

Spring 1956

# Commercial Arbitration in Indiana and the Proposed Uniform Act

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## Recommended Citation

(1956) "Commercial Arbitration in Indiana and the Proposed Uniform Act," *Indiana Law Journal*: Vol. 31 : Iss. 3 , Article 6.  
Available at: <http://www.repository.law.indiana.edu/ilj/vol31/iss3/6>

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## COMMERCIAL ARBITRATION IN INDIANA AND THE PROPOSED UNIFORM ACT

During the last half-century there has been a movement to reform and popularize the use of commercial arbitration.<sup>1</sup> Since 1920, fifteen states<sup>2</sup> and the Federal Government<sup>3</sup> have passed statutes which grant arbitration greater utility. In August, 1955, the National Conference of Commissioners on Uniform State Laws gave final approval<sup>4</sup> to a draft of a uniform arbitration statute.<sup>5</sup> These recent developments focus attention on a valuable alternative means for settling commercial disputes which largely circumvents the problems of crowded court dockets. To evaluate the Uniform Arbitration Act and clarify some of the problems it seeks to solve, a reappraisal of the status of this long recognized,<sup>6</sup> but seldom used, remedy in Indiana seems desirable.

Indiana recognizes arbitration in two forms: common law and statutory.<sup>7</sup> Both forms are interdependent, as the statute is cumulative to the common law.<sup>8</sup> Although in any one arbitration the parties must elect between the two types,<sup>9</sup> both may be discussed here together, as much of the case law applies to arbitration generally.

1. See, KELLOR, *AMERICAN ARBITRATION* 169-180 (1948).

2. Arizona (1929), *ARIZ. CODE ANN.* § 27-309 (1939); California (1927), *CAL. CODE CIV. PROC.* § 1280 (1949); Connecticut (1929), *CONN. GEN. STAT.* § 8151 (1949); Louisiana (1928), *LA. REV. STAT. ANN.* § 9:4201 (1950); Massachusetts (1925), *MASS. ANN. LAWS* c. 251, § 14 (1933); Michigan (1941), *MICH. COMP. LAWS* § 645.1 (1948); New Hampshire (1929), *N.H. REV. STAT. ANN.* c. 541, § 1 (1955); New Jersey (1923), *N.J. STAT. ANN.* § 2A:24-1 (1952); New York (1920), *N.Y. CIV. PROC. ACT* § 1448 (1955); Ohio (1931), *OHIO REV. CODE ANN.* § 2711.01 (Page 1953); Oregon (1925), *ORE. REV. STAT.* § 33.220 (1953); Pennsylvania (1928), *PA. STAT. ANN.* tit. 5, § 161 (1930); Rhode Island (1929), *R.I. GEN. LAWS* c. 475, § 1 (1938); Washington (1943), *WASH. REV. CODE* § 7.04.010 (1951); Wisconsin (1931), *WIS. STAT.* § 298.01 (1953).

3. 43 *STAT.* 883-886 (1925), 9 *U.S.C.* §§ 1-15 (1952).

4. The first draft received consideration in August, 1954. Under the rules of the Conference, it must be considered at one more meeting. Pirsig, *Toward a Uniform Arbitration Act*, 9 *ARB. J.* (n.s.) 115.

5. "Act relating to arbitration and to make uniform the law with reference thereto." The draft of this act was adopted by the National Conference of the Commissioners on Uniform State Laws on August 20, 1955, and approved by the House of Delegates of the American Bar Association August 26, 1955. Section 23 of the act authorizes the short title "Uniform Arbitration Act."

6. The earliest case reported in Indiana is *Mills v. Conner*, 1 *Blackf.* 7 (1818).

7. *IND. ANN. STAT.* §§ 3-201-226 (Burns 1946). This statute was passed in basically its present form in 1852.

8. *Kelley v. Adams*, 120 *Ind.* 340, 343, 22 *N.E.* 317 (1889); *Webb v. Zeller*, 70 *Ind.* 408, 410 (1880); *Miller v. Goodwine*, 29 *Ind.* 46, 47 (1867).

