.²⁴

Applying the above factors to this situation, the court finds the arbitration

20 See id.

21 *Newell v. Marc W. Lawrence Bldg. Corp.* (May 8, 1995), 5th Dist. No. 94-CA-292.

22 Id., citing *Toledo Police Patrolmen's Association v. City of Toledo* (1994), 94 Ohio App.3d 734, 740, 641 N.E.2d 799.

23 *Newell*.

24 Id., citing *Huntington & Finke Co. v. Lake Erie Lumber & Supply Co.* (1924), 109 Ohio St. 488, 143 N.E. 132, syllabus.

provision severable from the provision permitting the filing of a mechanic's lien. Under the terms of the contract, the plaintiff's filing of an action to foreclose a mechanic's lien is not inconsistent with its motion seeking to compel arbitration.

Moreover, aside from the filing of the complaint, the only legal action taken by the plaintiff in this case has been in response to the defendants' attempts to avoid arbitration.²⁵

Additionally, neither party has expended time or money conducting discovery, pretrial motions, or trial preparation.²⁶ As such, this is not a case where the defendants will be prejudiced by dilatory conduct by the plaintiff.²⁷

Accordingly, in applying the analytical framework set forth above to the facts of this case, the court is unable to conclude that the plaintiff has waived its right to seek arbitration in accordance with the contract.

The defendants' third argument is that the contract entered into between the parties is unconscionable.

An arbitration clause may be found to be unenforceable on grounds existing at law or in equity for the revocation of a contract.²⁸ The issue of unconscionability is a question of law.²⁹

In making a determination as to whether a contract is unconscionable, a factual

25 See id.

26 See id.

27 See id.

28 *Eagle v. Fred Martin Motor Co.* (Feb. 25, 2004), 157 Ohio App.3d 150, 159, 809 N.E.2d 1161, 2004-Ohio-829, at ¶ 16, citing R.C. 2711.01(A); *Pinette v. Wynn's Extended Care, Inc.* (Sept. 3, 2003), 9th Dist. No. 21478, 2003-Ohio-4636, at ¶ 7.

29 *Eagle*, 157 Ohio App.3d at 156, at ¶ 12, citing *Bank One, NA v. Borovitz*, 9th Dist. No. 21042, 2002-Ohio-5544, at ¶ 12, citing *Ins. Co. of N. Am. v. Automatic Sprinkler Corp.* (1981), 67 Ohio St.2d 91, 98, 423 N.E.2d 151.

inquiry into the particular circumstances of the transaction in question is required.³⁰

Such a determination requires a case-by-case review of the facts and circumstances surrounding the agreement.³¹

An unconscionable contract clause is one in which there is an absence of meaningful choice for the contracting parties, coupled with draconian contract terms unreasonably favorable to the other party.³² Thus, the doctrine of unconscionability consists of two separate concepts:

"(1) [U]nfair and unreasonable contract terms, i.e., 'substantive unconscionability,' and (2) individualized circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible, i.e., 'procedural unconscionability[.]' * * * These two concepts create what is, in essence, a two-prong test of unconscionability. One must allege and prove a 'quantum' of both prongs in order to establish that a particular contract is unconscionable." (Citations omitted.)³³

Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable. Because the determination of commercial reasonableness varies with the content of the contract terms at issue in any given case, no generally accepted list of factors has been developed for this category of unconscionability.

However, courts examining whether a particular limitations clause is

30 *Eagle*, 157 Ohio App.3d at 157, at ¶ 13, citing *Lightning Rod Mut. Ins. Co. v. Saffle* (Nov. 6, 1991), 9th Dist. No. 15134.

31 *Eagle*, citing *Burkette v. Chrysler Industries, Inc.* (1988), 48 Ohio App.3d 35, 37, 547 N.E.2d 1223; *Vincent*, 139 Ohio App.3d at 854-856.

32 *Eagle*, 157 Ohio App.3d at 163, at ¶ 30, citing *Collins v. Click Camera & Video, Inc.* (1993), 86 Ohio App.3d 826, 834, 621 N.E.2d 1294.

33 *Eagle*, citing *Collins*, 86 Ohio App.3d at 834.

substantively unconscionable have considered the following factors: the fairness of the terms, the charge for the service rendered, the standard in the industry, and the ability to accurately predict the extent of future liability.³⁴ Moreover, arbitration clauses are generally unconscionable where the "clauses involved are so one-sided as to oppress or unfairly surprise [a] party."³⁵

Procedural unconscionability, on the other hand, exists when it is determined that there was no voluntary meeting of the minds by the parties to the contract under circumstances particular to that contract.³⁶ With respect to procedural unconscionability, a court must consider factors bearing on the relative bargaining position of the contracting parties, including age, education, intelligence, business acumen, experience in similar transactions, whether the terms were explained to the weaker party, and who drafted the contract.³⁷ Additionally, the court should consider whether the party who claims that the terms of a contract are unconscionable was represented by counsel at the time the contract was executed.³⁸ "The crucial question is whether 'each party to the contract, considering his [or her] obvious education or lack of it, [had] a reasonable opportunity to understand the terms of the contract, or were the important terms hidden

34 *Small v. HCF of Perrysburg, Inc.* (2004), 159 Ohio App.3d 66, 70, 823 N.E.2d 19, 2004-Ohio-5757, at ¶ 21.

35 *Eagle*, at ¶ 32, citing *Neubrandner v. Dean Witter Reynolds, Inc.* (1992), 81 Ohio App.3d 308, 311- 312, 610 N.E.2d 1089, quoting Black's Law Dictionary (5th Ed.Rev.1979) 1367.

36 *Vanyo v. Clear Channel Worldwide* (Apr. 8, 2004), 156 Ohio App.3d 706, 712, 808 N.E.2d 482, at ¶ 17.

37 *Eagle*, at ¶ 31, citing *Johnson v. Mobil Oil Corp.* (E.D.Mich.1976), 415 F.Supp. 264, 268.

38 *Eagle*, citing *Bushman v. MFC Drilling, Inc.* (July 19, 1995), 9th Dist. No. 2403- M.

in a maze of fine print * * * ?' "39

In order to negate an arbitration clause, a party must establish a quantum of both substantive and procedural unconscionability.⁴⁰

The court will first examine the facts of this case to determine if there is evidence of substantive unconscionability. The defendants argue that several terms in the contract are unconscionable.

The defendants argue first that there is no provision in the contract informing them that they were waiving their right to a trial by jury by agreeing to the arbitration provision. However, the loss of the right to a jury trial is an obvious consequence of an agreement to arbitrate and, in the absence of indicia of an adhesion contract, a party to an arbitration agreement is bound even if the clause does not expressly reference the right to a jury trial.⁴¹

The defendants next argue that it is unconscionable to require them to pay attorney fees in the event the plaintiff has to enforce its rights under the contract while not according them their own attorney fees if they prevail. However, mutuality of obligation in contract law does not mean that each party must have the exact same obligations.⁴² Nowhere in the definition of consideration is there a requirement that the

39 *Lake Ridge Academy v. Carney* (1993), 66 Ohio St.3d 376, 383, 613 N.E.2d 183, citing and quoting *Williams v. Walker-Thomas Furniture Co.* (C.A.D.C.1965), 350 F.2d 445, 449.

40 *Small*, at ¶ 23; see, also, *Vanyo*, 156 Ohio App.3d at 712, at ¶ 17.

