1991

Arbitrability in Nebraska

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Arbitrability In Nebraska

After this Article went to press, the Nebraska Supreme Court predictably held the “future disputes” provisions of the Nebraska Uniform Arbitration Act unconstitutional in State v. Nebraska Association of Public Employees, 239 Neb. 653, 477 N.W.2d 577 (1991). The decision supports some conclusions in the text as to Nebraska law, but gives little insight on other important current issues. It is discussed in the Epilogue in Part V.

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I. INTRODUCTION

Historically, executory arbitration provisions have been unenforceable under Nebraska law. However, an award following submission by the parties is judicially enforceable. There is Nebraska Supreme Court dictum, stated in 1985 in Overland Constructors v. Millard School District, that agreements to arbitrate an existing dispute (as distinguished from future disputes) are enforceable under Nebraska law. But that dictum relied exclusively upon cases in which an award had been made, contains no mention of the distinction between an executory agreement to arbitrate and an


   An award, whether under the statute or common law, is, in the absence of fraud or mistake, prima facie binding on the parties thereto, and the burden of alleging and proving its invalidity rests upon the party seeking to set aside the decision. The general policy of the courts is that an arbitration award should not be set aside as inequitable unless it is grossly excessive and shocks the conscience of the court.


   While this court is supportive of parties resolving their differences through arbitration, if possible, we have consistently held that an arbitration agreement entered into before a dispute arises, denying to the parties their right to seek the assistance of the courts, is contrary to public policy and is not enforceable. In a long line of cases . . . , we have consistently held that a contract to compel parties to arbitrate future disputes and, thus, to oust the courts of jurisdiction to settle such disputes is against public policy and is void . . . . The School District directs our attention to the cases of Simpson v. Simpson and Knigge v. Knigge in support of its contention that arbitration clauses are enforceable. It neglects, however, to note the significant distinction in both Simpson and Knigge. In each of those cases a dispute had already arisen and the parties agreed to submit their known dispute to arbitration. In such cases we do enforce the decision growing out of the arbitration proceeding. The distinction is whether the agreement to submit to arbitration is entered into before the dispute arises and before the parties know the nature and extent of their dispute or whether it is entered into after the dispute has arisen and at a time when the parties are aware of the nature of the dispute and have agreed to a method of resolving that dispute.

4. Knigge v. Knigge, 204 Neb. 421, 282 N.W.2d 581 (1979)(appraisal of the petroleum engineer hired jointly by the parties to marital dissolution proceedings, and whose appraisal the parties had stipulated they would accept as correct, was held to be binding); Simpson v. Simpson, 194 Neb. 453, 232 N.W.2d 132 (1975)(the award of appraisers pursuant to an agreement for dissolution of a partnership was enforceable).
award, and finds no support in any reported holding of the Nebraska Supreme Court.

The Nebraska Legislature enacted the Uniform Arbitration Act with modifications ("Nebraska Act") in 1987, despite an Opinion of the Attorney General that the sections dealing with executory agreements to arbitrate future disputes are invalid under the Nebraska Constitution. Cases involving the underlying constitutionality of the Nebraska Act are pending in the Nebraska Supreme Court.

The Federal Arbitration Act ("Federal Act") preempts state law as to arbitrability when the Federal Act is applicable. The contract generally remains a state law matter, but enforceability of the arbitration agreement involves federal substantive law. Given an expansive application of the Federal Act to "a contract evidencing a transaction involving commerce," the Federal Act may constitute the legal basis for the enforceability of many Nebraska arbitration agreements.

The purpose of this Article is to provide an explanation and analysis of the applicability of state and federal rules as they relate to the enforceability of Nebraska agreements containing an obligation to arbitrate a disagreement.

II. COVERAGE OF THE NEBRASKA ACT

A. Section 25-2602 In General

Section 25-2602 of the Nebraska Act modifies the language of the

5. Actually, in Overland Constructors, there had been a determination by the architect pursuant to the arbitration provision. The opinion seems to be in error on two points: (1) the dictum attributed to prior holdings that executory agreements to arbitrate existing disputes are enforceable and (2) in failing to give effect to the arbitration award of the architect in this particular dispute.

6. There has been no reported Nebraska decision in which an executory agreement to arbitrate an existing dispute has been held enforceable against an attempted revocation. A common law submission to arbitration was revocable after the arbitration hearing, but prior to issuance of the award. Butler v. Greene, 49 Neb. 280, 68 N.W. 496 (1896).


Uniform Arbitration Act ("Uniform Act"), which is patterned after the Federal Act as to the validity of an arbitration agreement. The first sentence of section 25-2602 deals with "existing" controversies and uses the same language as the Uniform Act. Its second sentence changes the provisions on "future" disputes.

Section 25-2602 expressly covers employment agreements, like the Uniform Act. Arbitration provisions in collective bargaining agreements fall primarily under the authority of the federal Labor Management Relations Act. The Federal Arbitration Act excludes from its coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce," although some individual employment arrangements are covered by the Federal Act.

Section 25-2602 applies only to written arbitration agreements, and specifies that contract provisions control over the Nebraska Act. Section 25-2602 also coordinates the Nebraska Act with some other Nebraska statutes authorizing arbitration.

Section 25-2602 states:

A written agreement to submit any existing controversy to arbitration is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. A provision in a written contract to submit to arbitration any controversy thereafter arising between the parties, other than a claim arising out of personal injury based on contract or tort, is valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract, if the provision (a) is entered into voluntarily and willingly and (b) is not a part of a contract of adhesion, such as a standard installment loan contract, a consumer credit application, a credit card application, or an insurance contract except as provided in section 44-811.

The Uniform Arbitration Act also applies to agreements between employers


A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].

15. 9 U.S.C. § 2:

A written provision in any maritime transaction or a contract evidencing a transaction involving 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, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

and employees or between their respective representatives. Contract provisions agreed to by the parties shall control over contrary provisions of the Uniform Arbitration Act. A claim for workers' compensation shall not be subject to arbitration under the Uniform Arbitration Act. When a conflict exists, the Uniform Act shall not apply to sections 48-811, 54-404 to 54-406, 60-2701 to 60-2709, 70-1301 to 70-1329, and 86-408 to 86-410 and the Uniform Act on Interstate Arbitration and Compromise of Death Taxes.19

B. Existing Controversies

Section 25-2602 authorizes a written agreement to submit "any existing controversy" to arbitration. The only exceptions contained in the statute are "such grounds as exist at law or in equity for the revocation of any contract," workers' compensation claims, and conflicts with the arbitration provisions of other specified statutes.

