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ARBITRATION AND AWARD †

*Wesley A. Sturges**

It is a pleasure to me and indeed an honor to me and to the institution which I represent to be invited here today to participate in your program. I thank you for the invitation. It also gives me an opportunity to pay my respects to Bob Farley and his colleagues at the University of Mississippi Law School. I beg to say that we at Yale rate Mississippi very highly and hold our colleagues up there in high esteem. We feel a closeness to them and have genuine respect for them. Hoping that my words do not sound in flattery I pay my respects to that law school as one of the best in the country.

Turning to the subject of arbitration: I approach it as a method of liquidating controversies which may arise between parties—controversies of a civil nature—and treat the process as one that is available to lawyers for use in a given case if they shall determine its desirability in the case. It presents a choice of remedy in lieu of ordinary civil procedure of civil actions and requires the lawyer to select the method to be used in a given case. I am not here today to try to “sell” arbitration to the lawyers of Mississippi, but rather to examine the position of the process, particularly in this state, and to make some suggestions as to possible improvements of the present law of the state, particularly of the Mississippi statute on arbitration, in order that it may be as efficient as is reasonably practicable.

The arbitration that I am talking about is predicated upon an agreement of the parties to arbitrate; I thereby distinguish it from some terminology that has crept into our law under the name compulsory arbitration. Briefly stated, the term compulsory arbitration is most generally associated with the functioning of some sort of administrative board under regulatory powers of national or local government. Generally that agency is charged with powers and duties relating to the administration of various aspects of labor relations of employers and labor unions. It is not a term identifying the arbitral process under voluntary agreements of parties to arbitrate.

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*Dean of Yale Law School.

I am talking about arbitration which is based upon an agreement of the parties to arbitrate; it is not compelled; it is not required and is not supervised or scrutinized by an administrative board or commission acting under the power of the state.

In Mississippi, as in almost all other states, there are two general systems of arbitrating. One is called the common law system and the other is called the statutory system. You have an arbitration statute in the Mississippi Code. It outlines a statutory procedure for arbitrating and that statute in its last section expressly provides that that statutory system does not displace arbitrating at common law. Parties may choose between them. Both the statutory and common law of this state are predicated upon and are dependent upon an agreement by the parties to arbitrate.

Which is the better choice in this state? It is somewhat difficult to determine whether parties are better advised to invoke the arbitration statute or to forego the arbitration statute and proceed at common law. I will indicate why a little later.

But in granting the existence of the two methods of arbitration—one pursuant to the statute, the other at common law—what are some of the frailties that attend the process? I will examine them first as at common law and then under the Mississippi arbitration statute.

In this state, as in a considerable number of other states, it has been held at common law that agreements to arbitrate are revocable. Their revocability speaks itself in at least two particulars. *Jones v. Harris*² is a leading case in this field. For the first particular: Parties enter into an agreement to arbitrate. Later, before an award, one party changes his mind and does not wish to go forward with the arbitration. At common law and under the decisions of this state, he may notwithstanding his agreement to arbitrate, institute civil proceedings on the cause that was to be arbitrated. This is frequently called revocability by action. The agreement to arbitrate is held to be revocable in the particular that it cannot be pleaded in abatement or in bar of that action. The agreement to arbitrate is said to be revocable in this respect because it is against public policy; it is against public policy because it would oust the courts of their jurisdiction.

A second particular of common law is known as revocability by notice. Two parties go to arbitration under their agreement; they cooperate in the appointment of their arbitrator; the arbitrator fixes the time and place of hearing. The parties participate in the hearing and present their respective sides of the case. Along the end of the hearing

¹MISS. CODE §§ 279-297 (1942).
²59 Miss. 214 (1881).

one party (I will now call him the recalcitrant party) concludes that the arbitrator is leaning seriously in favor of the other side. He can end the whole proceeding in the name of revocability by notice. He may send up a little piece of paper to the arbitrator that says, "My dear sir; your authority is hereby revoked. Signed, R. P. And that is the end of the arbitration and of the authority of the arbitrator. In other words, the party may fish with hope for a favorable award in a common law arbitration, but when he comes to doubt that the arbitrator will go in his favor, he may if he wishes to do so, revoke by the notice. Giving such notice is an effective revocation, even though the parties may have stipulated in their arbitration agreement that there shall be no revocation, and even though there is an express consideration for the stipulation against revocability. In addition to these frailties of the agreement inherent in common law revocability by action and by notice, there is the further frailty that the agreement to arbitrate is not enforceable in any positive manner. So far as courts with equity powers have passed upon the question in this country they have declared that they will not specifically enforce an agreement to arbitrate. For example: They will not grant an injunction that the recalcitrant party go forward with the arbitration. Equity seems to have accepted the rules of common law revocability—and being revocable at law equity would not embarrass itself with a futile attempt at enforcement.