41 *Garcia v. Wayne Homes, LLC* (Apr. 19, 2002), 2nd Dist. No. 2001 CA 53, 2002-Ohio-1884.

42 *Robbins v. Country Club Retirement Center IV, Inc.* (Mar. 17, 2005), 7th Dist. No. 04 BE 43, 2005-Ohio-1338, at ¶ 24.

benefits or detriments flowing to each party be exactly the same.⁴³

Moreover, the contract does not take away any causes of action that would otherwise be available to the defendants. With respect to the specific argument which is made by the defendants, the contract does provide that the defendants are not entitled to take possession of the improvements until full and final payment is made. The plaintiff is only entitled to recover its attorney fees under the limited circumstance where the defendants enter into possession of the real estate in violation of this provision without making full payment. Given that the plaintiff is building a home on the defendants' property, and substantial detriment may be caused to the plaintiff by the defendants taking possession without making payment, the court finds that this particular provision is not unreasonable.

The contract also provides that the arbitration will take place in Louisville, Kentucky, which is the home city of the plaintiff but is not the place where the work took place. This provision is substantively unconscionable, for the reason that it is violative of Ohio law.

In this regard, R.C. 4113.62 provides in pertinent part:

"D)(2) Any provision of a construction contract, agreement, understanding, specification, or other document or documentation that is made a part of a construction contract, subcontract, agreement, or understanding for an improvement, or portion thereof, to real estate in this state that requires any litigation, arbitration, or other dispute resolution process provided for in the construction contract, subcontract, agreement, or understanding to occur in another state is void and unenforceable as against public policy. Any litigation, arbitration, or other dispute resolution process provided for in the construction contract,

⁴³ Id. at ¶ 28.

subcontract, agreement, or understanding shall take place in the county or counties in which the improvement to real estate is located or at another location within this state mutually agreed upon by the parties.”

The fact that the out-of-state arbitration provision is unconscionable does not, however, mean that the arbitration clause in its entirety is rendered unenforceable. If a contract or term in a contract is found to be unconscionable at the time that the contract was made, a court may choose either to refuse to enforce the contract, enforce the contract without the unconscionable portion, or limit the application of the unconscionable portion to avoid an unconscionable result.⁴⁴

Here, the arbitration provision “as a whole” is reasonable, and only one term contained therein is unconscionable. R.C. 4113.62 sets forth the appropriate remedy, which is that the arbitration shall take place in the county in which the improvement to real estate is located. Accordingly, the arbitration shall take place in Clermont County.

As to the other terms and provisions of the contract, the court is not persuaded that any of them should be unenforceable herein.⁴⁵ There are no one-sided rules drafted as prerequisites for attaining a hearing, and there is no evidence of a substantial fee required as a condition precedent to arbitration.⁴⁶ Furthermore, the defendants have presented no evidence that the arbitration costs and fees are prohibitive, unreasonable, and unfair as applied to the defendants.⁴⁷ Finally, the court cannot find that the agreement is “weighted heavily” against the weaker party.⁴⁸

44 *Eagle*, 157 Ohio App.3d at 166, at ¶ 36, citing R.C. 1302.15(A).

45 See *Eagle*, at ¶ 37.

46 See *id.*

47 See *Eagle*, 157 Ohio App.3d at 171, at ¶ 50.

48 See *id.*

Meanwhile, the court cannot find any evidence that the contract is procedurally unconscionable. Much of the defendants' argument is premised on the position that the contract entered into by the parties is an adhesion contract.

Under illustration 7, in comment a, the Restatement of the Law 2d (1981), Contracts, ¶ 208, notes that:

"It is to be emphasized that a contract of adhesion is not unconscionable per se, and that all unconscionable contracts are not contracts of adhesion. Nonetheless, the more standardized the agreement and the less a party may bargain meaningfully, the more susceptible the contract or a term will be to a claim of unconscionability."

Black's Law Dictionary (5 Ed. Rev. 1979) 38, defines an adhesion contract:

"Standardized contract form offered to consumers of goods and services on essentially 'take it or leave it' basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms."

Thus, this court is called upon to determine whether the contract entered into between the parties was one of adhesion and, separately, whether the contract was unconscionable.⁴⁹ In this regard, there is no evidence that the plaintiff presented this contract to the defendants on a "take it or leave it" basis.

Even if they felt pressured to agree to the arbitration provision, the defendants clearly did not have to buy a home from the plaintiff. There are a multitude of homebuilders in the local area. It is not possible to state that there is inherently unequal bargaining power between these two parties.

⁴⁹ See *O'Donoghue v. Smythe, Cramer Co.* (July 3, 2002), 8th Dist. No. 80453, 2002-Ohio-3447, at ¶ 25.

The contract was preprinted. However, a preprinted sales contract containing an arbitration clause that is a condition precedent to the final sale, without more, fails to demonstrate unconscionability of the clause.⁵⁰

The arbitration clause itself was contained in standard rather than fine print. The issues were neither hidden nor out of the ordinary, and there is no evidence that the defendants were hurried through some signature process.⁵¹

Under these circumstances, the law does not require that each aspect of a contract be explained orally to a party prior to signing.⁵² There is a "legal and common sensical-axiom that one must read what one signs."⁵³ While it is unknown whether the defendants read the arbitration clause, the fact that a party did not read the contract prior to signing it and was not informed of the arbitration provision would not in any event, absent other claims or indicia of adhesion or unconscionability, release a party from its obligation.⁵⁴

Moreover, nothing in the record allows the court to conclude that the defendants were unaware of the impact of the arbitration clause or that they were otherwise limited in understanding its impact.⁵⁵ The defendants had to acknowledge their assent to the arbitration provision by writing their initials next to it. The defendants acknowledge that there was some discussion regarding the arbitration provision, so they were aware of it.

50 *Eagle*, 157 Ohio App.3d at 173, at ¶ 56, citing *Harper v. J.D. Byrider of Canton*, 148 Ohio App.3d 122, 2002-Ohio-2657, 772 N.E.2d 190, at ¶ 16.

51 See *Robbins*, at ¶ 41.

52 *O'Donoghue*, at ¶29, citing *ABM Farms, Inc. v. Woods* (1998), 81 Ohio St.3d 498, 692 N.E.2d 574, syllabus.

53 *O'Donoghue*, citing *ABM Farms*, at 503, 692 N.E.2d 574.

54 *O'Donoghue*, citing *Garcia v. Wayne Homes*, 2nd Dist. No.2001 CA 53, 2002-Ohio-1884.

55 See *Vanyo*, at ¶ 19.

The plaintiff's salesperson made a statement to the effect that the plaintiff builds quality homes and that there would not need to be an arbitration. However, this was only a statement of optimism, and procedural unconscionability does not result because a salesperson makes the party feel that the particular provision at issue is "routine."⁵⁶ Such a statement as was made by the salesperson in this case does not constitute a misrepresentation.⁵⁷

Under these circumstances, the court cannot find that this was a contract of adhesion.⁵⁸ Similarly, given the public policy in favor of arbitration as stated in both federal and state law, this court is unable to say that the arbitration clause in and of itself is unconscionable.