Since the first Territorial Legislature in 1855, Nebraska has had formal statutory procedures for the voluntary submission of "all controversies which might be the subject of civil actions" to arbitration.20 If the statutory procedures were followed, the submission was not revocable by one party alone,21 but that provision was not tested constitutionally. Those statutes were repealed in the enactment of the Nebraska Act.22 A common law submission to arbitration outside the statutory procedures was revocable prior to an award.23

The language in Overland Constructors, and in the two arbitration decisions since then,24 indicates that an executory agreement to arbitrate an existing controversy might be enforceable today. This is simply language in the three opinions, however. The Nebraska Supreme Court has never actually decided a case on that basis, nor has it discussed the constitutional or policy distinctions between agreements to arbitrate existing controversies and agreements to arbitrate future disputes. The Nebraska Attorney General's Opinion took the language of Overland Constructors literally in advising that "an agreement to arbitrate an existing dispute is permissible."25

In Overland Constructors, the court appears to have invalidated an

20. See Gradwohl, supra note 1, at 443-46.
23. Butler v. Greene, 49 Neb. 280, 68 N.W. 496 (1896)(present dispute concerning pledged watch allegedly lost through negligence of pledgee submitted to three arbitrators; following the arbitration hearing, one party learned that two of the three arbitrators favored his opponent and revoked the submission agreement). See Hughes v. Sarpy County, 97 Neb. 90, 149 N.W. 309 (1914)(common law submission irrevocable when signed decision placed in envelope for delivery to the parties).
arbitration agreement after an award had been made. The issue framed was "whether parties are bound by the determination made by the architect pursuant to an arbitration clause contained in the contract documents."26 The court's statement of facts shows: (1) that "when the parties were unable to resolve their dispute, the architect pursuant to the contract documents, determined" the issue, (2) that the parties disagreed with the architect's determination and a meeting was held, and (3) that the architect modified its earlier determination.27 Nevertheless, the court held that, "In the instant case the agreement to arbitrate was entered into before the dispute arose and is therefore unenforceable."28 If this interpretation is correct, then the arbitration of an "existing" controversy pursuant to an agreement to arbitrate "future" disputes would be unenforceable, even after the award has been made.

Rawlings v. Amco Insurance Co.29 involved a provision in an insurance policy which provided that the amount of the loss be set by appraisal. Amco argued that there is a distinction between an arbitration clause covering liability issues and one limited to damages only. In rejecting that argument, the court stated: "Both aspects of the contract are subject to judicial resolution, and any predispute effort to bind the parties to forego resort to the courts on either issue ousts the courts of their legitimate jurisdiction."30

In Babb v. United Food & Commercial Workers Local 271,31 the court enforced an arbitration award of the UFCW International Executive Committee. The opinion contains strong language that "[a]rbitration agreements entered into before a dispute arises which purport to deny the parties the right to resort to the courts nonetheless oust the courts of their jurisdiction and are thus against public policy and therefore void and unenforceable."32 But the court explained that "the agreement between Babb and the successor union to submit the termination issue to arbitration was voluntary and arose after the dispute."33 In fact, Babb had voluntarily submitted his claim to arbitration on March 19, 1985, pursuant to an agreement executed August 12, 1983 (effective September 1, 1983). The arbitration provision stated that controversies arising out of the agreement must be

27. Id. at 223, 369 N.W.2d at 72.
28. Id. at 225, 369 N.W.2d at 73.
30. Id. at 876, 438 N.W.2d at 771.
32. Id. at 832, 448 N.W.2d at 172.
33. Id. at 832-33, 448 N.W.2d at 172. But what difference should it make whether the award was issued under an agreement to arbitrate "future disputes" or an "existing controversy"?
submitted to the UFCW International Executive Committee for a final and binding decision.\(^{34}\) Thus, unlike \textit{Overland Constructors}, Babb held enforceable an award under a preexisting "future disputes" agreement.

There is still no decision of the Nebraska Supreme Court involving a party who expressly agreed to arbitrate an existing controversy, but who later attempted to revoke the submission prior to an award. \textit{Rawlings} involved a "future disputes" provision. Babb involved an award based upon what the court characterized as an "existing" dispute provision. And, despite its dictum, \textit{Overland Constructors} denied effect to the architect's determination.

What has taken place is that since 1985 the court has spoken as if an executory agreement to arbitrate an existing controversy is enforceable under Nebraska law. But the court has not directly analyzed the issue, and there is no decisional authority specifically supporting the statements. Further, the court has not addressed the questions whether (1) an executory agreement to arbitrate an "existing controversy" pursuant to a prior "future disputes" agreement is enforceable under Nebraska law, and (2) if so, at what point the actions of the parties, pursuant to a "future disputes" agreement, constitute an agreement to arbitrate an "existing controversy."

\section*{C. Future Disputes

\subsection*{1. Effect of an Award}

Apart from the Nebraska Act, it would seem that any award following proper arbitration procedures is no longer revocable, whether entered pursuant to a "future disputes" agreement or an "existing controversy" agreement. Like an accord and satisfaction, "[a]t common law an award acts as a merger upon the original claims upon which it is predicated whenever a new duty is created thereby."\(^{35}\)

The language in recent decisions is not completely clear on this issue, however. \textit{Overland Constructors} denied effect to the architect's determination, which would certainly appear to have been an award.\(^{36}\) And in giving effect to an award, Babb stressed that the agreement "to submit the termination issue to arbitration was voluntary and arose after the dispute,"\(^{37}\) even though the arbitration decision was pursu-

\begin{footnotes}
\item[34] Id. at 828, 448 N.W.2d at 169-70.
\item[36] See supra text accompanying notes 26-28.
\item[37] Babb v. United Food & Commercial Workers Local 271, 233 Neb. 826, 832-33, 448 N.W.2d 168, 172 (1989). The opinion added: Babb voluntarily requested and invoked the arbitration procedure of the merger agreement in his March 19, 1985, letter to the international union. He was not forced to arbitrate by the successor union. The successor union acquiesced in Babb's invocation of the arbitration process.
\end{footnotes}
The court also has not focused recently upon the time at which an award becomes effective. A 1983 per curiam decision held that a provision in a collective bargaining agreement, which provided that "[t]he decision of the personnel board shall be final and binding upon the City," was an agreement "to arbitrate future disputes and thus to oust the courts of jurisdiction to settle such disputes." The court so held even though the personnel board had conducted a hearing and made a decision. In holding that the arbitration agreement "is against public policy and is void," the opinion cites only a case involving a wholly executory arbitration clause contained in an insurance policy. And both decisions are cited in Overland Constructors for the statement "we have consistently held that a contract to compel parties to arbitrate future disputes, and, thus, to oust the courts of jurisdiction to settle such disputes is against public policy and is void."

