

ENFORCEMENT OF LABOR ARBITRATION AGREEMENTS IN THE FEDERAL COURTS

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Section 301 of the Taft-Hartley Act¹ has focused renewed attention on the legal status of voluntary arbitration in the settlement of labor disputes. The practical status of labor arbitration seems assured. Governmental statistics and data compiled by various other bodies indicate the overwhelming acceptance by labor and management of voluntary labor arbitration. Figures of a 1949 survey taken by the Bureau of Labor Statistics indicate more than 83% of collective bargaining agreements in leading industries make provisions for arbitration of grievances arising from such agreements.² It is widely believed that the judicial enforcement of arbitration agreements and awards is of secondary importance, and that the element of voluntary acceptance is the primary consideration. However, this is not to say that judicial remedy in the exceptional case is immaterial, for many have suggested that it is important to the stability of the procedure.

This article will attempt to deal with two major arbitration questions raised by the provision in Taft-Hartley Section 301 for actions in the federal courts based upon the breach of collective bargaining contracts. *First*, can suit for breach of a collective bargaining contract under Section 301 be *stayed* until arbitration has been had in accordance with an arbitration clause contained in the agreement, by invoking provisions of the Federal Arbitration Act,³ or otherwise? *Secondly*, can an agreement to arbitrate be

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¹ Labor Management Relations Act, 61 STAT. 157 (1947), 29 U.S.C. § 185 (Supp. 1951).

² 70 Monthly Lab. Rev. 160 (1949). Some type of arbitration was provided for in 1273 or 83% of 1482 current collective bargaining agreements analyzed in 1949. This is to be compared with a survey in 1944 which showed that in 14 selected industries only 73% of the union contracts analyzed contained arbitration agreements. U.S. Dept. of Labor, Bureau of Labor Statistics, Bulletin #780 (1944).

³ 43 STAT. 833 (1926), as amended 61 STAT. 669 (1947), 9 U.S.C. §§ 1-14 (Supp. 1951).

enforced under Section 301 irrespective of federal or state arbitration statutes?

At common law, the courts early laid down the rule that agreements to arbitrate either existing or future disputes are revocable by either party at any time before the award is made. The explanation usually offered for this position is that of judicial antipathy toward other tribunals competing with the courts. The common law situation is anomalous, however, in that the courts have consistently awarded nominal or stipulated damages for breach of such agreements despite their "revocability," and will nominally enforce an award once made even though they would not have enforced the executory agreement to arbitrate.⁴

By statute, most of the states have modified the common law of arbitration in various ways and degrees. The rule in twenty-one states is to the effect that only an agreement to submit an existing dispute will be specifically enforced.⁵ Eleven states have adopted the broader view that future dispute clauses appearing in collective bargaining agreements will be enforced.⁶ However, a distinction has arisen as to whether the dispute is "justiciable" or not; and it has been held that only agreements to arbitrate those disputes subject to an action at law or equity can be enforced even in states with the more liberal type of statute.⁷ Consequently, much labor arbitration remains beyond the reach of the state legislation.

The Federal Arbitration Act has provisions similar to those of many state statutes. The Federal Act, however, is not in terms confined to "justiciable" disputes and future disputes clauses are made irrevocable, giving it potential practical value in the field of labor relations. The first four sections of the act contain the principal operative provi-

⁴ Gregory & Orlikoff, *The Enforcement of Labor Arbitration Agreements*, 17 U. of CHI. L. REV. 223 (1950).

⁵ Ark., Fla., Ga., Idaho, Ill., Ind., Iowa, Kan., Ky., Me., Md., Minn., Mont., Nev., N.M., Tenn., Texas, Utah, Va., West Va., and Wyoming.

⁶ Cal., Colo., Conn., Del., La., Mass., N.J., N.Y., N.C., Pa., and Washington.