By the same token, to defeat a motion for stay brought pursuant to R.C. 2711.02 on the basis of fraud, a party must demonstrate that the arbitration provision itself in the contract at issue, and not merely the contract in general, was fraudulently induced.⁵⁹ In considering the short length of the arbitration provision, the fact that the arbitration provision is not hidden or in fine print, and the fact that the arbitration provision is typical and not out of the ordinary, the court finds that there is no evidence of fraudulent inducement in this case.⁶⁰

Based upon the above analysis, the court finds that the issues which have been

56 See *Robbins* at ¶ 28.

57 See *id.*

58 See *O'Donoghue*, at ¶ 28.

59 *ABM Farms, Inc. V. Woods*, 81 Ohio St.3d 498, 1998-Ohio-612, 692 N.E.2d 574, at the syllabus.

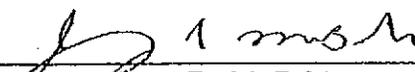
60 See *ABM Farms* at 503, 692 N.E.2d 574.

raised in this case are properly referable to arbitration in Clermont County, that there are no grounds that exist to render the arbitration clause unenforceable, and that the plaintiff's motion to stay the proceedings in this court until the issues raised in the pleadings can be arbitrated is well-taken and shall be granted.

Although the court has not addressed the mediation clause separately, the analysis which has been provided herein also applies to it. The plaintiff's motion to stay the proceedings pending mediation is also granted. In particular, the court would note that the mediation is to occur through the American Arbitration Association just the same as the arbitration. Also, for the reasons which have been stated previously as to the arbitration provision, the mediation shall be held in Clermont County rather than Jefferson County, Kentucky, pursuant to R.C. 4113.62.

IT IS SO ORDERED.

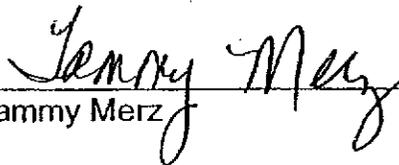
DATED: 8-16-05



Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were mailed by regular U.S. Mail to all counsel of record and unrepresented parties on this 16th day of August 2005.



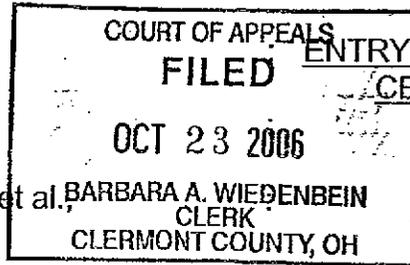
Tammy Merz

IN THE COURT OF APPEALS FOR CLERMONT COUNTY, OHIO

TAYLOR BUILDING CORPORATION : CASE NO. CA2005-09-083
OF AMERICA,
Appellee,

vs.

MARVIN BENFIELD, et al.,
Appellants.



ENTRY GRANTING MOTION TO
CERTIFY CONFLICT

The above cause is before the court pursuant to a motion to certify conflict to the Ohio Supreme Court filed by counsel for appellee, Taylor Building Corporation of America, on September 7, 2006.

Ohio courts of appeal derive their authority to certify cases to the Ohio Supreme Court from Section 3(B)(4), Article IV of the Ohio Constitution, which states that whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by another court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination. For a conflict to warrant certification, it is not enough that the reasoning expressed in the opinion of the two courts of appeal are inconsistent; the judgments of the two courts must be in conflict. *State v. Hankerson* (1989), 52 Ohio App.3d 73.

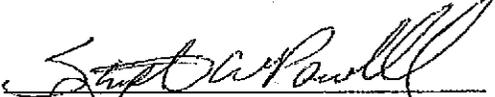
The issue involved in this case is the appropriate standard of review for a decision granting a motion to compel arbitration where the party opposing the motion alleges that the arbitration clause at issue is unconscionable. In the present case, this court held that when reviewing a trial court's ruling on the question of unconscionability of an arbitration contract, a de novo standard is applied. This court held that the un-

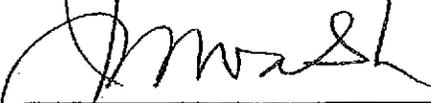
Appellee contends that this court's decision is in conflict with judgments rendered on the same question by the Sixth, Eighth, Ninth and Tenth Appellate Districts. These appellate districts have decided cases on the same question applying an abuse of discretion standard of review, although some of them have applied the de novo standard in other similar cases.

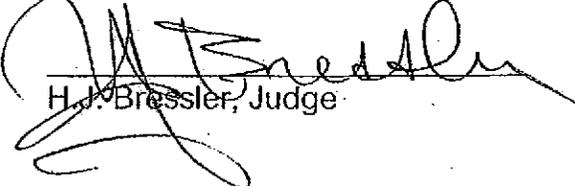
Specifically, appellee contends that this court's decision is in conflict with the following cases: *Small v. HCF of Perrysburg, Inc.*, 159 Ohio App.3d 66, 2004-Ohio-5757 (Sixth District Court of Appeals); *Sikes v. Ganley Pontiac Honda, Inc., et al.* Cuyahoga App. No. 82889, 2004-Ohio-155 (Eighth District Court of Appeals); *Harper v. J.D. Byrider of Canton* (2002), 148 Ohio App.3d 122 (Ninth District Court of Appeals); *Cronin v. California Fitness*, Franklin App. No. 04AP-1121, 2005-Ohio-3273 (Tenth District Court of Appeals).

Upon consideration of the foregoing, the court finds that the motion to certify conflict is with merit, and the same is hereby GRANTED. The certified question is as follows: Should an appellate court apply a de novo or abuse of discretion standard of review when reviewing a trial court's decision granting or denying a motion to compel arbitration where it is alleged that the arbitration clause is unconscionable?

IT IS SO ORDERED.


Stephen W. Powell, Presiding Judge


James E. Walsh, Judge


H. J. Bressler, Judge

NS—SPECIAL REMEDIES

ative Dispute Resolution § 153, ability.

waiver of participation by

company the party to and before the mediation may be

ative Dispute Resolution § 126, Client in Mediation.

mit, or supersede the federal U.S.C. Section 7001 et seq., modify, limit, or supersede of the notices described in

CHAPTER 2711

ARBITRATION

GENERAL PROVISIONS

- Section
- 2711.01 Provision in contract for arbitration of controversies valid; exceptions
- 2711.02 Court may stay trial; appeal
- 2711.03 Enforcing arbitration agreement
- 2711.04 Appointment of arbitrator
- 2711.05 Hearing of application
- 2711.06 Powers and duties of arbitrators; subpoena of witnesses, failure to obey
- 2711.07 Depositions

AWARD

- 2711.08 Award must be in writing
- 2711.09 Application for order confirming the award

VACATING, MODIFYING, AND CORRECTING AWARD

- 2711.10 Court may vacate award
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- 2711.12 Judgment to be entered
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MEDICAL CLAIMS

- 2711.21 Medical claims to be submitted to arbitration; procedures
- 2711.22 Written contract for arbitration binding on parties
- 2711.23 Agreement before medical care to submit any controversy to arbitration; conditions for validity
- 2711.24 Agreement to arbitrate medical claims; form; presumption of validity; cancellation

Comparative Laws

Ind.—West's A.I.C. 34-57-1-1.
Mich.—M.C.L.A. § 600.5001 et seq.

