
Federal Arbitration Act - State Law Not Binding on Federal Court in Diversity Suit - Lawrence v. Devonshire, 271 F.2d 402 (C.A. 2d, 1959)

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good will to his business if the goods are sold in a form or way which is contrary to his restriction, equitable machinery will enjoin the offender.

Just as modern needs have brought about servitudes on land unknown to the common law, they may also call for a limited departure from the free alienation of personalty for the purpose of promoting desirable business practices completely foreign to the common law.

FEDERAL ARBITRATION ACT—STATE LAW NOT BINDING ON FEDERAL COURT IN DIVERSITY SUIT

The plaintiff, a Massachusetts corporation, ordered thirty-six pieces of a certain style of wool from the defendant, a New York corporation. The final written contract contained a clause providing that "any complaint, controversy, or question which may arise with respect to this contract that cannot be settled by the parties thereto, shall be referred to arbitration. . . ." Delivery of the goods was made from New York to Boston, and the plaintiff found latent defects in the goods which did not prove to be the quality called for by the contract (plaintiff's version of fraud). In an action for damages for alleged fraudulent misrepresentations made by the defendant inducing the plaintiff to purchase the woolen fabric, the district court denied a stay of proceedings pending arbitration. The court of appeals reversed with a direction to grant the stay. The court of appeals found that the Federal Arbitration Act¹ was a declaration of national law binding upon federal courts when jurisdiction is based solely upon diversity of citizenship. *Lawrence v. Devonshire*, 271 F.2d 402 (C.A.2d, 1959).

"Maritime transactions" and transactions affecting "commerce," with the exception of employment contracts, come within the operation of the Federal Arbitration Act.² Written provisions for arbitration in maritime transactions and transactions affecting commerce are made valid, irrevocable and enforceable.³ However, such arbitration agreements are not grounds to make the transaction a federal question.⁴ Therefore, the question of arbitration will not be raised in a federal court unless jurisdiction is predicated on the judicial code. If a federal court has jurisdiction separate and apart from the arbitration agreement, and if the arbitration agreement otherwise comes within the scope of the Act, then a stay of the proceedings for purposes of arbitration will be granted upon application of one of the parties.⁵ In substance, these are the provisions of the

¹ 9 U.S.C.A. §§ 1 to 14 (Supp., 1959).

² 9 U.S.C.A. § 1 (Supp., 1959).

⁴ 9 U.S.C.A. §§ 4, 8 (Supp., 1959).

³ 9 U.S.C.A. § 2 (Supp., 1959).

⁵ 9 U.S.C.A. § 3 (Supp., 1959).

Federal Arbitration Act which, if matched against the rule of *Erie v. Tompkins*,⁶ under the proper set of facts, will provide a constitutional question to be decided by the United States Supreme Court.

An area of confusion in the federal courts was clarified in 1938 with the United States Supreme Court decision in *Erie*. In a personal injury case properly in the federal court because of diversity of citizenship, Justice Brandeis declared:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. . . . There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general. . . ."⁷

The *Erie* doctrine is designed to ensure the same result, for a state created cause of action, in a federal court exercising jurisdiction because of diversity as would be reached had the case been tried in a state court. The old federal practice of applying "general" law to state created causes of action was overruled⁸ and strict adherence to the *Erie* doctrine has followed.⁹

The Federal Rules of Civil Procedure govern the manner in which a case is commenced in a federal court, but the ultimate result of the litigation in diversity cases is governed by the state law. Whether or not arbitration affects the ultimate result of litigation is a subject on which the courts have altered their thinking in recent years. Historically, arbitration was a procedural matter, something relating only to the remedy.¹⁰ Recent thinking on this question is best stated in *Bernhardt v. Polygraphic*:¹¹

[T]he remedy by arbitration, whatever its merits or shortcomings, substantially affects the cause of action created by the State. The nature of the tribunal where suits are tried is an important part of the parcel of rights behind a cause of action. The change from a court of law to an arbitration panel may make

⁶ 304 U.S. 64 (1938).

⁷ *Ibid.*, at 78.

⁸ E.g., *Smith v. Tyson*, 16 Pet. (U.S.) 1 (1842).

⁹ *Smith v. Sperling*, 354 U.S. 91 (1957); *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945); *Orange, Texas v. Livingston Shipbuilding Co.*, 258 F.2d 240 (C.A.5th, 1958); *Smith v. Pasqualetto*, 246 F.2d 765 (C.A.1st, 1957); *Smith v. Potomac Edison Co.*, 165 F. Supp. 681 (D. Md., 1958); *Powell v. Home Insurance Co.*, 164 F. Supp. 654 (E.D.S.C., 1958).

