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Warren E. George Jr.

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THE FEDERAL ARBITRATION ACT IN STATE COURTS: CONVERSE *ERIE* PROBLEMS

Section 2 of the Federal Arbitration Act¹ provides that agreements to arbitrate future disputes are "valid, irrevocable, and enforceable."² The Act is applicable to arbitration clauses in contracts evidencing maritime or interstate commerce transactions.³ Although section 2 grants a substantive right,⁴ the Act itself does not afford federal-question juris-

¹ 9 U.S.C. §§ 1-14 (1964). The Act was passed in 1925 to remedy three problems:

1. The delay incident to a proceeding in our courts, which, in centers of commercial activity where there exists congestion of the court calendars, frequently amounts to several years. Contributing to this delay are the preliminary motions and other steps which litigants may take and the appeals which are open to them.

2. The expense of litigation.

3. The failure, through litigation, to reach a decision regarded as just when measured by the standards of the business world. This failure may result either because the courts necessarily apply general rules which do not fit all specific cases, or because the judge or the jury is not and cannot be made familiar with the peculiarities of the given controversy. A judgment by men particularly experienced in the given field is one of the greatest advantages of arbitration.

Committee on Commerce, Trade and Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153, 155-56 (1925).

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

³ 9 U.S.C. § 2 (1964). This section was designed to protect arbitration agreements from judicial hostility. See *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978 (2d Cir. 1942).

⁴ 9 U.S.C. §§ 1, 2 (1964).

⁵ "[I]t is reasonably clear that Congress intended by the Arbitration Act to create a new body of federal substantive law affecting the validity and interpretation of arbitration agreements." *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959), cert. dismissed, 364 U.S. 801 (1960).

The Federal Arbitration Act could be grounded in either the power to enact substantive law for interstate commerce and maritime transactions or the power to prescribe procedural rules for the federal courts. See, e.g., Committee on Commerce, *supra* note 1, at 154. In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198 (1956), the Supreme Court recognized that

[I]f the federal court allows arbitration where the state court would disallow it, the outcome of litigation might depend on the courthouse where suit is brought. For the remedy by arbitration . . . substantially affects the cause of action created by the State. . . . The change from a court of law to an arbitration panel may make a radical difference in ultimate result.

Id. at 203. If the Act were purely procedural, contrary "outcome determinative" state law would be controlling in diversity cases. To avoid this result, which would have emasculated the Act, the *Robert Lawrence* court concluded that § 2 was the source of substantive rights. As such, the states are bound to apply it under the supremacy clause. For a helpful discussion of § 2 as a source of substantive rights, see Note, *Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy*, 69 YALE L.J. 847 (1960).

diction,⁵ and resort to the federal courts for enforcement of an arbitration agreement must be predicated upon one of the traditional bases of jurisdiction.⁶ When these are absent,⁷ state courts have jurisdiction over the arbitration controversy.⁸

*Robert Lawrence Co. v. Devonshire Fabrics, Inc.*⁹ declared that section 2 of the Arbitration Act was national in scope, "equally applicable in state or federal courts."¹⁰ Since in many states the validity of agreements to arbitrate future disputes is not recognized,¹¹ proce-

⁵ *Krauss Bros. Lumber Co. v. Louis Bossert & Sons, Inc.*, 62 F.2d 1004, 1006 (2d Cir. 1933). "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, *save for such agreement*, would have jurisdiction under Title 28 . . ." 9 U.S.C. § 4 (1964) (emphasis added). This language compelled the *Krauss* court's conclusion that the Act itself does not provide a basis for jurisdiction in the federal courts. *Accord*, *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 408 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960).

⁶ See 28 U.S.C. §§ 1331-33 (1964).

⁷ For example, when the arbitration controversy is between citizens of the same state, or when the amount in controversy is \$10,000 or less, there will be no recourse to the federal courts. *Id.* § 1332.

The changes proposed by the American Law Institute in its *Study of the Division of Jurisdiction Between State and Federal Courts* § 1302(a), at 12 (1969) [hereinafter cited as *ALI Study*], would prevent *plaintiff's* invocation of diversity jurisdiction "in any district in a State of which he is a citizen." If enacted, this provision could increase the number of interstate commerce arbitration controversies brought in state courts.