Cross References

- County courts, applicability of arbitration provisions, 1907.41
- County mental retardation and developmental disabilities boards, employee disciplinary procedure, arbitration, 5126.23
- Courts of conciliation, O Const Art IV §19
- Escrow of moneys due under contract, dispute, arbitration, 153.63
- International commercial arbitration and conciliation, applicability, 2712.05
- Public employees' collective bargaining, disputes regarding agreement, arbitration, 4117.14
- Public improvement contracts, absence of dispute resolution provisions, 153.62
- Underground utility facilities, identification before construction of public improvement, disputes, arbitration, 153.64

GENERAL PROVISIONS

2711.01 Provision in contract for arbitration of controversies valid; exceptions

(A) A provision in any written contract, except as provided in division (B) of this section, to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

(B)(1) Sections 2711.01 to 2711.16 of the Revised Code do not apply to controversies involving the title to or the possession of real estate, with the following exceptions:

- (a) Controversies involving the amount of increased or decreased valuation of the property at the termination of certain periods, as provided in a lease;
- (b) Controversies involving the amount of rentals due under any lease;
- (c) Controversies involving the determination of the value of improvements at the termination of any lease;
- (d) Controversies involving the appraisal of property values in connection with making or renewing any lease;
- (e) Controversies involving the boundaries of real estate.

(2) Sections 2711.01 to 2711.16 of the Revised Code do not apply to controversies involving international commercial arbitration or conciliation that are subject to Chapter 2712. of the Revised Code.

(1991 H 221, eff. 10-23-91; 1975 H 682; 126 v 304; 1953 H 1; GC 12148-1)

Historical and Statutory Notes

Pre-1953 H I Amendments: 114 v 137, § 1

Cross References

- | | |
|---|---|
| Arbitration, cases excluded from, Sup R 15 | Public improvements, escrow of money due under contract, dispute, arbitration, 153.63 |
| Public employees' collective bargaining, disputes regarding agreement, arbitration, 4117.14 | Public improvements, underground utilities, disputes, arbitration, 153.64 |
| Public improvement contracts, absence of dispute resolution provision, 153.62 | |
| Public improvements, award and execution of contract, dispute procedures, 153.12 | |

Library References

Arbitration \Leftrightarrow 1.2, 3.1 to 3.4.

Westlaw Topic No. 33.

C.J.S. Arbitration §§ 3, 19 to 25.

Research References

Encyclopedias

- | | |
|---|---|
| OH Jur. 3d Adjoining Landowners § 77, by Arbitration. | OH Jur. 3d Alternative Dispute Resolution § 240, Matters Excluded by the Ohio Arbitration Act—Arbitration of Questions Involving Real Estate. |
| OH Jur. 3d Alternative Dispute Resolution § 207, Distinguished from Appraisal. | OH Jur. 3d Alternative Dispute Resolution § 245, Usual Grounds for Contract Revocation. |
| OH Jur. 3d Alternative Dispute Resolution § 209, Nature and Origin of Proceedings. | OH Jur. 3d Alternative Dispute Resolution § 246, Revocation of Common Law Arbitration Agreements. |
| OH Jur. 3d Alternative Dispute Resolution § 212, The Ohio Arbitration Act. | OH Jur. 3d Employment Relations § 535, Generally. |
| OH Jur. 3d Alternative Dispute Resolution § 221, Construction and Effect of Agreements to Arbitrate. | OH Jur. 3d Employment Relations § 538, Confirmation, Vacation, or Modification of Arbitration Awards. |
| OH Jur. 3d Alternative Dispute Resolution § 222, Necessity of Writing. | OH Jur. 3d Insurance § 1175, Validity of Provisions for Arbitration or Appraisal. |
| OH Jur. 3d Alternative Dispute Resolution § 225, Waiver or Loss of Right to Arbitrate. | Forms |
| OH Jur. 3d Alternative Dispute Resolution § 227, General Contract Law Principles. | Ohio Forms Legal and Business § 61, Introduction. |
| OH Jur. 3d Alternative Dispute Resolution § 231, Persons, Generally. | Ohio Forms Legal and Business § 64, Checklist—Agreement to Settle Boundary Line Dispute. |
| OH Jur. 3d Alternative Dispute Resolution § 236, Municipal Corporations and Other Political Subdivisions. | Ohio Forms Legal and Business § 8:69, Supermarket-Lessor to Erect Building. |
| OH Jur. 3d Alternative Dispute Resolution § 239, Matters Excluded by the Ohio Arbitration Act. | Ohio Forms Legal and Business § 10:20, Drafting Building and Construction Contracts. |

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hes the remedial rbitration costs brought by con- be held unen- Motor Co. (Ohio App.3d 150, 809 rbitration ⇨ 6.2

Whether a contract dispute is to be resolved through arbitration is a question for the court to answer, but once a decision is made to arbitrate, questions about the meaning of the contract are for the arbitrator. Board of County Com'rs of Lawrence County, Ohio v. L. Robert Kimball and Associates (C.A.6 (Ohio), 1988) 860 F.2d 683, rehearing denied, certiorari denied-110 S.Ct. 1480, 494 U.S. 1030, 108 L.Ed.2d 617.

Former employee's allegations that she suffered discrimination, harassment, and retaliation by employers during course of her employment and was wrongfully terminated from her position arose out of or related to her employment contract, and, thus, fell within scope of contract's arbitration provision. Orcutt v. Kettering Radiologists, Inc. (S.D. Ohio, 03-11-2002) 199 F.Supp.2d 746. Arbitration ⇨ 7.5

Former employee who stated in her complaint that her employment was governed by valid employment contract until time of her termination was estopped from claiming that contract had expired in order to avoid arbitration provision. Orcutt v. Kettering Radiologists, Inc. (S.D. Ohio, 03-11-2002) 199 F.Supp.2d 746. Arbitration ⇨ 46.1

21. Conflict and choice of laws

Where parties have agreed to arbitrate in particular forum, only district court in that forum has jurisdiction to compel arbitration pursuant to Federal Arbitration Act (FAA). Management Recruiters Intern., Inc. v. Bloor (C.A.6 (Ohio), 11-19-1997) 129 F.3d 851. Federal Courts ⇨ 198

2711.02 Court may stay trial; appeal

(A) As used in this section and section 2711.03 of the Revised Code, "commercial construction contract" means any written contract or agreement for the construction of any improvement to real property, other than an improvement that is used or intended to be used as a single-family, two-family, or three-family detached dwelling house and accessory structures incidental to that use.

(B) If any action is brought upon any issue referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending, upon being satisfied that the issue involved in the action is referable to arbitration under an agreement in writing for arbitration, shall on application of one of the parties stay the trial of the action until the arbitration of the issue has been had in accordance with the agreement, provided the applicant for the stay is not in default in proceeding with arbitration.

(C) Except as provided in division (D) of this section, an order under division (B) of this section that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

(D) If an action is brought under division (B) of this section upon any issue referable to arbitration under an agreement in writing for arbitration that is included in a commercial construction contract, an order under that division that denies a stay of a trial of the action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of

In determining whether arbitration clause in employment secrecy agreement between employee and employer was enforceable, district court would follow the Federal Arbitration Act (FAA) for issues related to interpreting arbitration clause specifically, and, pursuant to Ohio's choice of law rules, Florida contract law for issues related to general contract formation and validity. Pritchard v. Dent Wizard International Corp. (S.D. Ohio, 07-29-2003) 275 F.Supp.2d 903. Arbitration ⇨ 2.2

Under Ohio's choice of law rules, contract clause that dictates which state's law governs agreement is generally enforceable. Pritchard v. Dent Wizard International Corp. (S.D. Ohio, 07-29-2003) 275 F.Supp.2d 903. Contracts ⇨ 129(1)

22. Procedural matters

Arbitrators are not bound by formal rules of procedure and evidence, and the standard for judicial review of arbitration procedures is merely whether a party to arbitration has been denied a fundamentally fair hearing. Nationwide Mut. Ins. Co. v. Home Ins. Co. (C.A.6 (Ohio), 01-28-2002) 278 F.3d 621. Arbitration ⇨ 31; Arbitration ⇨ 34.1; Arbitration ⇨ 73.7(1)

Former employee seeking preliminary injunction against arbitration of his dispute with former employer over scope of employment secrecy agreement was not likely to succeed on merits of claim that he had right to jury trial under the Ohio and Missouri constitutions that superseded arbitration clause in agreement. Pritchard v. Dent Wizard International Corp. (S.D. Ohio, 07-29-2003) 275 F.Supp.2d 903. Arbitration ⇨ 23.5(1)

Appellate Procedure and, to the extent not in conflict with those rules, Chapter 2505. of the Revised Code.