9. When the parties have provided that the submission be made a rule of court, the arbitration is statutory. *Hawes v. Coombs*, 34 *Ind.* 445 (1870). But after making

A quasi-judicial remedy,<sup>10</sup> arbitration begins with a voluntary agreement between the parties.<sup>11</sup> By this agreement, or submission,<sup>12</sup> the parties to a dispute bind themselves to settle their controversy by arbitration. The submission delineates the area of the dispute, determines the number of arbitrators and the method of their selection, and the process by which they are to reach their conclusion.<sup>13</sup> The submission confers jurisdiction over the subject of the arbitration on the arbitrators and empowers them to conclusively decide all questions of law or fact relevant to the dispute.<sup>14</sup> Whether the arbitration is statutory or common law depends upon the submission.<sup>15</sup> A common law submission may be oral.<sup>16</sup> Under the statute the submission must be in writing and must provide that it is to be made a rule of a designated court.<sup>17</sup> Although at common law it is optional whether the parties give mutual bonds to carry out the arbitration,<sup>18</sup> the statute makes bonding mandatory.<sup>19</sup>

the election the parties must pursue the chosen course unless there is a mutual agreement to deviate. *Francis v. Ames*, 14 Ind. 251 (1860).

10. KELLOR, *ARBITRATION IN ACTION*, 3-4 (1941) distinguishes arbitration as a remedy from such methods of adjustment of differences as conciliation, mediation, and negotiation. Emphasis is placed on the distinction that arbitration is a quasi-judicial remedy which binds the parties to a result which may or may not be satisfactory in all respects to one of the parties.

11. Apparently the only exception to the general rule that the arbitration is dependent on a mutual agreement between the parties is the Pennsylvania arbitration statute. Under the provisions of PA. STAT. ANN. tit. 5, § 21 (1953), one party to a civil suit may compel the other party to arbitrate and forego litigation of the dispute. This statute, by amendment in 1861, is excepted from application to the city and county of Philadelphia, PA. STAT. ANN. tit. 5, § 146.

12. A submission is an agreement by which parties contract to refer an existing dispute to arbitration. It is to be differentiated from other agreements to arbitrate which encompass disputes which may arise in the future. For a general discussion of arbitration agreements, see KELLOR, *ARBITRATION IN ACTION*, 51-66 (1941).

13. See, *Kile v. Chapin*, 9 Ind. 150 (1857); *Cones v. Vanosdol*, 4 Ind. 248 (1853); *Shively v. Knoblock*, 8 Ind. App. 433, 35 N.E. 1028 (1893).

14. *Goodwine v. Miller*, 32 Ind. 419 (1869).

15. *Smith v. Kirkpatrick*, 58 Ind. 254 (1877); *Goodwine v. Miller*, 32 Ind. 419 (1869); *Hays v. Miller*, 12 Ind. 187 (1859); *Titus v. Scantling*, 4 Blackf. 89 (1835). See note 6, *supra*.

16. *Kelley v. Adams*, 120 Ind. 340, 343, 22 N.E. 317 (1889); *Miller v. Goodwine*, 29 Ind. 46 (1867); *Carson v. Earlywine*, 14 Ind. 256 (1860); *Griggs v. Seeley*, 8 Ind. 264 (1856).

17. IND. ANN. STAT. § 3-201 (Burns 1946). *Estep v. Larsh*, 16 Ind. 82 (1861); *Fargo v. Reighard*, 13 Ind. App. 39, 39 N.E. 888, 41 N.E. 74 (1895). The submission may not, however, be made a rule of court in a justice of the peace court, *Richards v. Reed*, 39 Ind. 330 (1872).

18. It was the practice to give bonds even in common-law arbitration. For a discussion of the extensive use of arbitration bonds in common-law arbitration and their utility in a suit on the award, see Steers, *Arbitration at Common Law in Indiana*, 5 IND. L.J. 175, 180-182 (1929).

19. IND. ANN. STAT. § 3-203 (Burns 1946). The section provides that when an agreement is made under statute, the parties must execute bonds to perform the award. The bond must specify the names of the arbitrators, the dispute, and an agreement to make the submission a rule of court.

Any person qualified to contract may enter into a submission to arbitrate.<sup>20</sup> A person not a party to the submission may not be bound by an award,<sup>21</sup> but he may benefit from an award if contemplated in the submission.<sup>22</sup>

The subject-matter of the arbitration at common law may be practically any type of dispute or controversy.<sup>23</sup> Even a disagreement which is not a legal cause of action can be submitted.<sup>24</sup> The statute, however, limits statutory submission to existing disputes<sup>25</sup> which might be the subject of a law suit but do not involve a claim to a freehold interest in land.<sup>26</sup> At common law, an agreement whereby the parties bind themselves to submit a future dispute to arbitration is not illegal,<sup>27</sup> but an award rendered thereunder is not conclusive on the parties if the agreement purports to "oust the courts of jurisdiction."<sup>28</sup> Because disputes must be existing before a statutory submission may be made, the statute perpetuates the common law limitation. At least a partial circumvention of this restriction may be accomplished by the use of a "condition precedent" clause in a contract.<sup>29</sup> However, the use of such clauses has been limited,

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20. *Webb v. Zeller*, 70 Ind. 408, 410 (1880); *Titus v. Scantling*, 4 Blackf. 89, 91 (1835). The Indiana statute excepted married women until amended in 1939.