⁷ For a collection of state statutory law, see Gregory and Orlikoff, *supra* note 4. In addition to the statutes there cited, see N.C. Gen. Stat. § 95-36.1 *et seq.*, (Supp. 1951).

sions. Section 1 defines "maritime transactions" and "commerce"; it then ends with the proviso that, "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." Section 2 provides that written provisions for arbitration contained in any contract which involves maritime transactions or commerce are "valid, enforceable and irrevocable," with the exception of the usual grounds for revocation of contracts. Section 3 provides for a stay of proceedings in any case where there is an "issue referable to arbitration" under a written agreement. Section 4 provides for specific enforcement of a written agreement to arbitrate by any federal court which would have jurisdiction of the subject matter of a suit arising out of the controversy, save for such agreement. The act thus offers two possible remedies: indirect enforcement by a stay of litigation until arbitration is carried out; and direct enforcement by an order for specific performance of the arbitration agreement.

Indirect Enforcement: Stay of Litigation of Arbitrable Issues

The problem of whether stay provisions of the Federal Arbitration Act are applicable to labor arbitration clauses in collective bargaining contracts has been a controversial one. The federal courts that have faced the question have taken various positions.

One problem presented is whether, despite the broad language of Section 3, the power to grant a stay is restricted to such arbitration agreements as are made valid by Section 2, that is, those involving "maritime transactions" or "commerce."⁸ A number of decisions have indicated that

⁸ The dictum of Judge Learned Hand has been the basis of subsequent holdings that the stay power granted in § 3 is not limited to "maritime transactions" or those involving "commerce" mentioned in § 2. Judge Hand said, "such arbitration" in § 3 may refer back to "any issue referable to arbitration" and not back to § 2. *Shanferoke Coal & Supply Co. v. Westchester Service Corp.*, 70 F.2d 297, 298 (2nd Cir. 1934), *Aff'd*, 293 U.S. 449 (1935).

Section 2 does not so limit Section 3.⁹

As heretofore noted, Section 1, after defining "maritime transactions" and "commerce," specifically excludes "contracts of employment."¹⁰ It has been urged that since the word "commerce" does not appear in Section 3, the proper construction is that contracts of employment are not excluded from the stay provisions of the act.¹¹ However, the prevailing view is to the effect that the placing of the exception clause in the definition section demonstrates a strong intent that the exception is applicable to the entire act and not merely to some of the sections.¹²

The further question has been raised in some courts whether a collective bargaining agreement is in fact a "contract of employment" under the exclusionary clause of Section 1.¹³ A federal district court in New York has disposed of this question by holding that the exception of "contracts of employment" applies to the entire act, yet collective bar-

⁹ *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3rd Cir. 1943); *Agostini Brothers Bldg. Corp. v. United States*, 142 F.2d 854 (4th Cir. 1944); *Lewittes and Sons v. United Furniture Workers*, 95 F.Supp. 364 (S.D. N.Y. 1951); *Wilson and Co. v. Fremont Cake and Meal Co.*, 77 F.Supp. 364 (D.C. Neh. 1948). But, see, *Gatliff Coal Co. v. Cox*, 142 F.2d 876 (6th Cir. 1944), "It would be senseless to say that exclusion from the act covers the validity of the contract but excludes the stay provision of § 3."

¹⁰ It is clear that the Federal Arbitration Act does not apply to arbitration agreements covering individual employment and personal service contracts. This is in accordance with the traditional judicial reluctance to direct enforcement of such contracts. See H.R. No. 96 68th Cong. 1st Sess. 1-2 (1925).

¹¹ *Watkins v. Hudson Coal Co.*, 151 F.2d 311 (3rd Cir. 1945), *Cert denied*, 327 U.S. 816 (1945); *American Communications Assoc. Local #1 v. WCAU, Inc.*, 12 LA 557 (E.D. Penn. 1949).

¹² *Shirley-Herman Co. v. International Hod Carriers Union*, 182 F.2d 806 (2nd Cir. 1950); *Oil Workers International Union v. Mercury Oil Refining Co.*, 187 F.2d 980 (10th Cir. 1951); *United Furniture Workers of America v. Colonial Hardwood Flooring Co.*, 168 F.2d 33 (4th Cir. 1948); *Amalgamated Assoc. of Motor Coach Employes v. Pennsylvania Greyhound Lines*, 192 F.2d 310 (3rd Cir. 1951). The Third Circuit court changed its earlier position in reliance upon the argument that Congress in 1947 acquiesced in the code caption to Section 1, which implied that the exclusions in that section apply to the entire act.