The court stated in Babb that a statutory or common law award is "prima facie binding" in the absence of fraud or mistake and "should not be set aside as inequitable unless it is grossly excessive and shocks the conscience of the court." The Nebraska Act solidifies the enforceability of awards, making written agreements "valid, enforceable, and irrevocable," and limiting the judicial grounds for denying confirmation, vacating, and modifying or correcting an award.

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38. See supra text accompanying notes 33-34.
39. See supra note 23 for early Nebraska decisions and supra note 4 for decisions enforcing the determinations of appraisers.
41. Id. at 736, 340 N.W.2d at 423.
42. Id. at 733, 340 N.W.2d at 421.
43. Id. at 736, 340 N.W.2d at 423.
44. Id. at 736, 340 N.W.2d at 423 (citing Heisner v. Jones, 184 Neb. 602, 169 N.W.2d 606 (1969)).
48. Id. § 25-2612:

Within sixty days of the application of a party, the court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in sections 25-2613 and 25-2614.

49. Id. § 25-2613(a):

(a) Upon application of a party, the court shall vacate an award when:

(1) The award was procured by corruption, fraud, or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neu-
2. Constitutionality

There is presently no judicial indication that the authorization in section 25-2602 for the enforceability of executory agreements to arbitrate future disputes between the parties will be held constitutional. The most recent Nebraska Supreme Court statement in 1989 was simply: "Arbitration agreements entered into before a dispute arises which purport to deny the parties the right to resort to the courts nonetheless oust the courts of their jurisdiction and are thus against public policy and therefore void and unenforceable."51

The Attorney General's Opinion advised the Legislature that the future disputes provisions are unconstitutional.52 The Opinion examined the standards for district court review of an arbitrator's decision and stated:

Under the standards for judicial review set out above, a District Court reviewing an arbitration decision ... under LB 71 could in no way consider the merits of the controversy, and would be limited, in great part, to questions concerning fraud or partiality. In our view, those standards are so narrow as to effectively parties to the arbitration the assistance of the courts. Therefore, we believe that ... the general arbitration provisions of LB 71 are unconstitutional. We would note, however, that LB 71 would be constitutional to the extent that it is applied to agreements for arbitration of existing controversies

50. Id. § 25-2614(a):
(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award when:
(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing, or property referred to in the award;
(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

under Section 2 of that bill.  

The District Court for Lancaster County has held future disputes provisions unconstitutional in two cases presently on appeal to the supreme court.

As originally introduced, the language of LB 71 was identical to the Uniform Act, covering both existing controversies and future disputes. The Legislature altered that language by floor amendment, with the changes relating to future disputes intended to insure the voluntariness of an agreement and help establish the constitutionality of the statute.

LB 71 eventually passed on a vote of forty-one to zero. The Bill’s principal sponsor apparently persuaded other legislators with the forceful arguments that arbitration agreements represent sound public policy; that the Legislature can properly determine public policy; that the legislative determination of policy might induce the Nebraska Supreme Court to change its prior holdings in this respect; that the statute insures the voluntariness of agreements to arbitrate future disputes; that the standards for judicial review are constitutionally sufficient under the Nebraska Constitution; and that arbitration is firmly embraced throughout the United States. Of course, the Nebraska Supreme Court, itself, has stated that the settlement of disputes by arbitration represents sound public policy. But those statements appear in situations where the process has been followed voluntarily to an award. Up to that point, the court has held that agreements to arbitrate are revocable by either party.

Further, the court’s statement of the basis for judicial review of a

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53. Id. at 1145-46 (emphasis in original text).
57. 1 NEB. LEGIS. J. 1201-02 (1987)(the vote was 41 affirmative, 0 negative, 4 present and not voting, and 4 excused and not voting.).
58. Floor debate on LB 71, 90th Legis., 1st Sess. 1952 (1987) statements of Senator David M. Landis. Senator Landis concluded: “The intent of this legislation [is] to give clear knowledge that the Legislature is now saying that arbitration is not violative of public policy, that we embrace this as a form of public policy.” Id.

An arbitration agreement is used as a convenient tool to settle disputes without going to court and to promote the peaceful settlement of disputes. The grounds for impeachment of the agreement and the decision of the arbitrators are necessarily narrow, in order to accomplish the public policy objective of an arbitration agreement.
common law arbitration award\textsuperscript{60} seems broader than the grounds for vacating an award under the Nebraska Act.\textsuperscript{61} Both allow review for matters of fraud or mistake. However, the common law review additionally allows at least a peek at the merits in that an award can be set aside if "it is grossly excessive and shocks the conscience of the court."\textsuperscript{62} Because arbitration is contractual, a court can determine under both the statute and common law whether the award falls within the scope of the agreement between the parties.

3. Voluntariness/Contract of Adhesion

The Legislature added provisions on voluntariness and contract of adhesion by floor amendment.\textsuperscript{63} However, absent the amendment, the substance of those provisions might have fallen within the language "save upon such grounds as exist at law or in equity for the revocation of any contract." Proponents viewed the amendment as a response to concerns expressed at the committee hearing, and during floor consideration, that arbitration could be forced on a party in an unequal bargaining position.\textsuperscript{64}

Those requirements are included only in the sentence on "future disputes," which was split off from the single sentence contained in the Bill as introduced and as in the Uniform Act. This would seem to infer that agreements relating to "future disputes" will be subject to greater judicial scrutiny as to voluntariness and equality of bargaining position than agreements relating to an "existing controversy."

Other states have also added statutory exceptions to the language of the Uniform Act for contracts of adhesion, insurance, and consumer-type papers.\textsuperscript{65} However, the phrase "entered into voluntarily and willingly" appears to be a Nebraska innovation.\textsuperscript{66} It remains to be seen how courts will interpret the phrase "voluntarily and willingly" with respect to arbitration provisions buried in lengthy documents, such as a standard form construction or architect's contract,\textsuperscript{67} an em-


\textsuperscript{61} See supra note 49 for the statutory grounds.