(2000 H 401, eff. 3-15-01; 1990 S 177, eff. 5-31-90; 1953 H 1; GC 12148-2)

Historical and Statutory Notes

Pre-1953 H 1 Amendments: 114 v 138, § 2

Amendment Note: 2000 H 401 added division (A); designated division (B); designated division (C) and inserted "Except as provided in division

(D) of this section," and "division (B) of" therein; added division (D); and made other nonsubstantive changes.

Cross References

County courts, submission of cases to arbitration, 1907.42

County mental retardation and developmental disabilities boards, employee disciplinary procedure, arbitration, 5126.23

Public employees' collective bargaining, disputes regarding agreement, arbitration, 4117.14

Public improvement contracts, absence of dispute resolution provision, 153.62

Public improvements, award and execution of contract, dispute procedures, 153.12

Public improvements, escrow of money due under contract, dispute, arbitration, 153.63

Public improvements, underground utilities, disputes, arbitration, 153.64

Library References

Arbitration ¶10, 23.9.

Westlaw Topic No. 33.

C.J.S. Arbitration §§ 49, 53 to 54, 57, 59.

Research References

Encyclopedias

OH Jur. 3d Alternative Dispute Resolution § 207, Distinguished from Appraisal.

OH Jur. 3d Alternative Dispute Resolution § 212, The Ohio Arbitration Act.

OH Jur. 3d Alternative Dispute Resolution § 217, Generally; Necessity of Submission.

OH Jur. 3d Alternative Dispute Resolution § 221, Construction and Effect of Agreements to Arbitrate.

OH Jur. 3d Alternative Dispute Resolution § 225, Waiver or Loss of Right to Arbitrate.

OH Jur. 3d Alternative Dispute Resolution § 226, Waiver or Loss of Right to Arbitrate—Effect of Participation as Estoppel.

OH Jur. 3d Alternative Dispute Resolution § 244, Effect on Right to Bring Suit; Stay of Proceedings.

OH Jur. 3d Alternative Dispute Resolution § 245, Usual Grounds for Contract Revocation.

OH Jur. 3d Alternative Dispute Resolution § 249, Stay of Trial.

OH Jur. 3d Alternative Dispute Resolution § 253, Court Order Compelling Arbitration—Required Notice.

OH Jur. 3d Appellate Review § 66, Rulings on Continuances and Stay Applications.

OH Jur. 3d Consumer & Borrower Protection § 71, Check Collection Charges.

OH Jur. 3d Contracts § 205, Implied Waiver; Estoppel.

OH Jur. 3d Employment Relations § 536, Enforcement of Arbitration Agreements.

Forms

Ohio Forms Legal and Business § 12A:1, In General.

Ohio Forms Legal and Business § 12A:3, Statutory Arbitration.

Ohio Forms Legal and Business § 12A:56, Agreement to Arbitrate Pending Action—Stay of Action.

Ohio Jurisprudence Pleading and Practice Forms § 98:9, Stay of Court Action—Finality.

Ohio Jurisprudence Pleading and Practice Forms § 98:15, Appellate Review.

Ohio Jurisprudence Pleading and Practice Forms § 98:27, Motion for Stay of Action Subject to Arbitration.

Treatises and Practice Aids

Klein, Darling, & Terez, Baldwin's Ohio Practice Civil Practice FMS § 4:55, Motion to Stay Proceedings Pending Arbitration.

Klein, Darling, & Terez, Baldwin's Ohio Practice Civil Practice FMS § 4:56, Order Staying Proceedings Pending Arbitration.

Sowald & Morganstern, Baldwin's Ohio Practice Domestic Relations Law § 1:9, Arbitration of Antenuptial Agreements.

LASC/OSLSA, Ohio Consumer Law § 21:1, Introduction.

LASC/OSLSA, Ohio Consumer Law § 21:3, Ohio Arbitration Act—Applicability.

financer was a stay action vner asserted greement and uced, and the was a docu- at was dated entering into (Ohio App. 8 No. 86057, Unreported.

tween home- waterproofing ionable, as no between par- educed price, h stated price ey were never n, and under- to cancel the ed under the signature ap- reviewed the v. Rusk Indus- 1-04-2005) No. 2934225, Unre-

tween home- waterproofing ionable; there red arbitration d high costs on d homeowners dtractor, there r, homeowners ontract if they l they asked no or misleading ration clause. 1. 6 Dist., San- 005-Ohio-5884; bitration ⇨ 6.2 ge contract was less of whether d to contract, not told about 7 of arbitration nt representing id by the terms ding arbitration rance by failing im that he was Inv. Co. (Ohio 305) No. 20630, 6, Unreported:

to lessee of low municipal hous- interfering with mpany, was in required resolu- use and sublease were no claims concerning lan-

guage contained in lease and sublease. Zaremba Properties Berea Co. v. Cuyahoga Metro. Hous. Auth. (Ohio App. 8 Dist., Cuyahoga, 04-21-2005) No. 84941, 2005-Ohio-1851, 2005 WL 914695, Unreported. Arbitration ⇨ 23.9

Whether contract between plumbing company and uniform rental company was valid and enforceable was a question to be settled by arbitration, rather than by court in declaratory judgment action, where parties' contract contained broad arbitration clause, and evidence of fraudulent inducement was presented only with regard to the contract as a whole; and not with regard to the arbitration clause itself. Lou Carbone Plumbing, Inc. v. Domestic Linen Supply & Laundry Co. (Ohio App. 11 Dist.,

Trumbull, 12-20-2002) No. 2002-T-0026, 2002-Ohio-7169, 2002 WL 31862330, Unreported. Arbitration ⇨ 23.13

Where trial court erroneously refused to enforce arbitration clause in contract for purchase of used automobile on ground that buyer sought rescission based on alleged fraudulent inducement that was not specific to arbitration clause, remand was required for determination as to whether arbitration provision was unconscionable in light of buyer's allegations that dealership falsely informed buyer prior to transaction that car had never been in wreck. Battle v. Bill Swad Chevrolet, Inc. (Ohio App. 10 Dist., 09-29-2000) 140 Ohio App.3d 185, 746 N.E.2d 1167. Arbitration ⇨ 23.30

2711.03 Enforcing arbitration agreement

(A) The party aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the written agreement. Five days' notice in writing of that petition shall be served upon the party in default. Service of the notice shall be made in the manner provided for the service of a summons. The court shall hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement.