21. Nor may one partner bind his co-partner by submission of a partnership matter without his assent and, although the submitting partner is bound to perform the award, the award does not thereafter bar a joint action by the firm grounded in the cause of action covered by the award. *Woody v. Pickard*, 8 Blackf. 55 (1846).

22. *Scarce v. Scarce*, 7 Ind. 286 (1855).

23. However, it is a general rule that matters which are criminal, or whose determination is considered intrinsically a matter of public policy such as divorce actions, cannot be the subject of arbitration. While there are not cases dealing with this issue in Indiana and the statute is silent on this point, other jurisdictions have refused to hold such matters arbitrable. Thus, courts have refused enforcement of awards based on an illegal contract or transaction. *See, Joe Lee Ltd. v. Lord Dalmony*, [1927] 1 Ch. Div. 300; *Metro Plan, Inc. v. Miscione*, 257 App. Div. 652, 15 N.Y.S. 2d 35 (New York 1939).

24. An honest difference of opinion may be submitted by the parties. "[N]or indeed is it necessary that they should have come to the actual point of dispute, for a matter simply in doubt may be submitted." *Milhollin v. Milhollin*, 71 Ind. App. 477, 480, 125 N.E. 217 (1919).

25. IND. ANN. STAT. § 3-201 (Burns 1946).

26. IND. ANN. STAT. § 3-202 (Burns 1946).

27. *The Supreme Council of the Order of Chosen Friends v. Forsinger*, 125 Ind. 52, 55, 25 N.E. 129 (1890); *Maitland v. Reed*, 37 Ind. App. 469, 77 N.E. 290 (1905).

28. It was held that, with reference to existing disputes, the parties were presumed to intend the award as conclusive, *Rice v. Loomis*, 28 Ind. 399 (1867). But where an agreement was made to refer future disputes to arbitration, the award was treated as only prima facie conclusive and the court could review the facts. *The Supreme Council of the Order of Chosen Friends v. Forsinger*, 125 Ind. 52, 59, 25 N.E. 129 (1890). See text, p. 406, *infra*.

29. In such a contract there is a provision that in the event a dispute should arise between the parties concerning the performance of the contract, arbitration shall be resorted to for settlement of the dispute and the making of an award shall be a condition precedent to any suit upon the contract.

and enforcement might well be restricted to certain types of agreements.<sup>30</sup>

The parties to a common law arbitration may revoke their submission at any time prior to the rendering of an award.<sup>31</sup> Consequently a party to a submission may wait until the end of the hearings and revoke if he feels the award will go against him. The arbitration bond at one time discouraged a revocation in a common law arbitration, but now parties may revoke with impunity, rendering such arbitration relatively uncertain of result.<sup>32</sup> Although the statute does not expressly prohibit revocation, it has been interpreted to prohibit revocation except by consent of the court.<sup>33</sup>

The selection of the arbitrators, the place of the hearings, the rules, if any, by which such hearings are to be governed, and the duration of arbitration are determined by the agreement between the parties. The

30. The use of such clauses is believed to be common in construction contracts where the engineer or architect is named as appraiser or arbitrator of any dispute which may arise between owner and builder. Indiana has enforced such provisions and has accorded to them special distinction: "[A] provision in a building contract by which an architect or engineer becomes the arbitrator is, if anything, more binding than an ordinary submission to arbitration for the reason that it becomes a part of the consideration of the contract." *Lake Michigan Water Company v. U.S. Fidelity, etc., Co.*, 70 Ind. App. 537, 542, 123 N.E. 703 (1919). This suggestion that the arbitration clause is part of the consideration of the contract as a whole runs counter to recent decisions holding that the promises to arbitrate are collateral to and separate from the remainder of the contract. *See, Nussbaum, The "Separability Doctrine" in American and Foreign Arbitration*, 17 N.Y.U. L.Q. Rev. 609 (1940); *Heyman v. Darwins, Ltd.*, [1942] A.C. 356, 366; *Batter Bldg. Materials Co. v. Kirshner*, 142 Conn. , 110 A.2d 464 (1954). For an indication that Indiana will not go to extremes to enforce such an agreement, *See Munk v. Kanzler*, 26 Ind. App. 105, 58 N.E. 543 (1900).