\textsuperscript{62} See supra note 2.

\textsuperscript{63} 1 Neb. Legis. J. 935, 969 (1987).

\textsuperscript{64} The Attorney General also advised the Legislature that "the arbitration provisions contained in LB 71 would apply only to agreements to arbitrate entered into voluntarily by the parties." Op. Att'y Gen., 1 Neb. Legis. J. 1183 (1987).


\textsuperscript{66} For a recent federal requirement that a waiver of a right or claim under the Age Discrimination in Employment Act be "knowing and voluntary," see infra note 116.

ployment agreement in the securities industry,\(^{68}\) or a franchise agreement.\(^{69}\)

4. **Personal Injury Claims**

Some states have also modified the language of the Uniform Act with respect to personal injury or tort claims.\(^{70}\) Nebraska adopted the language "other than a claim arising out of personal injury based on contract or tort" from Montana's 1985 enactment.\(^{71}\) This language was initially placed in the "existing controversy" sentence by the floor amendment,\(^{72}\) but was later moved to the "future disputes" sentence.\(^{73}\)

D. **Employment Agreements**

Adopting the Uniform Act language, section 25-2602 applies "to arbitration agreements between employers and employees or between their respective representatives."\(^{74}\) The primary effect of that language is to provide clear statutory authority, in addition to the provisions in the general Industrial Relations Act,\(^{75}\) for Nebraska public employers to enter into arbitration arrangements as the impasse resolution method for contractual grievance procedures. In general, the power of public entities to sue and be sued constitutes authority to voluntarily settle an existing controversy by arbitration.\(^{76}\)

Private sector collective bargaining agreements are covered by the federal Labor Management Relations Act. The substantive source of authority for arbitration pursuant to a collective bargaining agreement is the Labor Management Relations Act, rather than the Federal Arbitration Act.\(^{77}\)

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76. Hughes v. Sarpy County, 97 Neb. 90, 149 N.W. 309 (1914)(county bound by arbitration award).
77. Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647, 1657 (1991). Although the Court has not directly applied the Federal Arbitration Act to collective bar-
Some private sector individual employment arrangements are within the scope of the Federal Act. Individual employment agreements are covered by section 25-2602, but Nebraska agreements for arbitration of "future disputes" will be subject to careful examination with respect to issues of voluntariness and equality of bargaining position.

The Nebraska Act added a provision prohibiting the Commission of Industrial Relations from ordering "that any party under its jurisdiction submit to, or contract to submit to, arbitration." The District Court for Lancaster County has held that the report of a Special Master under the State Employees Collective Bargaining Act is not enforceable under the Nebraska Act.

E. Statutory Claims

Determination of whether an agreement to arbitrate a statutory claim is binding involves a matter of statutory interpretation of both the Nebraska Act and the subject matter statute. As a general proposition, it would seem that agreements to arbitrate claims arising under Nebraska statutes would be valid and enforceable to the same extent as arbitration agreements generally. The authority for such an arbitration agreement might be found in a statute providing for arbitra-

78. See infra notes 132-44 and accompanying text.
81. The absence of an agreement would raise Nebraska constitutional issues of delegation of authority and procedural due process, in addition to the open court requirement. See 87029 Op. Att'y Gen., 1 Neb. Legis. J. 1142, 1144-45 (1987)(discussion of proposed Special Master provisions of LB 661, State Employees Collective Bargaining Act). The Attorney General also considered unconstitutional a Bill providing that construction liens under $10,000 shall be subject to arbitration under the Nebraska Act. See 88009 Op. Att'y Gen., 1 Neb. Legis. J. 986 (1988). See also Drennen v. Drennen, 229 Neb. 204, 426 N.W.2d 252 (1988)(invalidating provisions in the child support referee statutes). The "herd laws" were held constitutional on the basis that the arbitration provisions were not an exclusive remedy but were cumulative to common law rights determinable in a court. Randall v. Gross, 67 Neb. 255, 93 N.W. 223 (1903). But the court held that the "fence viewers" law ousted district courts of general common law jurisdiction by virtue of a provision that "if disputes arise between the owners of adjoining lands concerning the proportion of fence to be made or maintained by either of them, such disputes shall be settled by fence viewers." Schnakenberg v. Schroeder, 219 Neb. 813, 814, 820, 367 N.W.2d 692, 695-96 (1985).
tion of that claim, the Nebraska Act, or even the Federal Act. Section 25-2602 of the Nebraska Act states that "[a] claim for workers' compensation shall not be subject to arbitration under the Uniform Arbitration Act." It also provides that when a conflict exists with several other statutes pertaining to arbitration of a claim, the Nebraska Act shall not apply. Additionally, courts may have to resolve situations in which the subject matter statute provides exclusive procedures for enforcement or may warrant a strong public policy of exclusivity, such as the employment discrimination statutes or the public employment bargaining impasse resolution sections of the Industrial Relations Act.

III. COVERAGE OF THE FEDERAL ARBITRATION ACT

A. Preemptive Substantive Law

The Federal Act provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Since the 1967 decision in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, that language has been considered federal substantive law which preempts conflicting state law. It does not constitute an independent grant of federal question jurisdiction to the federal courts.

83. Section 25-2602 of the Nebraska Act refers to "any existing controversy" and "any controversy thereafter arising between the parties." Additionally, the references to other statutes gives a clear inference that section 25-2602 includes agreements to arbitrate Nebraska statutory claims.
84. For examples of cases in which the Federal Act has provided substantive authority to arbitrate a state statutory claim, see infra text accompanying notes 120-23.

The Arbitration Act is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. Sec. 1331 (1976 ed., Supp. V) or otherwise. Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue. ... Section 3 likewise limits the federal courts to the extent that a federal court cannot stay a suit pending before it unless there is such a suit in existence. Neverthe-
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[126x626]ARBITRABILITY IN NEBRASKA

[49x604]does constitute substantive law which is controlling in both federal
and state courts. The earlier Nebraska determination in Wilson &
Co. v. Fremont Cake & Meal Co., that the Federal Act is procedural
rather than substantive law, would be different today following Prima
Paint and later decisions of the United States Supreme Court.