¹³ *Lewittes and Sons v. United Furniture Workers*, 95 F.Supp. 851 (S.D. N.Y. 1951); *United Office & Professional Workers v. Monumental Life Insurance Co.*, 88 F.Supp. 602 (E.D. Penn. 1950); see Note, 31 B.U.L. REV. 430 (1951).

gaining agreements are *not* "contracts of employment," and therefore Section 3 of the act authorizing stay of actions was applicable.¹⁴ In the face of the circuit and district court holding to the contrary, however, it is questionable whether the Court of Appeals for the Second Circuit will go along with this interpretation.¹⁵

Until recently, the district and appellate courts of the Third Circuit had taken a broad view of Section 3 while construing Section 1 narrowly, and were willing to grant a stay of trial under an agreement containing an arbitration clause regardless of whether the agreement was commercial or a collective bargaining contract.¹⁶ It first appeared that the Third Circuit's interpretation might be indicative of how other federal courts would hold upon the question. This illusion was dispelled, however, when a series of cases reached the courts in other circuits. The Sixth Circuit construed Section 1, excluding "contracts of

¹⁴ *Lewittes and Sons v. United Furniture Workers*, 95 F.Supp. 851 (S.D. N.Y. 1951). Mr. Justice Jackson speaking in *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 334 (1944) said, "Collective bargaining between employer and representative of a unit, usually a union, results in an accord as to terms which will govern hiring and work and pay in that unit. The result is not, however, a contract of employment except in rare cases; no one has a job by reason of it and no obligation to any individual ordinarily comes into existence from it alone. The negotiations between union and management result in what often has been called a trade agreement, rather than in a contract of employment. . . . [Thereafter] . . . who shall benefit by it are identified by individual hirings." See, however, Judge Hasties' opinion, *Amalgamated Assoc. of Motor Coach Employees v. Pennsylvania Greyhound Lines*, 192 F.2d 310 (3rd Cir. 1951).

¹⁵ *Shirley-Herman Co. v. International Hod Carriers Union*, 182 F.2d 806 (2nd Cir. 1950). The dictum in this case may indicate that the second circuit will follow the other circuits interpreting "contracts of employment" to include collective bargaining agreements. This case is not actually contra to *Lewittes and Sons v. United Furniture Workers*, 95 F.Supp. 851 (S.D. N.Y. 1951), however, since the party had not requested a stay of trial under the Federal Arbitration Act.

¹⁶ *Donahue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3rd Cir. 1943); *Watkins v. Hudson Coal Co.*, 151 F.2d 311 (3rd Cir. 1945); *Evans v. Hudson Coal Co.*, 165 F.2d 970 (3rd Cir. 1948). In reliance upon these circuit cases, several district court cases subsequently held likewise. *United Office & Professional Workers v. Monumental Life Insurance Co.*, 88 F.Supp. 602 (E.D. Pa. 1950); *American Communications Assoc. Local #1 v. WCAU, Inc.*, 12 LA 557 (E.D. Pa. 1949); *Metal Polishers Union v. Rubin*, 85 F.Supp. 363 (E.D. Pa. 1949).

employment," as applicable to Section 3 and denied an application for a stay in a suit involving a labor question.¹⁷ For a while, it seemed that the Fourth Circuit would follow the Third Circuit's interpretation, but *United Furniture Workers v. Colonial Hardwood Flooring Co.*¹⁸ proved the contrary. Dictum in the Second Circuit indicates that it will follow the prevailing interpretation of the statute.¹⁹ The Tenth Circuit has fallen in line with a recent decision.²⁰ And a holding of the Third Circuit in 1951 reversed its long standing policy of granting a stay even though the agreement involved was a collective bargaining agreement.²¹ It seems clear that these five holdings, with no circuit court holding to the contrary, negate any possibility of a different interpretation. Future decisions by other federal courts will probably accept this limitation of the act and will treat collective bargaining contracts as outside the scope of Section 3.