And as no general injunction order will issue that the recalcitrant party proceed under his arbitration agreement, so will a court of equity refuse to undertake the appointment of an arbitrator even to fill a vacancy occurring in an arbitral board once duly established. Such is the common law stature of arbitration agreements and their frailties as I understand obtain in Mississippi and many of the states. They are revocable in the two particulars which I have cited; and no remedies of specific performance will be granted—no injunctive order to proceed, no auxiliary order will be granted, such as filling a vacancy in the arbitral board which the parties may have agreed upon, but which the recalcitrant party will not cooperate in accomplishing.

I should now indicate that I have been referring to two types of arbitration agreements that are in current usage. One type of arbitration agreement is commonly known as the future disputes provision. Such provisions are in quite wide use in commercial contracts generally and, of course, in collective bargaining agreements. As distinguished from the arbitration provision to arbitrate disputes which may arise in the future there are agreements to arbitrate which are entered into only after the dispute has arisen between the parties. These agreements are generally called agreements of submission. As I read the Mississippi cases, the rules of common law revocability and non-enforceability are applicable to both classes of arbitration agreements.

What's the situation today in Mississippi under your arbitration statute? As I have indicated, your statute says in so many words that common law arbitrations are still good; that the enactment of the statutory system is not to be deemed to displace the privilege of parties to proceed at common law outside the statute.

The statute, as doubtless almost all of you know is considerably skeletonized. In the first place, it deals only with agreements of submission of existing disputes. It does not purport to cover any type of agreement to arbitrate a future dispute. So, a provision to arbitrate future disputes in a general commercial contract or in a collective bargaining agreement in this state is subject to common law revocability and non-enforcement. The statute is not burdensome in its requirements to qualify an agreement of submission under the statute. No more is required than that the agreement be in writing. Whether it must be signed by both persons is an unanswered question. An agreement of submission of an existing dispute in writing and signed by the parties can safely be said to qualify under the statute. Grant that we execute such an agreement, then where are we? Are we better off so far as the remedies of the statute are concerned than we would be at common law? The Mississippi statute is quite distinct from companion statutes of contemporary origin in other states in that it contains no provision that a qualified submission agreement is irrevocable. It is a common provision of the older arbitration statutes, like that of Mississippi, to declare generally that a qualifying submission agreement duly executed by the parties shall be irrevocable—meaning apparently no revocation by notice, and no revocation by action.

Secondly there are no provisions in the Mississippi statute that improve the party's position as compared with that at common law in seeking to obtain specific performance in any respect. In other words, even when the parties have entered into a qualifying submission agreement under the statute, probably it is revocable as at common law and non-enforceable as at common law. There is no provision in the Mississippi statute for any such positive affirmative enforcement of a qualifying submission agreement. So, as compared to the common law situation on revocability and on non-enforceability of arbitration agreements the Mississippi statute does not seem to offer much, if anything, to the efficiency of the arbitral process.

There are some advantages, however, that I will emphasize. In the first place, there is provision in the statute that in an arbitration held under a qualifying submission agreement, the arbitrators may compel the attendance of witnesses and the production of other evidence. That is definitely an advantage over the common law situation. In the absence of some special statute, common law arbitrators have no

authority for compulsory attendance of witnesses, nor for the production of documents or other evidence. In that particular the Mississippi statute gives an advantage provided the agreement is fully carried out and the arbitral board is ready to proceed.

A second advantage lies in the procedures that are provided in the statute for the enforcement and for the vacation or modification and correction of the statutory award. They are likely to be superior to the corresponding common law remedies. As I read the Mississippi statute the successful party to a statutory award may have the award confirmed and judgment or decree entered thereon by motion on short notice of five days. The same is provided for proceedings to vacate or to correct the face of a document of award. In case of the common law award, the party who is successful and who would enforce it generally must institute a plenary action or a plenary suit in equity for that purpose. He bases his cause of action upon the agreement for arbitration and upon the fact of the award and the due appointment of the arbitrator under the submission. Depending upon the state of the dockets of the courts, and absence of the availability of motions for summary judgment in such proceedings, probably it should be concluded that the five day notice motion to confirm a statutory award or the five day motion to vacate, modify or correct would prove more expeditious than the corresponding common law action or suit in equity in case of the common law award. In other words, in so far as the motion practice for confirmation of the award and entry of judgment or decree thereon, for vacation and for modification or correction of a statutory award is more expeditious than the corresponding plenary action or suit in the case of the common law award, so is there advantage in having a statutory award.