Despite federal preemption over state rules limiting arbitrability,
the contract containing arbitration provisions generally remains a
state law matter. It is only that portion of state law denying or limiting
the enforceability which is preempted and does not apply. There
are two important aspects of this preemption: (1) state rules denying
or limiting the enforceability of an arbitration agreement according
to its terms are preempted; and (2) "in applying general state-law princi-
pies of contract interpretation to the interpretation of an arbitration
agreement within the scope of the act . . . , due regard must be given to
the federal policy favoring arbitration, and ambiguities as to the scope
of the arbitration clause itself resolved in favor of arbitration." A
corollary would be that the issue of whether the arbitration clause,

less, although enforcement of the Act is left in large part to the state
courts, it nevertheless represents federal policy to be vindicated by the
federal courts where otherwise appropriate.


"Section 2 is a congressional declaration of a liberal federal policy favor-
ing arbitration agreements, notwithstanding any state substantive or
procedural policies to the contrary. The effect of the section is to create
a body of federal substantive law of arbitrability, applicable to any arbi-
tration agreement within the coverage of the Act." Moses H. Cone Me-
orial Hosp. v. Mercury Construction Corp. Enacted pursuant to the
Commerce Clause, U.S. Const., Art. I, Sec. 8, cl.3, this body of substantive
law is enforceable in both state and federal courts. Southland Corp. v.
Keating (Sec. 2 held to pre-empt a provision of the California Franchise
Investment Law that California courts had interpreted to require judi-
cial consideration of claims arising under that law). As we stated in
Keating, "[i]n enacting Sec. 2 of the federal Act, Congress declared a na-
tional policy favoring arbitration and withdrew the power of the states to
require a judicial forum for the resolution of claims which the con-
tracting parties agreed to resolve by arbitration." "Congress intended to
foreclose state legislative attempts to undercut the enforceability of arbi-
tration agreements." Section 2, therefore, embodies a clear federal pol-
icy of requiring arbitration unless the agreement to arbitrate is not part
of a contract evidencing interstate commerce or is revocable "upon such
grounds as exist at law or in equity for the revocation of any contract." 9
U.S.C. Sec. 2.

A headnote

of the court states:

Where arbitration constitutes a part of the contract between parties to it
and 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.

This sentence does not appear in the text of the opinion, but the rule was applied.

91. Volt Information Sciences v. Board of Trustees, 109 S. Ct. 1248, 1253-54
(1989)"There is no federal policy favoring arbitration under a certain set of pro-
itself, is applicable to a particular claim is to be determined by federal law, and is ordinarily a matter for an arbitrator rather than a court to decide. 92

B. Grounds For Revocation

Both the Federal Act and the Nebraska Act state that arbitration agreements are valid, irrevocable and enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract." In defining the roles of federal and state law as to contracts of adhesion, unconscionability, and similar issues, the Supreme Court of the United States said in a 1987 footnote:

Thus state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. . . . A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot. 93

Given that interpretation, situations may arise where federal law will preempt the additional statutory limitations on Nebraska agreements to arbitrate future disputes. 94 For example, an agreement to arbitrate a future "claim arising out of personal injury based on contract or tort" might fall within the scope of the federal law. And if the "voluntarily and willingly" requirements are in addition to those applicable to Nebraska contracts generally, federal law would preempt them. Similarly, provisions in installment loan contracts, consumer credit applications, and credit card applications would be preempted in agreements covered by the Federal Act if courts interpret the Ne-..
braska statutory language as imposing additional requirements on arbitration agreements, and not merely as reflecting general rules of contracts of adhesion. That the drafters placed those requirements in the second sentence of section 25-2602, and not in the first sentence, suggests that the requirements "rely on the uniqueness of an agreement to arbitrate" future disputes between the parties, and have a special meaning "precisely from the fact that a contract to arbitrate [future disputes] is at issue."

C. "Evidencing a Transaction Involving Commerce"

The Federal Act applies to "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . ." That language, contained in the 1925 federal enactment, was the subject of differing opinions between Justice Fortas and Justice Black in Prima Paint.

The Prima Paint Corporation acquired a New Jersey paint business and hired Flood and Conklin to perform consulting services in connection with transferring operations from New Jersey to Maryland. Justice Fortas' opinion stated:

The consulting agreement was inextricably tied to this interstate transfer and to the continuing operations of an interstate manufacturing and wholesaling business. There could not be a clearer case of a contract evidencing a transaction in interstate commerce.

Justice Black responded in dissent:

But in light of the legislative history which indicates that the Act was to have a limited application to contracts between merchants for the interstate shipment of goods, and in the light of the express failure of Congress to use language making the Act applicable to all contracts which "affect commerce," the statutory language Congress normally uses when it wishes to exercise its full powers over commerce, I am not at all certain that the Act was intended to apply to this consulting agreement.

The Court's opinion replies to Justice Black's statements in a foot-

95. Insurance contracts present an additional issue because of the McCarran-Ferguson Act. See infra text accompanying notes 127-31.
97. 388 U.S. 395, 401 (1967). But see Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956)(a suit for breach of an employment contract made in New York, agreeing to submit any dispute to arbitration by the American Arbitration Association under New York law). The contract, in Bernhardt, was between a New York corporation and a New York resident who later moved to Vermont, worked in Vermont, and was discharged in Vermont. The opinion states:

Nor does this contract evidence "a transaction involving commerce" within the meaning of § 2 of the Act. There is no showing that petitioner while performing his duties under the employment contract was working "in" commerce, was producing goods for commerce, or was engaging in activity that affected commerce, within the meaning of our decisions. Bernhardt v. Polygraphic Co., 350 U.S. 198, 200-01 (1955).
98. 388 U.S. 395, 409-10 (1967).
note that the 1924 House Report stated that the commerce power "reaches not only the actual physical shipment of goods but also contracts relating to interstate commerce." The Court has not yet further defined the phrase "evidencing a transaction involving commerce."

*Prima Paint* has led lower courts to apply what amounts to an "affecting commerce" standard. For example, the Act is being interpreted to apply to employment agreements of employees with "an active role in the transactions of an entity engaged in interstate commerce." Presumably, the arbitration arrangement, itself, could evidence a transaction in commerce from either its execution or its implementation.

Two of the recent Nebraska Supreme Court decisions might have fallen under the Federal Act had the issue been raised. *Babb* involved a merger agreement between two UFCW local labor unions covered by the Labor Management Relations Act. Union members were required to submit disputes or controversies arising out of the merger to the UFCW International Executive Committee for a binding decision. The court held that the Labor Management Relations Act did not govern an employment suit by an individual against the merged union.