Plaintiff as a strategic device may bring an action in the courts of the state where defendant is a citizen; even if the requirements of diversity and jurisdictional amount are met, defendant would be precluded from removing the action to the federal courts. 28 U.S.C. § 1441(b) (1964). See also *Victorias Milling Co. v. Hugo Neu Corp.*, 196 F. Supp. 64, 68 (S.D.N.Y. 1961), which suggests that for purposes of removal of arbitration questions, the party who first seeks judicial intervention should be classified as plaintiff. Section 1312(a)(2) of the *ALI Study* suggests that a defendant should be permitted entrance to a federal court if he has a "federal defense," but he must still meet the jurisdictional amount requirement.

⁸ Where a federal statute does not by its express terms provide for exclusive federal jurisdiction, the states exercise concurrent jurisdiction. See, e.g., *Claffin v. Houseman*, 93 U.S. 130 (1876).

⁹ 271 F.2d 402 (2d Cir. 1959), *cert. dismissed*, 364 U.S. 801 (1960). The decision provoked a veritable outpouring of law review commentary, most of it favorable. E.g., 45 CORNELL L.Q. 795 (1960); 73 HARV. L. REV. 1382 (1960); 108 U. PA. L. REV. 915 (1960).

¹⁰ 271 F.2d at 407 (dictum). "If it is an exercise of the commerce and admiralty powers, the act must apply not only to litigation in the federal courts but to suits in state courts as well." *Metro Indus. Painting Corp. v. Terminal Constr. Co.*, 287 F.2d 382, 386 (2d Cir.) (concurring opinion), *cert. denied*, 368 U.S. 817 (1961).

¹¹ Twenty-one states have made no legislative provision for enforcement of executory arbitration agreements. ALA. CODE tit. 7, §§ 829-44 (1960); COLO. REV. STAT. ANN., Rules of Civil Procedure, Ch. 16, Rule 109 (1963); DEL. CODE ANN. tit. 10, §§ 5701-06 (1953); GA. CODE ANN. §§ 7-201 to -224 (1936); IDAHO CODE ANN. §§ 7-901 to -910 (1948); IOWA CODE ANN. §§ 679.1-19 (Supp. 1969); KAN. STAT. ANN. §§ 5-201 to -213 (1963); KY. REV. STAT. §§ 417.010-.040 (1962); MISS. CODE ANN. §§ 279-97 (1956); MO. REV. STAT. §§ 435.010-.280 (1952); MONT. REV. CODES ANN. §§ 93-201-1 to -201-10 (1963); NEB. REV. STAT. §§ 25-

dural mechanisms for enforcing such agreements are often inadequate or unavailable. Enforcement of the federal arbitration right poses major difficulties for courts of these states, because they may apply their own procedural law when enforcing a federal right¹² but may not defeat the substance of a federal claim under the guise of regulating procedure.¹³ A state court enforcing the federal right is therefore presented with problems similar to those that confronted the federal courts after *Erie*¹⁴—determining both the limits of the substantive right to arbitration granted by federal law and the points at which forum procedure may undercut that right.

In this converse of the *Erie* situation,¹⁵ where a strong federal policy in favor of arbitration has been indicated,¹⁶ the state court should concern itself chiefly with fostering a uniformity of result in the state and federal courts by giving effect to the federal right substantially as would a federal court.¹⁷ The policies and approaches developed in federal courts following *Erie* can serve as a fruitful source of precedents and analogies. For example, the states should be concerned that the fortuity of suit in a state court rather than in the federal court “a block away” does not lead to a substantially different out-

2103 to -2120 (1964); NEV. REV. STAT. §§ 38.010-240 (1967); N.M. STAT. ANN. §§ 22-3-1 to -3-8 (1953); N.C. GEN. STAT. §§ 1-544 to -567 (1953); N.D. CENT. CODE §§ 32-29-01 to -29-21 (1960); S.C. CODE ANN. §§ 10-1901 to -1905 (1962); TENN. CODE ANN. §§ 23-501 to -519 (1955); UTAH CODE ANN. §§ 78-31-1 to -31-22 (1953); VA. CODE ANN. §§ 8.503-507 (Supp. 1968); W. VA. CODE ANN. §§ 55-10-1 to -10-8 (1966). Oklahoma, South Dakota, and Vermont have no statutory provision for commercial arbitration. In these states the common law hostility to arbitration ordinarily precludes specific enforcement of executory agreements to arbitrate. See, e.g., *Wilson v. Gregg*, 208 Okla. 291, 255 P.2d 517 (1962); *Mead's Adm'x v. Owen*, 83 Vt. 132, 135, 74 A. 1058, 1059 (1910). See also M. DOMKE, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* § 3.01 (1968).