As has been noted, the exclusionary provisions under Section 1 of the Federal Arbitration Act apply only to workers "engaged" in interstate commerce. However, suits under Section 301 of Taft-Hartley need only be founded on breach of collective bargaining contracts made in industries "affecting" commerce. Assuming the correct interpretation is that the exclusionary provision is to be read as applying to Section 3, a case might well arise where the contract of employment is in an industry that "affects" commerce but the employees in such industry are not "engaged" in commerce. It

¹⁷ *Gatliff Coal Co. v. Cox*, 142 F.2d 876 (6th Cir. 1944). "Herein" in the exception clause is a locative word and could apply to one section or the entire act.

¹⁸ 168 F.2d 33 (4th Cir. 1948). Compare this holding with the earlier opinion in *Agostini Bros. Building Corp. v. United States*, 142 F.2d 854 (4th Cir. 1944).

¹⁹ *Shirley-Herman Co. v. International Hod Carriers Union*, 182 F.2d 806 (2nd Cir. 1950).

²⁰ *Oil Workers Union v. Mercury Oil Refining Co.*, 187 F.2d 980 (10th Cir. 1951).

²¹ *Amalgamated Assoc. of Motor Coach Employees v. Pennsylvania Greyhound Lines*, 192 F.2d 310 (3rd Cir. 1951). This Third Circuit case apparently overrules *United Office & Professional Workers v. Monumental Life Insurance Co.*, *American Communications Assoc. Local #1 v. WCAU, Inc.*, *Metal Polishers Union v. Rubin*, *supra*, note 16.

may be argued that the exclusionary provision will not prevent a stay in such a case.

The legislative history of the Federal Arbitration Act offers little help in interpreting it. It has been suggested that the act was phrased with a generality for "future unfolding," thereby including arbitration in fields not foreseen at the passage of the act. However, a closer examination of the social temper of the 68th Congress and of the status of the labor movement of the time militates against such a notion.²² Much of the legislative history indicates that the act was intended to cover only commercial and maritime problems. The American Bar Association and other backers of the bill indicated its commercial character.²³

It is worthy of note, however, that in planning the Federal Arbitration Act the drafters drew heavily from the same sources as the framers of the state arbitration acts. And, contrary to the federal courts' interpretation of the federal act, at least two states have construed their statutes to cover collective bargaining agreements. Thus, the Supreme Court of California has construed the exclusion of "contracts pertaining to labor" from the state arbitration act to mean personal service contracts and not collective bargaining contracts.²⁴ The Pennsylvania statute has been interpreted similarly.²⁵

Assuming that a stay of suit for breach of collective bargaining contract will be granted under the Federal Arbitration Act, contrary to most of the holdings, Section 3 imposes the further requirement that there must be an "issue referable to arbitration." In the determination of this question,

²² Kaye & Allen, *The U. S. Arbitration Act and Collective Bargaining Agreements*, 4 ABB. JOURNAL (N.S.) 41 (1949).

²³ S.R. No. 536, 68th Cong. 1st Sess. 1-4 (1925). For a different view however see, H.R. No. 96, 68th Cong. 1st Session 1-2, "The purpose of this bill is to make valid and enforceable agreements for arbitration contained in contracts involving interstate commerce, or within the jurisdiction of admiralty, or which may be subject of litigation in the Federal Courts."

²⁴ *Levy v. Superior Court*, 15 Cal.2d 692, 104 Pac.2d 770 (1940).

²⁵ *Kaplan v. Bagrier*, 12 Pa. D. & Co. Rep. 693 (1929). However, of late this interpretation may be questioned. See, *Retail Drug Union v. Sun Ray Drug Co.*, 12 LA 418 (Pa. Ct. C.P., 1949).

the courts will take the moving party's version,²⁶ and it is an insufficient objection that the stay would involve supervision on the part of the court.

One of the most difficult problems in connection with the "referrable issue" is that surrounding no-strike clauses. If the arbitration clause provides that "all disputes, complaints and grievances" shall be submitted to arbitration, a violation of a "no-strike" clause would seem to be an issue referable to arbitration, and if a stay is granted the damage question will probably be arbitrated.²⁷ But where the arbitration clause is contained in a section headed "grievance procedure" and is limited to grievances as to "hours or other conditions of employment" then the clause may be interpreted as not covering claims for damages resulting from strikes.²⁸ The effect of the decisions noted is that management and labor may want to take a second look at their arbitration agreements and see that their intentions are clear on whether the issue of damages resulting from a breach of the no-strike clause are included within the arbitration clause.²⁹