(B) If the making of the arbitration agreement or the failure to perform it is in issue in a petition filed under division (A) of this section, the court shall proceed summarily to the trial of that issue. If no jury trial is demanded as provided in this division, the court shall hear and determine that issue. Except as provided in division (C) of this section, if the issue of the making of the arbitration agreement or the failure to perform it is raised, either party, on or before the return day of the notice of the petition, may demand a jury trial of that issue. Upon the party's demand for a jury trial, the court shall make an order referring the issue to a jury called and impaneled in the manner provided in civil actions. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding under the agreement, the proceeding shall be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding under the agreement, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with that agreement.

(C) If a written agreement for arbitration is included in a commercial construction contract and the making of the arbitration agreement or the failure to perform it is in issue in a petition filed under division (A) of this section, the court shall proceed summarily to the trial of that issue, and the court shall hear and determine that issue.

(2000 H 401, eff. 3-15-01; 132 v S 33, eff. 9-12-67; 1953 H 1; GC 12148-3)

Historical and Statutory Notes

Pre-1953 H 1 Amendments: 114 v 138, § 3 inserted "Except as provided in division (C) of this section," and substituted "the petition" for "application" therein; added division (C); and made other nonsubstantive changes.

Amendment Note: 2000 H 401 designated division (A) and substituted "that petition" for "such application" therein; designated division (B) and

Library References

Arbitration ⇨ 23, 23.1, 23.7, 23.11.
Westlaw Topic No. 33.
G.J.S. Arbitration §§ 62 to 66, 68 to 69, 72 to 73.

R.C. § 2711.06

Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

Chapter 2711. Arbitration (Refs & Annos)

General Provisions

2711.06 Powers and duties of arbitrators; subpoena of witnesses, failure to obey

When more than one arbitrator is agreed to, all the arbitrators shall sit at the hearing of the controversy unless, by consent in writing, all parties agree to proceed with the hearing with a less number. The arbitrators selected either as prescribed in sections 2711.01 to 2711.15, inclusive, of the Revised Code, or otherwise, or a majority of them, may administer oaths or affirmations to witnesses, fix the time and place of their hearings, adjourn their meetings from day to day or for a longer time, and also from place to place, and may subpoena in writing any person to attend before any of them as a witness and in a proper case to bring with him any book, record, document, or paper which is deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses in the court of common pleas. The subpoena shall issue in the name of the arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to said person and shall be served in the same manner as subpoenas to appear and testify before such court. If any person so subpoenaed to testify refuses or neglects to obey such subpoena, upon petition, the court of common pleas in the county in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person before said arbitrators, or punish said person for contempt in the same manner provided for securing the attendance of witnesses or their punishment for neglect or refusal to attend in such court.

(1953 H 1, eff. 10-1-53; GC 12148-6)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 114 v 139, § 6

R.C. § 2711.07

Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

Chapter 2711. Arbitration (Refs & Annos)

General Provisions

2711.07 Depositions

Upon petition approved by the arbitrators, or by a majority of them, the court of common pleas in the county in which such arbitrators, or a majority of them, are sitting may direct the taking of depositions to be used as evidence before the arbitrators, in the same manner and for the same reasons as provided by law for the taking of depositions in suits or proceedings pending in such court.

(1953 H 1, eff. 10-1-53; GC 12148-7)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 114 v 140, § 7

R.C. § 2711.08

Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

Chapter 2711. Arbitration (Refs & Annos)

Award

➔ **2711.08 Award must be in writing**

The award made in an arbitration proceeding must be in writing and must be signed by a majority of the arbitrators. A true copy of such award without delay shall be delivered to each of the parties in interest. The parties to the arbitration agreement may designate therein the county in which the arbitration shall be held and the award made.

(132 v S 33, eff. 9-12-67; 1953 H 1; GC 12148-8)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 114 v 140, § 8

R.C. § 2711.09

Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

Chapter 2711. Arbitration (Refs & Annos)

Award

2711.09 Application for order confirming the award

At any time within one year after an award in an arbitration proceeding is made, any party to the arbitration may apply to the court of common pleas for an order confirming the award. Thereupon the court shall grant such an order and enter judgment thereon, unless the award is vacated, modified, or corrected as prescribed in sections 2711.10 and 2711.11 of the Revised Code. Notice in writing of the application shall be served upon the adverse party or his attorney five days before the hearing thereof.

(1976 H 143, eff. 8-31-76; 132 v S 33; 1953 H 1; GC 12148-9)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 114 v 140, § 9

R.C. § 2711.10

Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

Chapter 2711. Arbitration (Refs & Annos)

Vacating, Modifying, and Correcting Award

2711.10 Court may vacate award

In any of the following cases, the court of common pleas shall make an order vacating the award upon the application of any party to the arbitration if:

- (A) The award was procured by corruption, fraud, or undue means.
- (B) There was evident partiality or corruption on the part of the arbitrators, or any of them.
- (C) The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (D) The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may direct a rehearing by the arbitrators.

(1969 H 1, eff. 3-18-69; 132 v S 33; 1953 H 1; GC 12148-10)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 114 v 140, § 10

R.C. § 2711.11

Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

Chapter 2711. Arbitration (Refs & Annos)

Vacating, Modifying, and Correcting Award

2711.11 Court may modify award

In any of the following cases, the court of common pleas in the county wherein an award was made in an arbitration proceeding shall make an order modifying or correcting the award upon the application of any party to the arbitration if:

(A) There was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award;

(B) The arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matters submitted;

(C) The award is imperfect in matter of form not affecting the merits of the controversy.

The order shall modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(1953 H 1, eff. 10-1-53; GC 12148-11)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 114 v 141, § 11

R.C. § 2711.15

Baldwin's Ohio Revised Code Annotated Currentness

Title XXVII. Courts--General Provisions--Special Remedies

Chapter 2711. Arbitration (Refs & Annos)

Vacating, Modifying, and Correcting Award

➔ **2711.15 Appeal**

An appeal may be taken from an order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding or from judgment entered upon an award.

(1953 H 1, eff. 10-1-53; GC 12148-15)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 114 v 142, § 15

Westlaw

OH B. An., 2000 H.B. 401

Page 1

Ohio Bill Analysis, 2000 H.B. 401

Ohio Final Bill Analysis, 2000 House Bill 401

2000

Ohio Legislative Service Commission

1999-2000 Regular Session

Sub. H.B. 401

123rd General Assembly

(As Passed by the General Assembly)

Reps. Salerno, Mottley, Robinson, Corbin, Cates, Buchy, Amstutz, Jones

Effective date: [FNal]

ACT SUMMARY

- Eliminates the right of a party aggrieved by the alleged failure of another to perform under an arbitration agreement in a commercial construction contract to have a jury trial of the issue of whether there is an arbitration agreement or whether there is a failure to perform under the agreement for arbitration and provides that the court must hear and determine that issue.

- Provides that only an order that denies (not an order that grants) a stay of a trial of any action pending arbitration under an arbitration agreement in a commercial construction contract is a final, appealable order.

CONTENT AND OPERATION*Enforcing arbitration agreement**Prior law*

Under the continuing Arbitration Law, a party who is aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the agreement. Five days' notice in writing of the application must be served upon the party in default in the manner provided for the service of a summons. The court must hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is *not* in issue, the court must make an order directing the parties to proceed to arbitration in accordance with the agreement.