¹² See *Central Vt. Ry. v. White*, 238 U.S. 507 (1915).

¹³ *Brown v. Western Ry.*, 338 U.S. 294, 296 (1949).

If the states afford courts for enforcing the Federal Act, they must enforce the substance of the right given by Congress. They cannot depreciate the legislative currency issued by Congress—either expressly or by local methods of enforcement that accomplish the same result.

Dice v. Akron, C. & Y.R.R., 342 U.S. 359, 369 (1952) (Frankfurter, J., concurring). *Accord*, *C. Wright, FEDERAL COURTS* § 45, at 149-50 (1963).

¹⁴ *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

¹⁵ See Hill, *Substance and Procedure in State FELA Actions—The Converse of the Erie Problem?*, 17 OHIO ST. L.J. 384 (1956); Note, *State Enforcement of Federally Created Rights*, 73 HARV. L. REV. 1551, 1558 (1960).

¹⁶ The Supreme Court has recognized “the unmistakably clear congressional purpose that the arbitration procedure . . . not [be] subject to delay and obstruction in the courts.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

¹⁷ See Hill, *supra* note 15, at 414.

come.¹⁸ Making recourse to arbitration dependent upon the court in which suit is brought would result in "forum shopping" by parties no longer interested in arbitration.¹⁹ When parties to a contract relating to interstate commerce intended that arbitration rather than litigation be the method of solving commercial disputes, their expectations should not be thwarted by state law. If they are, a consequent "debilitating uncertainty in the planning of everyday affairs"²⁰ might jeopardize the considerable utility of arbitration.

Sections 3 through 5 of the FAA have been classified as part of the procedural devices for the implementation of the mandate of section 2.²¹ Section 3 authorizes any court of the United States to stay trial of an action pending arbitration;²² section 4 grants district courts the power to compel arbitration;²³ section 5 allows the court to appoint

¹⁸ See *Hanna v. Plumer*, 380 U.S. 460, 467 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). In *Coastal States Gas Producing Co. v. Producing Properties, Inc.*, 203 F. Supp. 956 (S.D. Tex. 1962), an action on a contract containing a clause that provided for arbitration of future disputes was brought in a Texas state court. Defendant, aware that the agreement to arbitrate was no bar to the suit under state law then in effect, sought to remove the action to federal court. Although the contract evidenced interstate commerce, the district court was obliged to remand the case to the state court because defendant could not establish diversity jurisdiction. To assure similarity of outcome the federal court declared that the Federal Arbitration Act preempted state law and stated further that since the contract involved interstate commerce it was "the duty of the State court to enforce the arbitration agreement." *Id.* at 959. Texas has since passed a modern arbitration statute. TEX. REV. CIV. STAT. ANN. arts. 224 to -38-6 (Supp. 1969).

¹⁹ See *Erie R.R. v. Tompkins*, 304 U.S. 64, 74-78 (1938).

²⁰ *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). Prior to *Erie*, "citizens at the crucial level of everyday activity [were subjected] to dual and often inconsistent systems of substantive law, without means of foretelling which system, in the unforeseeable contingency of litigation, was going to apply." Hart, *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489, 505 (1954).

Parties to arbitration agreements in interstate commerce contracts are similarly subjected to uncertainty when they lack recourse to the federal courts. The suggested converse *Erie* approach would alleviate this uncertainty by assuring that arbitration could proceed in spite of contrary state law.

²¹ See Note, *Federal Arbitration Act and Application of the "Separability Doctrine" in Federal Courts*, 1968 DUKE L.J. 588, 612-13. But see note 25 *infra*.

²² If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (1964).