31. *Grand Rapids, & I.R. Co. v. Jaqua*, 66 Ind. App. 113, 115 N.E. 73 (1917). Even though the submission expressly states that the agreement is irrevocable, a common law submission may be revoked, *Heritage v. State ex rel. Crim*, 43 Ind. App. 595, 88 N.E. 114 (1908). However, a written submission cannot be revoked by parol, *Shroyer v. Bash*, 57 Ind. 349 (1877); *Mand v. Patterson*, 19 Ind. App. 619, 49 N.E. 974 (1897).

32. This uncertainty stems from the notion that the arbitrators were agents of the parties and thus subject to revocation of their authority. Today few support the logic or utility of this concept, but it has become so embedded in the matrix of the common law that it is virtually indestructible except through legislation.

Damages cannot be measured unless the award has been rendered, and therefore the injured party is confined to nominal damages, *Bash v. Christian*, 77 Ind. 290 (1881). Before the advent of the principle of quantum damnificatus, when the penal sum of the bond was recoverable if there was a breach, the effectiveness of the bond stood on quite a different footing. Consequently the rule of revocation developed at a time when it did not work the iniquity which it does today. Once an award has been confirmed, suit on the bond may be maintained for the amount of the judgment confirming the award, interest, and costs. *Shroyer v. Bash*, 57 Ind. 349 (1877); *Miller v. Hays*, 26 Ind. 380 (1866).

33. A suit pending in court was referred by rule of court to arbitration. A subsequent attempt to revoke the submission was declared ineffective. *Heritage v. State ex rel. Crim*, 43 Ind. App. 595, 88 N.E. 114 (1908). The court interpreted the statute to mean that once made a rule of court the submission could be revoked only with consent of the court. No criterion for granting consent is set forth in the instant case nor in the statute, and no subsequent case has dealt with the point.

arbitrators in a statutory arbitration must fulfill certain requirements before proceeding with the hearings,<sup>34</sup> and may subpoena witnesses and evidence.<sup>35</sup> During the hearings they are not bound by legal rules of evidence, but may not capriciously refuse to hear relevant evidence introduced by the parties.<sup>36</sup> At common law and under the statute, all the arbitrators must be present at the hearings.<sup>37</sup> If the submission is silent, a decision must be unanimous at common law,<sup>38</sup> but in a statutory arbitration, if the submission does not otherwise provide, a majority award is valid.<sup>39</sup> Partiality in an arbitrator, if known to a party while he may still revoke the submission, may be waived.<sup>40</sup> During the course of the hearings, demonstrations of bias toward one party may be grounds for invalidating the award.<sup>41</sup> Under the common law and the statute, the arbitrators conduct the hearings subject only to the requirements that they allow opportunity to both parties to support their allegations.<sup>42</sup> The arbitrators are *functi officio* when they reach their award and may not thereafter reopen the hearings to correct or modify the award.<sup>43</sup>

The award can be oral in a common law arbitration;<sup>44</sup> the statute

34. See, IND. ANN. STAT. §§ 3-207 (Burns 1946).

35. IND. ANN. STAT. § 3-207 (Burns 1946). The arbitrators must procure subpoenas to be issued through a justice of the peace.

36. IND. ANN. STAT. § 3-208, § 3-216 (Burns 1946). The misconduct of the arbitrator in rejecting evidence must be affirmatively shown. *Russell v. Smith*, 87 Ind. 457 (1882); *Milner v. Noel*, 43 Ind. 324 (1873).

37. See, IND. ANN. STAT. § 3-208 (Burns 1946); *Heritage v. State ex rel. Crim.* 43, Ind. App. 595, 88 N.E. 114 (1908). *But see*, *Grand Rapids & I.R. Co. v. Jaqua*, 66 Ind. App. 113, 115 N.E. 73 (1917), where the court stated that the rule only was intended to prevent a majority of arbitrators from secretly meeting and precluding participation by the minority in the hearings. The submission also may provide that in case of disagreement the arbitrators may resort to an umpire for a decision, in which case the umpire alone may render the award, *Sanford v. Wood*, 49 Ind. 165 (1874); *Cones v. Vanosdol*, 4 Ind. 248 (1853).

38. *Byard v. Harkrider*, 108 Ind. 376, 9 N.E. 294 (1886); *Baker v. Farmbrough*, 43 Ind. 240 (1873).

39. IND. ANN. STAT. § 3-208 (Burns 1946).

40. *Indiana Ins. Co. v. Brehm*, 88 Ind. 578 (1883).