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Ohio Bill Analysis, 2000 H.B. 401

Under prior law, if the making of the arbitration agreement or the failure to perform it was *in issue* in a petition as described in the preceding paragraph, the court was required to proceed summarily to the trial of the issue. The court was required to hear and determine that issue if no jury trial was demanded. On or before the return day of the notice of application, either party could demand a jury trial of the issue of the making of the arbitration agreement or the failure to perform it. If a jury trial was demanded, the court was required to make an order referring the involved issue to a jury. The jury was called and impaneled in the manner provided in civil actions. If the jury found that no agreement in writing for arbitration was made or that there was no default in proceeding under the agreement for arbitration, then the proceeding on the issue was required to be dismissed. If the jury found that an agreement for arbitration was made in writing and that there was a default in proceeding under the agreement for arbitration, the court was required to make an order summarily directing the parties to proceed with the arbitration in accordance with the agreement. (R.C. 2711.03.)

Operation of the act

The act eliminates a party's right to demand a jury trial of the issue of whether there is a written agreement for arbitration or whether there is a failure to comply with the agreement to arbitrate when the party who is aggrieved by an alleged failure to perform under a written agreement for arbitration that is included in a *commercial construction contract* (see "*Definition*," below) files a petition in a court of common pleas for an order directing that the arbitration proceed in the manner provided for in the agreement. The act provides that if a written agreement for arbitration is included in a commercial construction contract and if the making of the arbitration agreement or the failure to perform it is *in issue* in the petition, the court must proceed summarily to the trial of that issue, and the court must hear and determine that issue. (R.C. 2711.03(C).)

*Appealability of court order pertaining to stay of trial**Continuing law*

Under the continuing Arbitration Law, if any action is brought upon any issue that is referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending must order the *stay of the trial* of the action until the arbitration of the issue has been had in accordance with the agreement if all of the following apply: (a) one of the parties makes an application for stay of the trial, (b) the applicant for the stay is not in default in proceeding with arbitration, and (c) the court is satisfied that the issue involved in the action is referable to arbitration under the agreement in writing for arbitration. An order that grants or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a *final order* and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, R.C. Chapter 2505. (Appeals Law). (R.C. 2711.02.)

Operation of the act

Ohio Bill Analysis, 2000 H.B. 401

Under the act, if an action is brought upon any issue that is referable to arbitration under an agreement in writing for arbitration that is included in a commercial construction contract (see "Definition," below), only an order that denies (not an order that grants) a stay of a trial of the action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a final order and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, R.C. Chapter 2505. (R.C. 2711.02(D).) (See COMMENT 2.)

Definition

For purposes of its provisions, the act defines "commercial construction contract" as any written contract or agreement for the construction of any improvement to real property, other than an improvement that is used or intended to be used as a single-family, two-family, or three-family detached dwelling house and accessory structures incidental to that use (R.C. 2711.02(A)).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	06-24-99	p. 965
Reported, H. Civil & Commercial Law	04-04-00	p. 1753
Passed House (95-0)	05-02-00	pp. 1848-1849
Reported, S. Judiciary	11-16-00	p. 2250
Passed Senate (33-0)	11-16-00	p. 2264

[FN1]. The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared.

OH B. An., 2000 H.B. 401

END OF DOCUMENT

9 U.S.C.A. § 2

United States Code Annotated Currentness

Title 9. Arbitration (Refs & Annos)

Chapter 1. General Provisions

➔§ 2. **Validity, irrevocability, and enforcement of agreements to arbitrate**

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1947 Acts. House Report No. 255, see 1947 U.S. Code Cong. Service, p. 1515.

Derivation

Act Feb. 12, 1925, c. 213, § 2, 43 Stat. 883.

9 U.S.C.A. § 3

United States Code Annotated Currentness

Title 9. Arbitration (Refs & Annos)

Chapter 1. General Provisions

▶§ 3. Stay of proceedings where issue therein referable to arbitration

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.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 670.)

HISTORICAL AND STATUTORY NOTES.

Revision Notes and Legislative Reports

1947 Acts. House Report No. 255, see 1947 U.S. Code Cong. Service, p. 1515.

Derivation

Act Feb. 12, 1925, c. 213, § 3, 43 Stat. 883.

9 U.S.C.A. § 4

United States Code Annotated Currentness

Title 9. Arbitration (Refs & Annos)

Chapter 1. General Provisions

➔ § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 671; Sept. 3, 1954, c. 1263, § 19, 68 Stat. 1233.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1947 Acts. House Report No. 255, see 1947 U.S. Code Cong. Service, p. 1515.

1954 Acts. Senate Report No. 2498, see 1954 U.S. Code Cong. and Adm. News, p. 3991.

Derivation

Act Feb. 12, 1925, c. 213, § 4, 43 Stat. 883.

References in Text

Federal Rules of Civil Procedure, referred to in the text, are set out in Title 28, Judiciary and Judicial Procedure.

Amendments

1954 Amendments. Act Sept. 3, 1954, brought provisions into conformity with present terms and practice.

9 U.S.C.A. § 10

United States Code Annotated Currentness

Title 9. Arbitration (Refs & Annos)

Chapter 1. General Provisions

➔ § 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

- (1) where the award was procured by corruption, fraud, or undue means;
 - (2) where there was evident partiality or corruption in the arbitrators, or either of them;
 - (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
 - (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- [(5) Redesignated (b)]

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

CREDIT(S)

(July 30, 1947, c. 392, 61 Stat. 672; Nov. 15, 1990, Pub.L. 101-552, § 5, 104 Stat. 2745; Aug. 26, 1992, Pub.L. 102-354, § 5(b)(4), 106 Stat. 946; May 7, 2002, Pub.L. 107-169, § 1, 116 Stat. 132.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1947 Acts. House Report No. 255, see 1947 U.S. Code Cong. Service, p. 1515.

1990 Acts. Senate Report No. 101-543, see 1990 U.S. Code Cong. and Adm. News, p. 3931.

1992 Acts. House Report No. 102-372, see 1992 U.S. Code Cong. and Adm. News, p. 830.

Revision Notes and Legislative Reports

2002 Acts. House Report No. 107-16, see 2002 U.S. Code Cong. and Adm. News, p. 138.

LIS. Serial 22
No. 8220, FICHE 4

TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION.

JANUARY 24, 1924.—Referred to the House Calendar and ordered to be printed.

Mr. GRAHAM of Pennsylvania, from the Committee on the Judiciary, submitted the following

REPORT.

[To accompany H. R. 846.]

The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce or within the jurisdiction or admiralty, or which may be the subject of litigation in the Federal courts. It was drafted by a committee of the American Bar Association and is sponsored by that association and by a large number of trade bodies whose representatives appeared before the committee on the hearing. There was no opposition to the bill before the committee.

The matter is properly the subject of Federal action. Whether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law court in which the proceeding is brought and not one of substantive law to be determined by the law of the forum in which the contract is made. Before such contracts could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States. The remedy is founded also upon the Federal control over interstate commerce and over admiralty. The control over interstate commerce reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce.

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

The need for the law arises from an anachronism of our American law. Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby

ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement. The procedure is very simple, following the lines of ordinary motion procedure, reducing technicality, delay, and expense to a minimum and at the same time safeguarding the rights of the parties. There is provided a method for the summary trial of any claim that no arbitration agreement ever was made, and there is also provided a hearing if the defeated party contends that the award was secured by fraud or other corruption or undue influence, or that some evident mistake not affecting the merits exists in the award. If the parties to the arbitration are willing to proceed under it, they need not resort to the courts at all. If one party is recalcitrant, he can no longer escape his agreement, but his rights are amply protected. At the same time the party willing to perform his contract for arbitration is not subject to the delay and cost of litigation. Machinery is provided for the prompt determination of his claim for arbitration and the arbitration proceeds without interference by the court. The award may then be entered as a judgment, subject to attack by the other party for fraud and corruption and similar undue influence, or for palpable error in form.