²³ "A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate . . . may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement. 9 U.S.C. § 4 (1964).

arbitrators when the parties are unable or unwilling to do so.²⁴ The sections are a means of preserving the right to arbitrate.²⁵ When state law is in opposition to these enforcement provisions, the federal right itself may be threatened; state law should not control.²⁶ Where the states lack similar enforcement mechanisms they could, by analogy, apply the federal devices through use of their general equity powers and thereby preserve the federal right.

The arbitration laws of some states provide that an arbitration clause does not preclude an action on the contract,²⁷ or that compliance with an arbitration clause is not a condition precedent to bringing such a suit.²⁸ Such state law subverts the right to have a dispute settled by arbitration. A party answering the suit might be held to have waived his right to arbitration;²⁹ failure to answer might lead to a valid default judgment against him. When a previously existing agreement to arbitrate is raised defensively as a bar to an action on the contract and the agreement is validated by federal law, a state court should give effect to the defense. It can do so by staying the action, as would a federal court under section 3.³⁰

²⁴ If in the agreement provision be made for a method of naming or appointing an arbitrator . . . such method shall be followed; but if no method be provided therein . . . then upon the application of either party to the controversy the court shall designate and appoint an arbitrator

9 U.S.C. § 5 (1964).

²⁵ Sections 3 through 5 are arguably so crucial to preserving the substantive right as to become substantive themselves. The right to arbitrate is of little value if a concurrent attempt to litigate can be successful. One party acting in bad faith could nullify the right by refusing to proceed with arbitration, or by refusing to appoint an arbitrator when arbitration is contingent upon such appointment. *Cf.* text at note 36 *infra*.

²⁶ *See* note 13 and accompanying text *supra*. The concern of a state court seeking to implement the § 2 right will be with following the mandate of *Brown v. Western Ry.*, 338 U.S. 294 (1949). In so doing, the court should consider whether or not the application of its arbitration enforcement procedures will substantially detract from the federal right.

²⁷ *E.g.*, Mo. REV. STAT. § 435.010 (1952).

²⁸ *Id.* *See* *Big Vein Pocahontas Co. v. Browning*, 137 Va. 34, 120 S.E. 247 (1923).

²⁹ Filing an answer may have the effect of joining issue on the claim subject to arbitration. *DOMKE*, *supra* note 11, § 19.01, at 181. *But see* *Haupt v. Rose*, 265 N.Y. 108, 191 N.E. 853 (1934), where the court held that a party could seasonably seek arbitration, although a previous motion to dismiss the complaint in a pending action had been denied.

³⁰ In *Necchi Sewing Mach. Sales Corp. v. Carl*, 260 F. Supp. 665 (S.D.N.Y. 1966), an action had been brought in an Oklahoma state court on a contract containing an agreement to arbitrate future disputes. Oklahoma would not have enforced the clause. *See* note 11 *supra*. By this kind of forum shopping plaintiff in the Oklahoma court could have subverted defendant's right to arbitrate. The federal court had no power to stay the state action under § 3 of the FAA but did so under 28 U.S.C. § 2283 in order to protect and effectuate its decree compelling arbitration. 260 F. Supp. at 669. Section 2283 provides:

A court of the United States may not grant an injunction to stay proceedings in a

Some states allow a written agreement to submit to arbitration to be revoked by a party, without justification, at any time before an award is made.³¹ Section 2 of the FAA disallows the revocation, but a state arbitration law might not provide for specific enforcement of arbitration agreements.³² The remedy available at law for the breach is clearly inadequate: the amount to be recovered for such revocation is limited to the costs and damages sustained in preparing for and attending the arbitration.³³ Since section 4 of the FAA has been recognized as a mechanism for granting specific performance of an arbitration agreement,³⁴ the states could preserve the arbitration right by analogously compelling arbitration.³⁵

A state statute terminating the arbitration agreement when the parties cannot agree upon a method for appointing arbitrators³⁶ undermines the right to arbitrate and should be supplanted by section 5 of the Federal Act, which allows for court appointment of arbitrators in such a situation. Where state law has made no provision for the appointment of arbitrators,³⁷ the Federal Act could be adopted as a guiding analogy.

The proper approach to this converse *Erie* situation was taken recently by a New York court in *In re Rederi*.³⁸ One party to a mar-

State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The efficacy of this remedy is limited to situations in which a party can establish a basis of jurisdiction in the federal courts.