¹⁰ *Heckers v. Fowler*, 2 Wall. (U.S.) 123 (1864); *California Prune and Apricot Growers Assn. v. Catz*, 60 F.2d 788 (C.C.A.9th, 1932); *Meacham v. Jamestown*, 211 N.Y. 346, 105 N.E. 653 (1914).

¹¹ 350 U.S. 198 (1956).

a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed both by the Seventh Amendment and ch. 1, art. 12th, of the Vermont Constitution.¹²

Agreements to arbitrate are revocable at common law up until the time an award is rendered. Whether an agreement to arbitrate is revocable, or irrevocable, adds weight to the theory that arbitration affects "substance." In the *Lawrence* case, Judge Medina adopted the thinking of *Bernhardt*. There seems to be little doubt that the ultimate result of arbitration could easily be the opposite of the result of a judicial trial on the same subject matter. Seemingly, it would follow that a federal court may not apply the Federal Arbitration Act in diversity cases when to do so would substantially affect a state created cause of action.

At this point, the *Erie* rule could provide a solution to the problem of arbitration in the federal courts. In a case involving a maritime transaction, or some matter affecting commerce, which is before the federal court solely because of diversity, the Federal Arbitration Act would be inapplicable because the state law is the only applicable law. In fact, this was Justice Frankfurter's reasoning in his concurring opinion in *Bernhardt*.¹³ But since that case did not involve a maritime transaction, or a contract affecting commerce, the reasoning was neither decisive in that case, nor controlling for subsequent cases.

As previously stated, the Court of Appeals for the Second Circuit has chosen to find that the Federal Arbitration Act is a declaration of substantive national law binding upon the federal courts. To support this theory, it is necessary to look to the purpose of arbitration and the Federal Act and the power upon which Congress could predicate such a declaration.

¹² *Ibid.* at p. 203. Whether the arbitrators misconstrued a contract is not open to judicial review. *The Hartbridge*, 62 F.2d 72 (C.C.A.2d, 1932); *Mutual Benefit Health & Accident Assn. v. United Cas. Co.*, 142 F.2d 390 (C.C.A.1st, 1944). Questions of fault or neglect are solely for the arbitrators' consideration. *Richardson & Sons v. Hedger Transportation Corp.*, 98 F.2d 55 (C.C.A.2d, 1938). Arbitrators are not bound by the rules of evidence. *Burchell v. Marsh*, 17 How. (U.S.) 344 (1854); *Spring Cotton Mills v. Buster Boy Suit Co.*, 275 App. Div. 196, 88 N.Y.S.2d 295 (1949) *aff'd*, 300 N.Y. 586, 89 N.E.2d 877 (1949). They may draw on their personal knowledge in making an award. *American Almond Products Co. v. Consolidated Pecan Sales Co.*, 144 F.2d 448 (C.C.A.2d, 1944); *The Guldborg*, 1 F. Supp. 380 (S.D.N.Y., 1932); *Spring Cotton Mills v. Buster Boy Suit Co.*, 300 N.Y. 586, 89 N.E.2d 877 (1949). Absent agreement of the parties, a written transcript of the proceedings is unnecessary. *Application of Shapiro*, 197 Misc. 241, 97 N.Y.S.2d 644 (1949), modified 277 App. Div. 927, 98 N.Y.S.2d 451 (1950); *Andersen Trading Co. v. Brimberg*, 119 Misc. 784, 197 N.Y.S. 289 (1922). Swearing of witnesses may not be required. *Application of Shapiro*, 197 Misc. 241, 97 N.Y.S.2d 644 (1949), modified, 277 App. Div. 927, 98 N.Y.S.2d 451 (1950). And the arbitrators need not disclose the facts or reasons behind their award. *Shirley Silk Co. v. American Silk Mills, Inc.*, 257 App. Div. 375, 13 N.Y.S.2d 309 (1939).

¹³ *Shirley Silk Co. v. American Silk Mills, Inc.*, 257 App. Div. 275, 13 N.Y.S.2d 309 (1939).