41. IND. ANN. STAT. § 3-216 (Burns 1946). *Robinson v. Shanks*, 118 Ind. 125, 20 N.E. 713 (1888).

42. *Baltes v. Bass Foundry & Machine Works*, 129 Ind. 185, 28 N.E. 319 (1891); *Goodwine v. Miller*, 32 Ind. 419 (1869); *The Indiana Central Rwy. Co. v. Bradley*, 7 Ind. 49 (1855). It is in this area that delay may ensue due to failure to provide for rules under which the hearings are to be conducted. For suggestions relevant to inclusion of provisions which expedite the hearings, See KELLOR, *ARBITRATION IN ACTION*, 83-96 (1941). A poorly conducted arbitration not only results in wasted time but may also lead to commission of errors sufficient to provide grounds for vacating the award.

43. *Baltes v. Bass Foundry & Machine Works*, 129 Ind. 185, 28 N.E. 319 (1891); *Mand v. Patterson*, 19 Ind. App. 619, 49 N.E. 974 (1897).

44. *Kelley v. Adams*, 120 Ind. 340, 22 N.E. 317 (1889); *Forqueron v. Van Meter*, 9 Ind. 270 (1857).

provides that it must be written and a true copy delivered to the parties.<sup>45</sup> It must state the decision of the arbitrator in terms sufficient to make its meaning clear and may provide for money damages or that an act be performed.<sup>46</sup> The court may correct or invalidate an award which contains a patent mistake.<sup>47</sup> The award is subject to invalidation if it decides questions not covered by the submission.<sup>48</sup>

As an award is presumed to conclude all questions of law or fact covered by the submission, it may be pleaded in bar of an action based on the same dispute.<sup>49</sup> An award may not be attacked collaterally,<sup>50</sup> nor may the invalidation of an award be appealed.<sup>51</sup> A statutory award may be enforced by a suit on the bond or a suit on the award, but only after the award is confirmed in accordance with the statutory provisions.<sup>52</sup> Although jury trial may be had in a suit upon a common law award, the statute provides otherwise.<sup>53</sup> The narrow statutory grounds for upsetting an award are aimed at establishing certainty of fair hearings and are not so much concerned with the substantive content of the award.<sup>54</sup>

Indiana, then, has declared that it favors the process of arbitration, and accords to an award the status of a judgment of a court.<sup>55</sup> Arbitration in common law form is subject to the disadvantage of revocability. Through statutory arbitration has overcome this disadvantage, it is limited in application to existing disputes. With the exception of the treatment of certain contracts which have provided that arbitration and award shall be a condition precedent to any suit upon the contract, Indiana has supported the "ouster" rule. In this respect, Indiana has not given to arbitration the complete recognition afforded by leading commercial jurisdictions.

45. IND. ANN. STAT. § 3-209 (Burns 1946) provides that the award must be written, signed by the arbitrators making the award, and attested by a witness. The award is void under IND. ANN. STAT. § 3-211 (Burns 1946) unless a copy is delivered to the party or at his residence within 15 days after signature. *Flatter v. McDermott*, 15 Ind. 389 (1860); *Conrad v. Johnson*, 25 Ind. 487 (1865).

46. IND. ANN. STAT. § 3-219 (Burns 1946).

47. IND. ANN. STAT. § 3-217 (Burns 1946).

48. IND. ANN. STAT. § 3-216 (Burns 1946). However, where the award may be limited without affecting the merits of the decisions on the matters actually submitted, the court may modify the award under Ind. Ann. Stat. § 3-217 (Burns 1946). *Deford v. Deford*, 116 Ind. 523, 19 N.E. 530 (1888); *McCulloch v. McCulloch*, 12 Ind. 487 (1859).

49. *Walters v. Hutchins*, 29 Ind. 136 (1867); *Brown v. Perry*, 14 Ind. 32 (1859).

50. *Rice v. Loomis*, 28 Ind. 399 (1867).

51. *Smith v. Long*, 43 Ind. App. 668, 88 N.E. 356 (1908).

52. IND. ANN. STAT. § 3-214 (Burns 1946).

53. IND. ANN. STAT. § 3-215, § 3-218 (Burns 1946); *Spencer v. Curtis*, 57 Ind. 221 (1877).

54. *See*, IND. ANN. STAT. § 3-216 (Burns 1946).

55. *Smith v. Stewart*, 5 Ind. 220 (1854); *Fargo v. Reighard*, 13 Ind. App. 39, 39 N.E. 888 (1895).