³¹ See *McClendon v. Shutt*, 237 Miss. 703, 115 So. 2d 740 (1959); IDAHO CODE ANN. § 7-903 (1948). MONT. REV. CODES ANN. § 93-201-3 (1963) provides that if the submission to arbitration is not made an order of the court it may be revoked at any time before the award is made.

³² If the state law allows revocation of an arbitration agreement, the specific enforcement machinery is patently unavailable. In *Electrical Research Prods. v. Vitaphone Corp.*, 20 Del. Ch. 417, 171 A. 738 (1934), the court held that specific enforcement of arbitration agreements was unavailable in both courts of equity and courts of law. N.D. CENT. CODE § 32-04-12 (1960) states that "[t]he following obligations cannot be enforced specifically . . . (3) [a]n agreement to submit a controversy to arbitration." *But cf.* note 35 *infra*.

³³ IDAHO CODE ANN. § 7-910 (1948); MONT. REV. CODES ANN. § 93-201-10 (1963).

³⁴ See, e.g., *Necchi S.p.A. v. Necchi Sewing Mach. Sales Co.*, 348 F.2d 693 (2d Cir. 1965), *cert. denied*, 383 U.S. 909 (1966).

³⁵ In *Nordenstrom v. Swedberg*, 143 N.W.2d 848 (N.D. 1966), the Supreme Court of North Dakota specifically enforced an arbitration agreement contained in a contract made and performed in Minnesota, even though North Dakota law prohibited specific enforcement. See note 32 *supra*. In so doing the court recognized the substantive character of laws governing arbitration and indicated that it was bound by the applicable conflict of laws rule to follow Minnesota law. A similar situation will confront state courts when rights under the FAA are claimed. A court could treat the question as one of conflict of laws and thus enforce an arbitration agreement in spite of its own statute.

³⁶ ILL. REV. STAT. ch. 10, § 103 (1967).

³⁷ The arbitration statutes of Colorado and New Mexico make no such provision.

³⁸ 31 App. Div. 2d 372, 297 N.Y.S.2d 1011 (1st Dep't 1969).

itime contract³⁹ that provided for arbitration of future disputes demanded arbitration; the other sought to stay arbitration under the limitations provision of the New York arbitration statute⁴⁰ on the ground that the claims were untimely.⁴¹ The state court reasoned that since the Federal Arbitration Act was based on the "exclusive Federal power over interstate commerce and over admiralty"⁴² and since the Act created "national substantive rights governed by Federal and not State law,"⁴³ the FAA was controlling. The court determined that under section 4 of the Act it could consider only the issues of the making of the agreement and the failure to comply with it, and that the issue of time limitation would therefore have to be decided in arbitration.⁴⁴ The result reached in *Rederi* is a sound one.⁴⁵ When rights to arbitration based on the FAA are asserted in state courts, they should be enforced. By giving effect to the paramount federal law, the state will ensure uniformity of outcome in state and federal courts, prevent forum shopping, and promote the use of arbitration in interstate commerce and maritime transactions.

³⁹ State courts have concurrent jurisdiction over arbitration controversies related to admiralty matters under the "saving to suitors" clause of 28 U.S.C. § 1333(1).

⁴⁰ If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration.

N.Y. CIV. PRAC. LAW § 7502(b) (McKinney 1963).

⁴¹ Petitioner's resort to the state court may have been an attempt to obtain a forum amenable to the contention that the claims were untimely. The contention was based on a contract clause that entitled petitioner to rights, privileges, and immunities contained in the Carriage of Goods by Sea Act, 46 U.S.C. § 1303(6) (1964). The Act provides that a carrier shall be discharged from all liability unless suit is brought within one year after delivery of the goods. In a federal court the contention would have been no bar to arbitration because arbitration is not within the term "suit" as used in that statute. *Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d 687, 689 (2d Cir. 1952).

⁴² 31 App. Div. 2d at 373, 297 N.Y.S.2d at 1013, *citing* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

⁴³ 31 App. Div. 2d at 373, 297 N.Y.S.2d at 1013, *citing* *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959).