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99. *Id.* at 401-02 n.7. The majority's complete statement is as follows:

> It is suggested in dissent that, despite the absence of any language in the statute so indicating, we should construe it to apply only to "contracts between merchants for the interstate shipment of goods." Not only have we neither the desire nor the warrant so to amend the statute, but we find persuasive and authoritative evidence of a contrary legislative intent. *See, e.g.*, the House Report on this legislation which proclaims that "[t]he control over interstate commerce [one of the bases for the legislation] reaches not only the actual physical interstate shipment of goods but also contracts relating to interstate commerce." *H. R. Rep. No. 96, 68th Cong., 1st Sess., 1* (1924). We note, too, that were the dissent's curious narrowing of the statute correct, there would have been no necessity for Congress to have amended the statute to exclude certain kinds of employment contracts. See § 1. In any event, the anomaly urged upon us in dissent is manifested by the present case. It would be remarkable to say that a contract for the purchase of a single can of paint may evidence a transaction in interstate commerce, but that an agreement relating to the facilitation of the purchase of an entire interstate paint business and its re-establishment and operation in another State is not.


under the merger agreement. The applicability of the Federal Arbitration Act does not appear to have been considered in the litigation.

*Overland Constructors* involved a $1,672,500 construction contract for a new school. The contract documents contained an arbitration clause which provided that the architect would decide disputes between the parties. Although a construction contract can be subject to the Federal Act, the issue was not raised by the parties in *Overland Constructors* and the court's decision was based solely on Nebraska law.

**D. Choice Of Laws**

*Volt Information Sciences v. Board of Trustees* involved a construction contract with an arbitration clause covering "all disputes between the parties" and a choice of laws clause that "[t]he Contract shall be governed by the law of the place where the project is located." In response to the Board's suit for fraud and breach of contract, Volt sought to compel arbitration. The Board resisted the order to compel arbitration pending the outcome of claims against third parties involved in the design and management of the project. A provision in the California Code of Civil Procedure stated that a court may stay arbitration pending the outcome of a court action when "[a] party to the arbitration agreement is also a party to a pending court action or special proceeding with a third party, arising out of the same transaction or series of related transactions and there is a possibility of conflicting rulings on a common issue of law or fact."

In holding the California procedural rules to be applicable, the Court stated: "Congress' principal purpose [was] ensuring that private arbitration agreements are enforced according to their terms." But the Court held that "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agree-

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105. Id. at 1251. The choice of laws provisions were contained in a standard form contract of the American Institute of Architects incorporated in the construction contract. Id. at 1255.
106. Id. at 1251.
107. Id. at 1255.
ments to arbitrate."  

It would seem that delaying arbitration until after third party lawsuits, "arising out of . . . [a] series of related transactions," limits the enforceability of the agreement to arbitrate. The Court held, however, that the parties had agreed to such delays by choosing California law to govern the contract. The parties did not dispute whether they had chosen California law to apply to the arbitration. They litigated the issue of preemption rather than choice of laws. It would appear from the decision that rules for the interpretation of a choice of laws clause are the same on arbitration issues as on other contract provisions.

Thus, if a contract subject to the Federal Act specifies that Nebraska law applies, the Federal Act would control the general determination of validity and enforceability, but Nebraska law would control the arbitration procedures. Under both the Federal Act\(^\text{109}\) and the Nebraska Act,\(^\text{110}\) the parties can contractually specify the procedural rules for conducting the arbitration.

If Nebraska contract law applies by virtue of general conflicts of laws rules rather than by the parties' express choice of laws, both the Nebraska Act and the Federal Act are potentially applicable. There do not appear to be substantial procedural differences between the Acts. A Nebraska court having jurisdiction of a matter would apply the Nebraska Act to procedural issues, including review and enforcement of an award.\(^\text{111}\) A federal court having jurisdiction of a matter would apply the Federal Act provisions to procedural issues.

E. Relationship To Other Federal Statutes

Whether claims under other federal statutes can be made subject

108. Id. at 1254.

109. Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, . . . so too may they specify by contract the rules under which the arbitration will be conducted. Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward.


to arbitration by agreement depends upon Congressional intention. The Federal Act, itself, applies generally to agreements to arbitrate federal statutory claims, but subject to whatever statutory or clear policy limitations Congress may impose. The Court has recently sustained the adequacy of the Federal Act's procedural provisions to adjudicate an individual's Age Discrimination in Employment Act ("ADEA") claim. It has also rejected arguments that employment agreements are inherently the product of unequal bargaining power to such an extent that they are unenforceable under section 2 of the Federal Act. Recent amendments to the ADEA impose stringent requirements for the waiver of any right or claim under the Act.


The Arbitration Act, standing alone, therefore mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.


115. Id. at 1655-56.


(f)(1) An individual may not waive any right or claim under this Act unless the waiver is knowing and voluntary. Except as provided in paragraph (2), a waiver may not be considered knowing and voluntary unless at a minimum—

(A) the waiver is part of an agreement between the individual and the employer that is written in a manner calculated to be understood by such individual, or by the average individual eligible to participate;

(B) the waiver specifically refers to rights or claims arising under this Act;

(C) the individual does not waive rights or claims that may arise after the date the waiver is executed;

(D) the individual waives rights or claims only in exchange for consideration in addition to anything of value to which the individual already is entitled;

(E) the individual is advised in writing to consult with an attorney prior to executing the agreement;

(F)(i) the individual is given a period of at least 21 days within which to consider the agreement; or

(ii) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of employees, the individual is given a period of at least 45 days within which to consider the agreement;

(G) the agreement provides that for a period of at least 7 days following the execution of such agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired;

(H) if a waiver is requested in connection with an exit incentive or other employment termination program offered to a group or class of em-
F. State Claims Other Than Breach Of Contract

_Perry v. Thomas_ held that a stockbroker's breach of employment contract claim was arbitrable under the Federal Act, despite a California wage claim statute to the contrary. The Court noted, but declined to rule on, the issue of whether ancillary claims for conversion, civil conspiracy, and breach of fiduciary duty were arbitrable with, or severable from, the breach of contract claim. On remand, the California Court of Appeals did not rule on this issue. But later California decisions have held claims of securities firm employees under state age discrimination and overtime pay statutes to be arbitrable by virtue of the reasoning in _Perry v. Thomas_.