The Uniform Arbitration Act,<sup>56</sup> by validating all written agreements to submit existing disputes to arbitration and all future disputes clauses in contracts,<sup>57</sup> is a basic departure from the Indiana position. The act makes such agreements irrevocable except upon such grounds as exist in law or equity for the revocation of any contract.<sup>58</sup> Under the act, there is no requirement to file the submission in court at the inception of the arbitral process, nor to post bond. When a valid agreement to arbitrate is proven, the court is given the power to order arbitration.<sup>59</sup> If a party refuses to appoint arbitrators and the agreement does not cover this situation, arbitrators may be appointed by the court.<sup>60</sup>

When the agreement does not fix the procedure of the hearings, the act provides for notice to the parties and conduct of the hearing at the discretion of the arbitrators.<sup>61</sup> The parties may not waive the right to counsel prior to the hearings<sup>62</sup> and the arbitrators may not refuse to allow cross-examination of witnesses nor presentation of material evidence.<sup>63</sup> The arbitrators are to have the power to subpoena witnesses and evidence.<sup>64</sup> Should an arbitrator cease to act during the hearing, the remaining arbitrators may continue to a determination of the controversy.<sup>65</sup> Unlike the Indiana act, specific provision is made for an *ex parte* hearing when one party refuses to appear.<sup>66</sup>

The award may be rendered by a majority of the arbitrators, the agreement not otherwise providing.<sup>67</sup> However, the arbitrators are not necessarily *functi officio* after the award is rendered, but may resume their status to modify or correct an award.<sup>68</sup> The court may also modify

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56. Hereafter cited as UAA.

57. UAA § 1.

58. *Ibid.*

59. UAA § 2(a) provides "[T]he court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the Court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied."

60. UAA § 3.

61. UAA § 5.

62. UAA § 6.

63. UAA § 5(b).

64. UAA § 7. This section makes it optional on the adopting state whether to grant this power directly to the arbitrators or to require them to work through the medium of the court.

65. UAA § 5(c).

66. UAA § 5(a).

67. UAA § 4.

68. UAA § 9. This power may be exercised upon application of a party made within twenty days of the delivery of the award to the party. Not all awards may be so corrected, but only those in which there was an evident miscalculation of figures or an imperfection of form not affecting the merits of the controversy. Such a provision is in keeping with the expectations of the parties and relieves the court from making such a correction or, in the alternative, invalidating the award.

or correct an award under the act after such powers of the arbitrators have lapsed.<sup>69</sup>

Under the act, courts are given broad power to enforce the arbitral process.<sup>70</sup> Concomitantly they have lost substantially all jurisdiction over the subject-matter of the controversy involved. Provision is made for appellate review of certain orders of the court relevant to the arbitration proceeding,<sup>71</sup> but, in keeping with the act's goal of enforcing arbitration agreements, no appeal may be taken from an order directing arbitration.<sup>72</sup>

The Uniform Arbitration Act enforces agreements to arbitrate disputes which may thereafter arise between parties, a policy to which Indiana is not committed. Treatment of the future disputes clause under the Uniform Act runs counter to a long line of decisions<sup>73</sup> which stem from *Vynior's Case*<sup>74</sup> where the common law rule was stated by Lord Coke in dictum to be that a party could not, by an agreement entered into before the nature of the dispute was known, be precluded from a judicial determination of his controversy. The rationale for the rule was given in a later case: Parties were not, by private agreement, competent to "oust the courts of jurisdiction."<sup>75</sup> The rule does violence to the intent of the parties as of the time they entered into the agreement. It seems to be based on an unspoken premise that arbitration will lead to an unfair result to one of the parties, while a judicial determination would preclude such an outcome. The rule has been criticized as having been originated by mistake in that Coke's dictum was contrary to earlier precedent.<sup>76</sup> Its

69. UAA § 13. The power of the court under UAA § 13 to modify an award are identical to those presently given by IND. ANN. STAT. § 3-217 (Burns 1946). The grounds on which a court may vacate an award are generally the same under UAA § 12(a) (1-7), and IND. ANN. STAT. § 3-216 (Burns 1946), except that under UAA § 12(a) (3) an award "contrary to public policy" is additionally a ground for vacating. Under UAA § 12(a) (3) the court may, in its discretion, order a rehearing before the same, or other, arbitrators. If the ground for vacating was the lack of a valid agreement to arbitrate, the court may not, of course, order further arbitration.

70. This is characteristic of the more modern arbitration acts passed by the jurisdictions listed in notes 2, 3, *supra*.