Another possible method of indirect enforcement of arbitration arises in connection with attempts by an employer to secure an injunction within the limitations of the Norris-LaGuardia Act.³⁰ Under Section 8 of that act, the

²⁶ *Shanferoke Coal & Supply Co. v. Westchester Service Corp.*, 293 U.S. 449 (1935); *Shirley-Herman Co. v. International Hod Carriers Union*, 182 F.2d 805 (2nd Cir. 1950); *Textile Workers Union v. Aleo Manufacturing Co.*, 94 F.Supp. 626 (M.D. N.C. 1950).

²⁷ *Lewittes and Sons v. United Furniture Workers*, *supra* note 12; *Shirley-Herman Co. v. International Hod Carriers Union*, *supra*, note 15; *Textile Workers Union v. Aleo Manufacturing Co.*, 94 F.Supp. 626 (M.D. N.C. 1950).

²⁸ *United Furniture Workers of America v. Colonial Hardwood Flooring Co.*, 168 F.2d 33 (4th Cir. 1948). Judge Parker in this case said "It would seem possible of course for the parties to provide for the arbitration of any dispute which might arise between them, but they did not do this."

²⁹ A clause of general arbitration does not cease to be within the Federal Arbitration Act when the dispute narrows down to damages alone. But the "arbitration act does not cover an arbitration agreement sufficiently broad to include a controversy as to the existence of the very contract which embodies the arbitration agreement." *Kulukundis Shipping Co. v. Amtorg Trading Co.*, 126 F.2d 978 (2nd Cir. 1942).

³⁰ 47 STAT. 702, (1932), 29 U.S. C. §§ 101-115 (Supp. 1951).

federal courts shall not grant relief to an employer if he has "failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or . . . has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration." May the court issue the injunction where the Federal Mediation and Conciliation Service has fully performed its statutory duty under Sections 201-205 of Taft-Hartley and the parties have failed to carry out their agreement to arbitrate?³¹

Direct Enforcement of Arbitration Agreements

The question of whether specific performance of an arbitration agreement may be granted resolves itself around Section 4 of the Federal Arbitration Act and Section 301 of Taft-Hartley. As previously noted, Section 4 provides for specific enforcement of a written agreement to arbitrate by any federal court which would have jurisdiction of the subject matter of a suit growing out of the controversy save for such agreement. The prevailing view is that the stay procedure in Section 3 and the compulsory relief accorded by Section 4 are independent of one another.³² However,

³¹ An employer who refused to arbitrate was refused an injunction because of § 8 of the Norris-LaGuardia Act in *Brotherhood of Railroad Trainmen v. Toledo R.R.*, 321 U.S. 50 (1944) (involving the Railway Labor Act). See FORKOSCH, *Compulsory Arbitration and the Taft-Hartley Act*, 51 Col. L. Rev. 933 (1951).

³² *Donahue v. Susquehanna Collieries Co.*, 133 F.2d 3 (3rd Cir. 1943); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2nd Cir. 1942), "There is a well recognized distinction between a 'stay' and 'specific performance,' since the first merely arrests further action by the court itself in the suit until something outside the suit has occurred, but the court does not order that it shall be done, whereas in the second, through exercise of discretionary equity powers the court affirmatively orders someone to do or refrain from doing some act outside the suit." Also, see: *American Locomotive Co. v. Gyro Process Co.*, 185 F.2d 316 (6th Cir. 1950); *In re Phalberg*, 131 F.2d 968 (2nd Cir. 1942). Denial of stay under § 3 does not preclude action under § 4. The subsidiary question of whether § 4 will be limited by § 2 has not been directly decided. However, it has already been noted that in the early interpretations of the act some courts held § 1 only excepts those sections where the term "commerce" appears and since § 4 does not contain this term specific performance could be granted. In *United Office & Professional Workers v. Monumental Life Insurance Co.*, *supra*, notes 16 and 21, the court held that the union's request for arbitration under § 4 would be enforced.

the question of specific performance under the Federal Arbitration Act has practically become a "dead letter" in view of the weight of authority indicating that Section 1 excludes collective bargaining agreements from the entire statute.