⁴⁴ 31 App. Div. 2d at 373, 297 N.Y.S.2d at 1013. *See also* *Reconstruction Finance Corp. v. Harrison & Crosfield*, 204 F.2d 366, 369 n.9(c) (2d Cir. 1953), where the court stated: "We assume, *arguendo*, that, although the federal arbitration statute governs here for jurisdictional purposes, the New York statute of limitations applies since there is no federal statute of limitations."

⁴⁵ *Compare* *Wilson & Co. v. Fremont Cake & Meal Co.*, 153 Neb. 160, 43 N.W.2d 657 (1950), where the court held that when "an attempt is made to enforce arbitration by invoking the Federal Arbitration Act, in the courts of this State the issue is one of procedure and not of substantive right, and the laws of this state are controlling." *Id.* at 160, 43 N.W.2d at 659 (syllabus of the court). By this reasoning the Nebraska Supreme Court found that an arbitration clause, valid under § 2 of the FAA, was unenforceable.

CONCLUSION

The utility of commercial arbitration is impaired by both the lack of uniformity in state arbitration laws and the failure of the FAA to afford federal jurisdiction. Two solutions present themselves. First, Congress should define the circumstances under which parties may have access to the federal courts to enforce arbitration agreements in contracts involving interstate commerce and maritime transactions.⁴⁶ It could, for example, stipulate that for all claims arising under the Arbitration Act, federal-question jurisdiction is available without regard to the amount in controversy. Second, the states, for their part, should undertake the "herculean task" of enacting uniform laws of arbitration.⁴⁷ Many state arbitration laws fail to provide any procedural guidelines for resolving concurrent attempts to litigate and arbitrate a controversy or for requiring a recalcitrant party to proceed to arbitration. Provisions covering these problems are an essential part of any modern arbitration statute.⁴⁸ Adoption of the Uniform Arbitration Act⁴⁹ would mitigate the converse *Erie* problems presently facing the state courts; the Uniform Act provides a mechanism for specific enforcement of arbitration agreements and largely duplicates the Federal Arbitration Act.⁵⁰ Thus the states would not have to shape arbi-

⁴⁶ Some differences in remedy and procedure are inescapable if the different governments are to retain a measure of independence in deciding how justice should be administered. If the differences become so conspicuous as to affect advance calculations of outcome, and so to induce an undesirable shopping between forums, the remedy does not lie in the sacrifice of the independence of either government. It lies rather in provision by the federal government, confident of the justice of its own procedure, of a federal forum equally accessible to both litigants.

Hart, *supra* note 20, at 508.

⁴⁷ See Carb, *The Need for Uniform Laws of Arbitration*, 15 Bus. LAW. 37 (1959).

⁴⁸ Four essential elements of modern arbitration statutes are:

1. the irrevocability of any agreement to submit future disputes to arbitration;
2. the power of a party, pursuant to a court directive, to compel a recalcitrant party to proceed to arbitration;
3. the provision that any court action instituted in violation of an arbitration agreement may be stayed until arbitration in the agreed manner has taken place;
4. the authority of the court to appoint arbitrators and fill vacancies when the parties do not make the designation

M. DOMKE, COMMERCIAL ARBITRATION 18-19 (1965).

⁴⁹ 9 U.L.A. 78-85 (1957). A total of 11 states have adopted the Uniform Act; Alaska, Arkansas, Indiana, and Maine have adopted the Uniform Act within the past two years.

⁵⁰ Section 1 of the Uniform Act makes executory arbitration agreements valid, enforceable, and irrevocable; § 2(a) provides for the specific enforcement of an arbitration clause; § 2(d) provides for stay of an action involving an issue subject to arbitration; § 3 provides for the appointment of arbitrators by the court. 9 U.L.A. 78, 79 (1957).

tration remedies whenever federal claims were presented in their courts.

Neither solution is likely to be forthcoming. Enforcement of the federal statute and the federal policy favoring commercial arbitration is therefore likely to devolve upon the state courts. When it does, the state courts should follow the suggested converse *Erie* approach and implement the Federal Act in the way the *Rederi* court has done. This subservience of state procedural rules should lessen the uncertainty caused by the absence of express procedural paths for resolving questions concerning the enforceability of arbitration agreements.

Warren E. George, Jr.