So far as the prestige and position of the award is concerned, so far as the conclusiveness and finality of the award is concerned, and so far as the scope of judicial review in proceedings on an award is concerned, the stature of the statutory and common law awards seem quite similar. In short, the statutory causes to vacate, modify or correct a statutory award appear to be virtually a codification of common law rules.

Accordingly the advantages in this statute seem to be chiefly (1) arbitrators' power for compulsory attendance of witnesses and (2) possibility if not probability that the motion practice under the statute with respect to statutory award for enforcement, vacation or modification and correction is more expeditious than the corresponding common law plenary action or suit to enforce or to vacate the common law award. Incidentally the Mississippi statute expressly provides with respect to the statutory award that the party may choose to use the common law remedy rather than the statutory motion. He may use the

motion proceeding or he may bring plenary suit. The Supreme Court has held that the plenary suit is a proper alternative remedy for the enforcement of a good statutory award. I draw the inference that the converse would be true and that a plenary suit rather than a motion to vacate could be effectively instituted against a statutory award. On the whole, therefore, I submit that the arbitral process in this state, whether in the labor field or in the commercial field, and under the statute as well as at common law is subject to the common law frailties which I have previously cited.

Now with your permission, I will call your attention to the more modern arbitration statutes of other jurisdictions. I am going back to the New York arbitration law which was originally enacted in 1920, and is now in effect in New York as Article 84 of the New York Civil Practice Act. The general pattern of that law has since been followed in the arbitration statutes of most of the important commercial and industrial states and by the Congress in the United States Arbitration Act. Arbitration statutes of this pattern are now in effect in such states as California, Connecticut, New Jersey your sister state of Louisiana, and in the United States Act. How does this more recent arbitration legislation compare with the older arbitration statutes like that of Mississippi? How do they differ?

In the first place the newer acts embrace provisions to arbitrate future disputes as well as agreements of submission of existing controversies. Generally either type of agreement will qualify under the statute if it is in writing except that it is expressly provided that the agreement of submission also must be signed by the parties.

In the second place these statutes address themselves to the common law rules of revocability and non-enforceability and provide for the irrevocability and enforceability of arbitration agreements that qualify under the statute. The typical introductory section is to this effect: a provision to arbitrate a future dispute or an agreement of submission of an existing dispute qualifying under the statute shall be valid, irrevocable and enforceable. Succeeding sections implement this declared purpose of making those qualifying agreements to arbitrate irrevocable and enforceable by providing specific remedies. The first of these remedies overcomes common law revocability by action. To this end it is provided that if the parties shall have entered into an arbitration agreement of either type, but one party changes his mind and starts an action or suit in court in defiance of their agreement, the aggrieved party may apply to the court in which the proceeding is started for a stay of trial of that action. The recalcitrant party may duly challenge the making of the alleged arbitration or its coverage of the cause sued upon. In such case the court shall hear the matter,

unless a jury trial is claimed. Upon finding that the arbitration agreement was duly entered into and that it covers the dispute sued upon, stay of the trial is ordered. So there is an end to common law revocability by action. Now for the more positive enforcement remedies. The arbitration statutes of this more recent pattern provide for specific enforcement in two particulars: (1) If a party becomes recalcitrant in the performance of his agreement to arbitrate, the aggrieved party may by motion, on short notice, apply for summary injunctive order to proceed with arbitration according to the agreement. Trial to the court or by jury may be had if the recalcitrant party puts in issue the making of the agreement, his default thereunder, or its coverage of the particular controversy sought to be arbitrated. The general order to proceed nullifies a great part of common law revocability and non-enforceability (2) There is one further remedy in these statutes that addresses itself particularly to the matter of the arbitral board. Parties have agreed to arbitrate, but they have said nothing about whether they will have one or more arbitrators nor how they are to be appointed. The chap who now wishes not to arbitrate may well refuse to participate in setting up an arbitral board. The aggrieved party may go to court by motion on short notice to have the court appoint an arbitrator. The arbitrator appointed by the court is further given all the powers that an arbitrator would have had had he been appointed by cooperation and participation of the two parties. Like motion is available if the arbitral board breaks down in the course of the proceedings *i.e.* a vacancy occurs by reason of death or the withdrawal of an arbitrator. These newer arbitration statutes also generally provide that when the arbitral board is duly appointed, it may after giving notice of the time and place of hearing, proceed *ex parte*, in the absence of a party if his absence is without good cause. To stay away from the hearing out of recalcitrance will not defeat the arbitration. Indeed, the arbitrator is virtually directed by the statute to hear such evidence as is brought before him by the participating party with respect to the issue at hand and to render his award on that evidence. It is no objection to the confirmation of such an award that it was rendered after an *ex parte* arbitration if the absent party stayed out without sufficient cause.