Arbitration has come to find favor with the courts, although this was not always so.¹⁴ Obviously the expeditious settlement of disputes and the resulting relief to overloaded court calendars was intended by Congress.¹⁵ Similarly, the participants in disputed transactions are afforded more economical and prompt solutions to their controversies, something Congress could not overlook when passing the Act.¹⁶

But the source of power and the extent to which Congress chose to exercise it is vital in determining whether Congress intended to establish substantive national law in the field of arbitration. Legislative history is of negligible value in the determination of Congressional intent.¹⁷ The Federal Act covers a narrow field, namely maritime transactions and commerce. Congress has plenary power in these areas and, by reason of this legislative domain, may act to the exclusion of the states. The concept of Congressional power over individuals whose activities affect interstate commerce has greatly developed since 1925.¹⁸ Since the field of regulation was expressly narrowed, and since the Constitution gives Congress the exclusive power to deal with these matters, the *Erie* doctrine would have no application. It seems reasonable to assume that Congress intended the benefits of Section 2 to apply to all contracts within its power to regulate under the Commerce and Maritime clauses of the Constitution.¹⁹ Under this interpretation of the Act, its provisions would be enforced in federal courts whose jurisdiction is based solely on diversity.

There have been two cases, *Wilson v. Freemont*²⁰ and *Pioneer Trust and Savings v. Screw*,²¹ apparently based on diversity, which applied the Federal Act. However, they are doubtful support for the theory that Congress has declared a policy of substantive national law.

In the event that the United States Supreme Court, or federal courts of the Seventh Circuit adopt the "national law" reasoning of the case at bar, the Illinois laws and decisions on arbitration would conflict with the federal law. There must be a dispute existing at the time arbitration is agreed to in order that agreements to arbitrate become binding in Illinois.²² The

¹⁴ *Wilko v. Swan*, 201 F.2d 439 (C.A.2d, 1953).

¹⁵ *Radiator Specialty Co. v. Cannon Mills*, 97 F.2d 318 (C.C.A.4th, 1938).

¹⁶ *Wilko v. Swan*, 346 U.S. 427 (1953).

¹⁷ H.R. Rep. 96, 68th Cong., 1st Sess., p. 1 (1924).

¹⁸ Compare *Hammer v. Dagenhart*, 247 U.S. 251 (1918) and *Child Labor Tax Case*, 259 U.S. 20 (1922) with *Wickard v. Filburn*, 317 U.S. 111 (1942), *United States v. Darby*, 312 U.S. 100 (1941) and *N.L.R.B. v. Jones & Laughlin*, 301 U.S. 1 (1937).

¹⁹ U.S.C.A. Const. Art. I, § 8, cl. 3; Art. III, § 2, cl. 1.

²⁰ 77 F. Supp. 364 (D.Neb., 1948).

²¹ 73 F. Supp. 578 (E.D.Wis., 1947).

²² *Cocalis v. Nazlides*, 308 Ill. 152, 139 N.E. 95 (1923); *McKenna Process Co. v. Blatchford Corp.*, 304 Ill. App. 101, 25 N.E.2d 916 (1940).

resulting situation would be an arbitration agreement unenforceable in the Illinois courts because there was no existing dispute when executed, but valid, enforceable, and irrevocable in the federal court hearing the case because of diversity.

Congress has not seen fit to make arbitration agreements federal questions. Since the jurisdiction of the federal courts in matters of arbitration must be based on diversity, or a federal question, the more utilitarian solution to this problem would be strict adherence to the *Erie* doctrine and Justice Frankfurter's reasoning in the *Bernhardt* case. Conflicting results in state and federal courts dealing with the same arbitration agreement in the same state would thus be avoided.

FEDERAL PROCEDURE—LIKELIHOOD OF THE DEFENDANT CONTINUING IN THE NARCOTICS TRAFFIC HELD SUFFICIENT GROUNDS TO DENY BAIL PENDING APPEAL

The defendant was found guilty by a jury of a violation of the Federal Narcotic Control Act involving twelve ounces of heroin.¹ The trial judge entered a conviction, sentenced the defendant to fifteen years in prison and imposed a fine of \$10,000. Following motions after verdict the defendant served notice of intent to appeal, and asked that bond be set. The trial judge refused to enlarge the defendant on bail pending appeal for reasons, *inter alia*, that the defendant had been previously convicted of a narcotic offense by the same court, and served a sentence of some three years, but did not learn from his previous experience and had returned to unlawful dealings in narcotic drugs. Under such circumstances, the trial judge refused to assume the responsibility of putting defendant on the street where he could again commit such violations. The trial court also found defendant's appeal to be frivolous. The defendant appealed this ruling and, in a memorandum and order, the appellate court affirmed the

¹ 21 U.S.C.A. § 174 (Supp., 1959) provides: "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years, and, in addition, may be fined not more than \$20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than \$20,000.

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."