Irrespective of federal or state arbitration acts, there is a possibility that agreements to arbitrate may be specifically enforced under Taft-Hartley Section 301. At present there is a split of authority on whether the injunction will issue, but there is substantial support for the view that it may.³³ Of course in seeking an injunction, the litigant is faced with fulfilling the requirements of the Norris-LaGuardia Act if a "labor dispute" is involved. The argument in favor of such relief is that, with the remedy for breach of contract under the section, it would be an anomaly to limit the court's power simply to damages.³⁴ The pioneer case holding to this view is that of *Textile Workers Union v. Aleo Mfg. Co.* decided by a district court within the Fourth Circuit in 1951.³⁵ The action was to compel compliance with a collective bargaining agreement containing an arbitration clause. Plaintiff union had established it had no adequate remedy at law and was entitled to equitable relief under the Declaratory Judgment Act, but the main question was whether injunctive relief might issue under Section 301. Defendant insisted the court was barred from issuing an injunction in any case involving a "labor dispute." To this Judge Hayes answered:

³³ *Wilson & Co. v. United Packinghouse Workers*, 83 F.Supp. 102 (S.D. N.Y. 1949); *Textile Workers Union v. Aleo Mfg. Co.*, 94 F.Supp. 626 (M.D. NC 1950); *American Federation of Labor v. Western Union Tel. Co.*, 179 F.2d 535 (6th Cir. 1950); *Mountain States Communications Workers v. Mountain States Tel. & Tel. Co.*, 81 F.Supp. 397 (D.C. Colo. 1948). *Contra*: *Alcoa Steamship Co. v. McMahon*, 173 F.2d 567 (2nd Cir. 1948) *cert denied*, 338 U.S. 821 (1948); *United Packing House Workers v. Wilson & Co.*, 80 F.Supp. 563 (D.C. Ill. 1948); *International Union Workers No. 563 v. Royal Typewriter Co.*, 88 F.Supp. 669 (D.C. Conn. 1949); *Duris v. Phelps-Dodge Copper Products Corp.*, 87 F.Supp. 229 (D.C. N.J. 1949).

³⁴ A possible foundation for such argument might well be that § 301 creates a new substantive right irrespective the remedies and that damages are only one such remedy.

³⁵ 94 F.Supp. 626 (M.D. N.C. 1950).

“Plaintiff is not seeking an injunction against the defendant doing anything embraced in Section 104 (a) and (c) of the Norris-LaGuardia Act. A mandatory injunction requiring defendant to perform its agreement in no manner involves (a) or (c). These sections are limitations in behalf of employees; they have no application to an injunction against an employer.”

While there is much to be said for the result in the light of the fact situation in the *Aleo* case, the problem is by no means solved.

Conclusion

Until recently the lack of uniformity in the interpretation of the Federal Arbitration Act has led to a wide diversity of holdings. If there is a collective bargaining agreement with provisions for arbitration and there occurs a breach of the arbitration clause the parties have two possible statutes to turn to for a remedy—Taft-Hartley Section 301, and the Federal Arbitration Act. The only stated remedy under Section 301 is damages; however, there is some recent authority that injunctive relief may be available for the party who requests that arbitration be carried out in accordance with the provisions of the agreement. If one of the parties requests a stay of trial until arbitration is had in accordance with the contract, there was, until recently, authority for granting it under Section 3 of the Arbitration Act; but it can now be said with some degree of certainty that collective bargaining agreements will not be enforced directly or indirectly under this statute.

It may be conceded that the importance of according legal status to labor arbitration agreements can be overemphasized. But some means should be available to enforce such contracts. The dockets of most federal courts are crowded; any reasonable method which might alleviate this problem should be resorted to, and this is especially true where the parties themselves have provided a system. Courts have repeatedly held that members of voluntary associations must exhaust their remedies within the association before resort-

ing to the courts and an analogy might be drawn where the parties have provided machinery for arbitration.

As yet we have not reached that point where many of us would urge that parties to labor disputes be compelled to arbitrate their differences. But where they have voluntarily agreed upon arbitration as the method for settling their disputes, there would seem to be a strong case for requiring a recalcitrant party to fulfill his undertaking.