The Court of Appeals for the Eighth Circuit held in _Swenson v. Management Recruiters International_ that an arbitration provision in an individual employment contract, covered by the Federal Act,
could not be applied to a Title VII claim or a claim under the "parallel" Minnesota Human Rights Act. But the court also held that the employee's state law claims for invasion of privacy and tortious conversion of the contents of her mail were arbitrable. With respect to the Minnesota Human Rights Act, the court stressed that it based its holding upon congressional intent in passing Title VII and not upon the state legislative intent in enacting the Minnesota Human Rights Act.123

Taken at face value, this reasoning could mean that an arbitration clause in a contract evidencing a transaction involving commerce, which provides for arbitration of state workers' compensation claims, would preempt the specific statutory prohibition in section 25-2602.124 But such a clause is probably invalid as a "scheme, artifice, or device" to avoid the Nebraska Workers' Compensation Act,125 which would, under both the Federal Act and the Nebraska Act, be one of "such grounds as exist at law or in equity for the revocation of any contract." The statutory exclusion in section 25-2602 for a future "claim arising out of personal injury based on contract or tort", however, seems quite likely to be preempted by an arbitration provision covered by the Federal Act. In that situation, there is no state "scheme, artifice, or device" statute, and no specialized tribunal like the workers' compensation court having exclusive subject matter jurisdiction. The provision in the Nebraska Act on personal injury claims "takes its meaning precisely from the fact that a contract to arbitrate is at issue."126

G. Business of Insurance

Insofar as Nebraska might, within its general contract rules, treat an arbitration clause in an insurance agreement as a "contract of adhesion,"127 the agreement would be outside of the protection of the Federal Act. If, however, Nebraska's legislative invalidation of that provision was not upon "such grounds as exist at law or in equity for the revocation of any contract," the Nebraska determination would conflict with the Federal Act and be preempted by its substantive provisions.

The McCarran-Ferguson Act states: "No Act of Congress shall be

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123. Id. at 1309 ("We emphasize that we reach this holding based upon the legislative history and congressional intent manifested by Congress in passing Title VII. The intent of the state legislature in passing the Minnesota Human Rights Act [citation omitted] is not relevant to our holding.").
124. NEB. REV. STAT. § 25-2602 (1989) ("A claim for workers' compensation shall not be subject to arbitration under the Uniform Arbitration Act.").
126. See supra note 93 and accompanying text.
construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance." The "future disputes" sentence in section 25-2602 adds to "such grounds as exist at law or in equity for the revocation of any contract": "[i]f the provision (a) is entered into voluntarily and willingly and (b) is not a part of a contract of adhesion, such as a standard installment loan contract, a consumer credit application, or an insurance contract except as provided in section 44-811 [relating to assessment associations]."

It is not clear whether that language in section 25-2602 falls within the terms of the Federal Act ("such grounds as exist at law or in equity for the revocation of any contract") or the McCarran-Ferguson Act ("law enacted . . . for the purpose of regulating the business of insurance"). There is authority that general state arbitration statutes are not enacted for the purpose of regulating the business of insurance, but rather for the purpose of allowing parties to agree to resolve contract disputes nonjudicially. The Nebraska statute, however, contains specific language concerning "future disputes" arising under an insurance contract and thus is arguably distinguishable from that authority.

It appears unlikely that arbitration provisions in primary Nebraska insurance policies will be enforceable. Treated under general contract principles concerning revocability or "contracts of adhesion," there is no conflict between section 25-2602 and the Federal Act. The drafters apparently referred to "insurance contract" in section 25-2602 in order to regulate one of the key aspects of the "business of insurance," that of insurer and insured relationships. Treated as a special law enacted for the purpose of regulating the business of insurance, this aspect of section 25-2602 would be protected by the McCarran-Ferguson Act from the preemptive effect of the Federal Arbitration Act.

H. "Seamen, Railroad Employees, or Any Other Class of Workers Engaged in Commerce"

Section 2 of the Federal Act states that the Act applies to "a contract evidencing a transaction involving commerce." Section 1 states

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."

Although enacted in 1925, the general applicability language in section 2 has come to approximate the "affecting commerce" standard contained in later federal statutes. The "any other class of workers engaged in foreign or interstate commerce" exclusionary language in section 1 has yet to be definitively interpreted and coordinated with the language in section 2.

The United States Supreme Court expressly avoided a determination of the full scope of the section 1 exclusion in *Gilmer v. Interstate/Johnson Lane Corp.*, for the reasons that the issue had not been raised by the parties in the lower courts and that the arbitration requirement was contained in a New York Stock Exchange rule rather than an employment agreement. Neither the parties nor the Court raised the issue in *Perry v. Thomas*, in connection with an earlier claim by an individual securities representative. The issue was avoided in *Bernhardt v. Polygraphic Co.*, following a determination

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122. See supra notes 97-101 and accompanying text.
132. *See supra* notes 97-101 and accompanying text.
133. *111 S. Ct. 1647, 1651-52 n.2 (1991)* (citations omitted), which states:

Section 1 of the FAA provides 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." 9 U.S.C. § 1. Several *amici curiae* in support of Gilmer argue that that section excludes from the coverage of the FAA all "contracts of employment." Gilmer, however, did not raise the issue in the courts below, it was not addressed there, and it was not among the questions presented in the petition for certiorari. In any event, it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment. The FAA requires that the arbitration clause being enforced be in writing. See 9 U.S.C. §§ 2, 3. The record before us does not show, and the parties do not contend, that Gilmer's employment agreement with Interstate contained a written arbitration clause. Rather, the arbitration clause at issue is in Gilmer's securities registration application, which is a contract with the securities exchanges, not with Interstate. The lower courts addressing the issue uniformly have concluded that the exclusionary clause in § 1 of the FAA is inapplicable to arbitration clauses contained in such registration applications. We implicitly assumed as much in *Perry v. Thomas*, where we held that the FAA required a former employee of a securities firm to arbitrate his statutory wage claim against his former employer, pursuant to an arbitration clause in his registration application. Unlike the dissent, ... we choose to follow the plain language of the FAA and the weight of authority, and we therefore hold that § 1's exclusionary clause does not apply to Gilmer's arbitration agreement. Consequently, we leave for another day the issue raised by *amici curiae*.