Other provisions of these statutes of this new pattern are similar to the Mississippi statute. In other words, the provisions of the Mississippi statute for the procurement of witnesses and evidence by compulsory process is common to the newer group of statutes to which I have referred. The motion provisions of the Mississippi statute for the enforcement of a good statutory award and for seeking the vacation or modification and correction of the award are common to these newer statutes. Again, the provisions of the Mississippi statute listing the causes to vacate an award, limited as they are, are almost identical with the cor-

responding remedies in the newer statutes. Accordingly, I come to the conclusion that the Mississippi statute, so far as it goes, in its coverage, is one of the better of the older ones. Its shortcomings, judged by the pattern of the more recent statutes to which I have referred, lie in (1) its failure to embrace provisions to arbitrate future disputes as well as agreements of submission of existing disputes and (2) its failure to provide summary remedy to overcome common law revocability and non-enforceability.

On the other hand, in view of the worthy quality of the Mississippi statute, so far as it goes, it could be readily amended by adding those provisions of the newer statutes which make for irrevocability and enforceability of qualifying arbitration agreements.

I wish to discuss one or two further matters involving the newer arbitration statutes and their consideration, if the Mississippi statute should be amended. The arbitration statutes which follow the pattern of the New York law of 1920 are considerably divergent as to their coverage or arbitration provisions in collective bargaining agreements. In some of these statutes it is expressly provided that the act shall not apply to provisions for arbitration in collective contracts between unions and employers or between associations of employees and associations of employers. Other statutes of this general pattern are not so precise but purport to exclude arbitration provisions in personal service contracts. The United States Arbitration Act excepts arbitration provisions in certain contracts of employment. Query whether or not a collective bargaining agreement, in writing, carrying out an arbitration provision, would qualify under these less precise exclusions. In other words, there has been some confusion and uncertainty among the legislatures as to whether or not the new type of statute, making arbitration provisions irrevocable and specifically enforceable in the particulars that I have indicated should embrace provisions to arbitrate future disputes in collective bargaining agreements. In Connecticut and in New York there are no such exceptions; and, indeed, the New York statute, as recently amended, expressly provides that the statute shall apply to arbitration provisions in collective agreements between employers and unions. The Supreme Court of Connecticut so held without such express provision. This diversity in these statutes seems to reflect some misapprehension about the operation of these statutes of the newer pattern. If the parties enter into an arbitration provision or agreement of submission of an existing dispute which qualifies under the statute, the statute accords remedies to overcome common law revocability and non-enforceability of the agreement. If the parties voluntarily enter into an arbitration agreement which qualifies under the statute and do not see fit to stipulate in their agreement that the statute shall not apply, the statute

and its remedies will apply. On the other hand, the parties may stipulate that the statute shall not apply leaving their agreement subject to common law revocability and non-enforceability. The parties may choose so to stipulate or not to stipulate. In short, what the new statutes do is this: with respect to agreements which qualify under the statute, parties may if they wish, have common law revocability and non-enforceability. They may have those rules by so stipulating even though their arbitration agreement complies with the statute. On the other hand, if the parties do not wish to have common law revocability and non-enforceability they may invoke the statute by accomplishing an arbitration agreement which conforms to its requirements. The parties may choose. They have no such choice at common law. They cannot effectively stipulate against revocability nor for specific enforcement. In either case the arbitral process is wholly dependent upon a voluntary agreement by the parties to arbitrate; these newer arbitration statutes, no more than the older ones, compel any parties to enter upon any agreement to arbitrate.