To secure jurisdiction for arbitration, however, service of process must be made personally, so that there is no danger that a defendant, having an honest defense, will be called upon to defend his case at a distance under a disadvantage. The proceeding will be commenced practically as any action is now commenced in the Federal courts.

In view of the strong support of commercial and legal bodies, the entire lack of opposition before the committee, the obvious justice of the result sought to be attained, and the evident propriety and necessity of Federal action, we submit that the bill should become law. It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.

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68TH CONGRESS }
1st Session }

SENATE

TO MAKE VALID AND ENFORCEABLE CERTAIN AGREEMENTS FOR ARBITRATION

MAY 14, 1924.—Ordered to be printed

Mr. STERLING, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1005]

The Committee on the Judiciary, to whom was referred the bill (S. 1005) to make valid and enforceable written provisions or agreements for arbitration of disputes arising out of contracts, maritime transactions, or commerce among the States or Territories or with foreign nations, report the same back with certain amendments thereto and, as so amended, the committee recommend that the bill do pass.

The amendments are as follows:

In lines 6 and 7, page 1 of the bill, strike out the words "or interstate."

In line 6, section 2, page 2, strike out the words "contract or"; and in line 7, section 2, page 2, after the word "or" insert the words "a contract evidencing a"; and in line 9, on said page, strike out the words "between the parties."

In line 18, section 4, page 3, after the word "agreement" as it first occurs in said line, insert the following proviso:

Provided, That the hearing and proceedings under such agreement shall be within the district in which the petition for an order directing such arbitration is filed.

On page 6, strike out section 8 of the bill.

Beginning with the word "That," in line 21, section 10, page 6, strike out all down to and including the word "attorneys" in line 25.

On page 10, strike out section 14 of the bill.

On page 11, strike out section 16 of the bill.

Beginning with section 9, renumber the sections following as required by the striking out of certain designated sections.

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The purpose of the bill is clearly set forth in section 2, which, as proposed to be amended, reads as follows:

SEC. 2. That a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The "maritime transactions or contracts," to which the bill will apply, are defined in section 1. Likewise, the definition of "commerce" in the same section, shows to what contracts in interstate or foreign commerce the bill will be applicable.

It is not contended that agreements to arbitrate have no validity whatever. A party may be liable in an action for damages for the breach of an executory agreement to arbitrate; or, if the agreement has been executed according to its terms and an award made, the appropriate action may be brought at law or in equity to enforce the award. Both maritime contracts or transactions and contracts involving interstate commerce are at least valid to this extent.

But it is very old law that the performance of a written agreement to arbitrate would not be enforced in equity, and that if an action at law were brought on the contract containing the agreement to arbitrate, such agreement could not be pleaded in bar of the action; nor would such an agreement be ground for a stay of proceedings until arbitration was had. Further, the agreement was subject to revocation by either of the parties at any time before the award. With this as the state of the law, such agreements were in large part ineffectual, and the party aggrieved by the refusal of the other party to carry out the arbitration agreement was without adequate remedy.

Until recently in England, and up to the present time in nearly, if not quite all, the States of the Union, such has been the law in regard to arbitration agreements. The Federal courts have in the main been governed by the same rules and, as a consequence, have denied relief to the parties seeking to compel the performance of executory agreements to settle and determine disputes by arbitration. If the agreement to arbitrate is found in a maritime contract or transaction, no action in admiralty for specific performance will lie, for the simple reason that this court is without power to grant equitable relief.

Various reasons have been given for these ancient rules of English law, followed as they have been by our State and Federal courts. Among these reasons were, first, the expressed fear on the part of the courts that arbitration tribunals did not possess the means to give full or proper redress, and also the doubt they entertained as to their right to compel an unwilling party to submit his cause to such a tribunal, thus denying to him the right to submit the same to the ordinary courts of justice for hearing and determination. Second, the jealousy of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction. To what extent the second reason influenced the first may be difficult to say; but it is not unreasonable to suppose that a desire to retain, if not extend, their jurisdiction had much to do with inspiring the fear

that arbitration tribunals could not do justice between the parties. And third, established precedent has had its large part of course in perpetuating the old rules long after the courts themselves could no longer see that they were founded in reason or justice.

It has been said that "arrangements for avoiding the delay and expense of litigation and referring a dispute to friends or neutral persons are a natural practice of which traces may be found in any state of society." The desire to avoid the delay and expense of litigation persists. The desire grows with time and as delays and expenses increase. The settlement of disputes by arbitration appeals to big business and little business alike, to corporate interests as well as to individuals. The Arbitration Society of America, with offices in the city of New York, has, through its arbitration tribunal, settled more than 500 cases during its less than two years of existence. In the New York Times of May 11 is found a brief résumé of the work accomplished. We quote the following:

In contrast with the long time required by the courts with their congested calendars to settle a dispute, the records of the society show that the average arbitration required but a single hearing, and occupied but a few hours of the time of disputants, counsel, and witnesses. The cost to the disputants was said to be trifling as compared with the cost of litigation.

"Complicated controversies involving large sums of money, which, beyond a reasonable doubt, if taken to the courts would have been fought through years of costly litigation, have been legally determined in this tribunal whose only rule of procedure is the rule of common sense, in from two to three weeks," the report states, "and the specially significant thing—just as significant as the saving of time and money—is the fact that wide satisfaction has resulted from the procedure. Winners and losers alike bear witness to this in letters on file at the office of the society."

The record made under the supervision of this society shows not only the great value of voluntary arbitrations but the practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly entered into.

The bill, while relating to maritime transactions and to contracts in interstate and foreign commerce, follows the lines of the New York arbitration law enacted in 1920, amended in 1921, and sustained by the decision of the Supreme Court of the United States in the matter of the Red Cross Line v. Atlantic Fruit Co., rendered February 18, 1924.

Reference has been made herein to the definitions contained in the first section of the bill. The second section is set forth in full.

Section 3 provides for a stay of proceedings and arbitration in any suit where it appears that the issue involved is referable to arbitration under the contract.

Section 4 provides a simple method for securing the performance of an arbitration agreement. The aggrieved party may apply to the proper district court on five days' notice, and the court will order the party to proceed. The constitutional right to a jury trial is adequately safeguarded.

Section 5 provides for the manner of naming the arbitrators in case the parties have failed to name them.

Section 6 provides for expedition in the matter of the hearing of arbitration matters by the court.

Section 7 gives the arbitrators power to summon witnesses.

Section 9 protects libels and seizures of vessels in admiralty proceedings.

Section 10 provides for the entry of a judgment where the parties have agreed thereto and for determining the appropriate court.

Section 11 provides that an award may be vacated where it was procured by corruption, fraud, or undue means, or where there was partiality or corruption on the part of the arbitrators, or where they have been guilty of misconduct or have refused to hear evidence pertinent and material to the controversy, or have been guilty of any other misbehavior prejudicial to the rights of either party, or where they have exceeded their powers.

Section 12 gives power to the court to modify or correct the award where there was evident material miscalculation of figures, or evident material mistake in the description of any person, thing, or property, or where the arbitrators have made an award upon a matter not submitted to them, or where the award is imperfect in matter of form.