71. UAA § 19(a) (1-6). Appeals may be taken from orders of the court denying application for: (1) an order to arbitrate, (2) an order granting stay of arbitration, (3) an order confirming or denying an award, (4) an order modifying an award, (5) an order vacating an award without directing a rehearing, (6) a judgment entered on an award.

72. This is in contrast to the present Indiana position which does not allow an appeal where the court vacates an award. The Indiana view is that an award is not a final judgment until confirmed and that since appeals can only be taken from a final judgment the vacating of an award may never be appealed. *Smith v. Long*, 43 Ind. App. 668, 88 N.E. 356 (1908).

73. See, COHEN, *COMMERCIAL ARBITRATION AND THE LAW*, 227 (1918).

74. 4 COKE, PART VIII, 80 (1609).

75. *Kill v. Hollister*, 1 Wills 129, 95 Eng. Rep. 532 (1746).

76. Cohen, *op. cit. supra* note 73, 103-127. *Contra*, Sayre, *Development of Commercial Arbitration Law*, 37 YALE L. J. 595 (1928).

origin has been laid to a pecuniary motive on the part of judges, whose income under a fee system was dependent on maintaining their jurisdiction.<sup>77</sup> Furthermore, the proliferation of the "ouster" rule is due in part to the oracular sweep of the phrase, rather than to concrete considerations of public policy.<sup>78</sup>

Defenders of the rule urge that it provides a safeguard against unwitting preclusion from the protection of the courts and that the inclusion of future disputes clauses in "take it or leave it" form contracts might result in an unwilling arbitration forced on a party who did not desire to arbitrate the particular dispute.<sup>79</sup> Doubtless this could happen. But in any contractual relationship one party is likely to occupy a position enabling him to insist on provisions not desirable to the other party. The weaker party may insist on a limited clause when he desires only certain types of disputes arbitrated. If there is a real fear that a party should be protected from unwittingly consenting to arbitration, a statute may provide that arbitration clauses should be signed separately or occupy a prominent position in the contract.<sup>80</sup>

Under the Uniform Act and the other modern acts, arbitration is specifically enforceable. Coercive enforcement of this voluntary process has been advanced as being contrary to the spirit of the process.<sup>81</sup> However, contracts are normally voluntary undertakings which have behind them the coercive power of the state. Whereas the breach of a contract can be compensated for in damages, an arbitration agreement, where damages are uncertain, demands specific performance; this is the only way to enforce the intent of the parties as it existed when the parties were not swayed by considerations engendered by the heat of the dispute.

No remedy is an unfailing panacea. Arbitration can become, on occasions, time-consuming and expensive,<sup>82</sup> as can any remedy when the

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77. See, *Park Construction Co. v. Independent School District*, 209 Minn. 182, 296 N.W. 475 (1941); *United States Asphalt Refining Co. v. Trinidad Lake Petroleum*, 222 Fed. 1006 (D.C.N.Y. 1915).

78. "Perhaps the true explanation is the hypnotic power of the phrase, 'oust the jurisdiction.' Give a bad dogma a good name and its bite may become as bad as its bark." Frank, J., in *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 984 (2d Cir. 1942).

79. See, Phillips, *The Paradox in Arbitration Law: Compulsion as Applied to a Voluntary Proceeding* 46 HARV. L. R. 1258 (1932-33).

80. In Rhode Island, the arbitration statute provides that a future disputes clause is valid when contained in a separate paragraph immediately before the testimonium clause or the signature of the parties. R. I. GEN LAWS, c. 475 § 1 (1938). As this statute is singularly unique, this fear is apparently not widespread.

81. See, Phillips, *op. cit. supra* in note 79.

82. See, *Electrical Research Products v. Vitaphone Corp.*, 20 Del. Ch. 417, 171 A. 738 (1934), where sixty-two hearings were held and the combined expenses to the parties totaled more than \$750,000.00 without an award being reached.

issues are many and complex. Arbitration may result in compromise rather than clear-cut decisions, but this is more likely to be due to the selection of partisan arbitrators, rather than any intrinsic fault of the process. Effectiveness of arbitration is dependent on the selection of counsel and arbitrators by the parties. Faulty selection may result in injustice, as faulty selection of a counsel or of a jury may also result in a poor trial.

Objection might be made to arbitration because it fails to follow the principle of *stare decisis*. However, the arbitrators are concerned with the settlement of the particular controversy, and not with making law for the future. Arbitration has as its virtue the fact that parties may have a decision based on the flexible practices within a particular trade or industry, unhampered by the encrustations of earlier, perhaps outmoded, decisions.<sup>83</sup> However, though arbitrators are not bound by the law, it does not follow that they will ignore it. It is recommended that lawyers be selected as arbitrators when the issues in dispute are primarily legal.<sup>84</sup> Also, counsel for parties would be remiss if they did not argue legal issues applicable to the dispute.

To the parties and their lawyers, arbitration offers the advantage of a private settlement of a dispute before judges of their own choosing. The selection of experts in the field of the dispute often effects a saving of time and money to the parties because the expanded scope of judicial notice may eliminate the need for much expert testimony.<sup>85</sup> Moreover, when expert testimony is required it can be readily understood and evaluated by the arbitrators. The expediency and finality of arbitration commends itself to the businessman, who desires early resumption of normal commercial relations, and to the lawyer, to whom time means money.<sup>86</sup>

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83. *Stare decisis* lends stability to the law and makes it predictable. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 51-64 (1952). However, on occasions its bonds restrict development of the law. In fields other than arbitration, judges have squirmed uneasily while following precedent: "If the question were new in this state, speaking for myself I should not hesitate to reject the English rule as wrong in principle. . . ." *In re Gray's Estate*, 147 Pa. St. 67, 74, 23 A. 205 (1892); ". . . I think that the effect of it is to defeat the testator's intention . . . but it is a rule by which I am undoubtedly bound." *In re Dunster* [1909] 1 Ch. 103, 105. Both these cases dealt with the problem of lapsed residuary legacies, and the rule that a lapsed share could not pass to the remaining residuary legatees but had to pass by intestacy to the next of kin. As in the "ouster" situation, the repeated cry that "there can be no residue of a residue" fulfills in auricular impact what it lacks in utility and logic.

84. See, Grossman, *Arbitration and the Lawyer*, 17 N.Y.U.L.Q. REV. 510 (1939); Popkin, *Practical Problems Confronting the Practicing Lawyer*, 17 LAW & CONTEMP. PROB. 652 (1952).

85. See, Robb, *Arbitration Procedure Compared With Court Litigation in Patent Controversies*, 17 LAW & CONTEMP. PROB. 679 (1952).

86. "[P]arties are now represented in 77 percent of their arbitrations by legal counsel . . ." KELLOR, *AMERICAN ARBITRATION* 171 (1948).

Increased use of arbitration in recent years has apparently resulted in satisfactory results, judging from the relatively few appeals from decisions of the arbitrators.<sup>87</sup> Paradoxically, the experience of one industry suggests that industry-wide adoption of this remedy has resulted in a reduction in arbitral settlements over the course of years, the parties apparently relying more and more on voluntary adjustments with consequently fewer interruptions of commercial intercourse.<sup>88</sup>

Adoption of a statute recognizing future dispute agreements promotes utilization of arbitration. Widespread adoption of a uniform arbitration act would also result in uniform enforcement of arbitration clauses. The classification of arbitration as procedural has resulted in the application of *lex fori*.<sup>89</sup> Consequently, the party to such an agreement who resides in a state which does not enforce future dispute clauses may compel a party who resides in a future dispute jurisdiction to arbitrate, but he may not himself be compelled unless by terms of the agreement, or otherwise, jurisdiction can be acquired over him in the latter type of jurisdiction.<sup>90</sup> Because of its limited application, the Federal Arbitration Act has not materially improved this fundamentally inequitable situation.<sup>91</sup> Understandably, extensive use of the future dispute agreement is hampered when parties from different jurisdictions are dealing with each other.

The experience of the states which have adopted statutes that enforce future disputes agreements has apparently resulted in no disillusionment. The Uniform Act effectuates arbitration in accordance with the terms of the agreement between the parties and seeks to forestall failure of the process where the parties have not provided for certain contingencies. It is believed that the considerations in favor of stimulating the use of the remedy of arbitration and making it more readily available for the settlement of disputes outweigh any objections against enforcement of future disputes clauses. Though, like any remedy, arbitration may be misused and produce occasional undesirable results, its basic utility demands encouragement.

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87. In arbitrations held under the Rules of the American Arbitration Association only 6% have been attacked in court, and in only 1% were the attacks sustained. KELLOR, *AMERICAN ARBITRATION* 65 (1948).

88. *Id.* at 119-21.

89. See, Stern, *The Conflict of Laws in Commercial Arbitration*, 17 *LAW & CONTEMP. PROB.* 567 (1952).

90. See, Phillips, *Arbitration and Conflict of Laws: A Study of Benevolent Compulsion*, 19 *CORN. L. Q.* (1934).

91. See, Sturges and Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 *LAW & CONTEMP. PROB.* 580, 585-598 (1952).