134. *482 U.S. 483, 486-87 (1987).*
135. *350 U.S. 198, 201 n.3 (1956).*

Since no transaction involving commerce appears to be involved here, we do not reach the further question whether in any event petitioner would be included in "any other class of workers" within the exceptions of § 1 of the Act.
that there was no "transaction involving commerce" under section 2. And the statutory language was substantially misquoted in an explanatory footnote in *Paperworkers v. Misco,*136 which involved a collective bargaining agreement.

Justice Stevens, joined by Justice Marshall, dissented in *Gilmer* because the "arbitration clauses contained in employment agreements are specifically exempt from coverage of the FAA"137 and "that compulsory arbitration conflicts with the congressional purpose animating the ADEA, in particular."138 The dissenting opinion relies upon early judicial interpretations of the Federal Act, legislative history of enactment of the Federal Act, and the bargaining relationships of employers and individual employees as to conditions of employment.139 That interpretation, however, treats the section 1 exclusion as if it states "nothing herein contained shall apply to contracts of employment of workers affecting foreign or interstate commerce." It effectively deletes the language "seamen, railroad employees, or any other class of" and converts "engaged in" to "affecting."

There are federal court holdings that the section 1 exclusion applies to "only those other classes of workers who are actually engaged in the movement of interstate or foreign commerce or in work so closely related thereto as to be in practical effect a part of it."140 This interpretation stems from the legislative history of the enactment and the context of the statutory language, both of which indicate a category of employees engaged in the movement of persons or goods in interstate commerce. It comports with the Court's statements that

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136. 484 U.S. 29, 40 n.9 (1987). The footnote omits the words "seamen, railroad employees, or any other class of," stating merely that the Act "does not apply to 'contracts of employment of . . . workers engaged in foreign or interstate commerce.'" See *Harry Hoffman Printing v. Graphic Communications Int'l Union Local 261,* 912 F.2d 608, 612 (2d Cir. 1990); *American Postal Workers Union v. United States Postal Serv.,* 861 F.2d 211, 215 n.2 (9th Cir. 1988).

137. *Gilmer v. Interstate/Johnson Lane Corp.,* 111 S. Ct. 1647, 1657 (1991)(Stevens, J., dissenting, joined by Marshall, J.). The dissent also reasoned that the exclusion in section 1 is not limited to "agreements entitled 'Contract of Employment'" and that "§ 1 should be interpreted to cover any agreements by the employee to arbitrate disputes with the employer arising out of the employment relationship, particularly where such agreements to arbitrate are conditions of employment." Id. at 1659.

138. Id. at 1660.

139. Id. at 1658-60.

"questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." The interpretation suggests that the language may come to mean a class of workers engaged in interstate transportation "for hire." The Court of Appeals for the Sixth Circuit held that postal workers fell under the exclusion, stating that the concern is "not whether the individual worker actually engaged in interstate commerce, but whether the class of workers to which the complaining worker belonged engaged in interstate commerce."

The exclusionary language of section 1 can easily be reconciled with the basic coverage language of the Federal Act in section 2. There are simply two different standards which are applied for separate purposes. Section 2 requires, in effect, that for the Federal Act to apply, the situation must be one "affecting commerce." Section 1 excludes from such coverage contracts of employment of seamen, railroad employees and any other class of workers engaged in the movement of persons or goods in foreign or interstate commerce for hire.

IV. CONCLUSION

Nebraska has adopted the Uniform Arbitration Act with modifications concerning agreements to arbitrate "future disputes." It is not clear how much change, if any, there will be from prior Nebraska law.

Nebraska arbitration awards, as distinguished from executory agreements to arbitrate, have been judicially enforceable in the past. There is an indication that the Nebraska Supreme Court will sustain the constitutionality of the statutory provisions on agreements to arbitrate.


142. See, e.g., Connell v. Meritor Sav. Bank, No. 25715 (E.D. Pa. Feb. 27, 1991)(WESTLAW, Allfed library, Dist file)("The exclusions provided by Section one apply only to the employment contracts of workers actually engaged in the interstate transportation industry."); Elgart v. Sono-Tek Corp., No. 88-7593 (E.D. Pa. Nov. 9, 1989)(LEXIS, Genfed library, Dist file)("Moreover, the phrase 'any other class of workers engaged in foreign or interstate commerce' in section 1 has been narrowly construed to apply only to transportation workers."); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1069 (2d Cir. 1972)("Erving clearly is not involved in the transportation industry."); General Warehousemen Local 767 v. Standard Brands, 579 F.2d 1282, 1294 n.9 (5th Cir. 1978)("actually engaged in the transportation industry"); Malisian v. Prudential-Bache Sec., 654 F. Supp. 101, 103 (W.D.N.C. 1987)("in transportation industries").


trate "existing controversies," although no Nebraska Supreme Court holding has actually enforced such an agreement against an attempt to revoke prior to an award. The "future disputes" provisions of the statutes appear likely to be held unconstitutional and unenforceable under the Nebraska Constitution. Any rules concerning the submission by the parties of an "existing controversy" to arbitration, pursuant to a written "future disputes" agreement, are wholly unclear from the court's jumbled analysis in recent decisions.

The Federal Arbitration Act is a valuable but unappreciated source of substantive authority for valid, irrevocable and enforceable Nebraska arbitration agreements. Contracts "evidencing a transaction involving commerce" (for practical purposes, "affecting commerce"), which contain arbitration provisions, preempt state law limitations on the enforceability of arbitration arrangements.

V. EPILOGUE

The Nebraska Supreme Court held in *State v. Nebraska Association of Public Employees*145 "that (1) provisions in Neb. Rev. Stat. §§ 25-2601 et seq. (Reissue 1989) authorizing binding arbitration of future disputes, and (2) clauses in contracts providing for binding arbitration of future disputes, violate Neb. Const. art. I, § 13."146 The constitutional open court provision states that "[a]ll courts shall be open, and every person, for any injury done him in his lands, goods, person or reputation shall have a remedy by due course of law, and justice administered without denial or delay."147 The result was clearly predictable from long standing judicial precedents and the Opinion of the Attorney General issued during legislative consideration of the 1987 enactment.148

The parties to state public employment collective bargaining agreements included arbitration provisions covering disputes and grievances which might arise thereafter. When a grievance arose, the State reneged, revoked its agreement to submit disputes between the parties to arbitration, and brought a declaratory judgment action.149 The supreme court decision invalidating the statute and contractual arbitration provision affirmed the determination of the District Court for Lancaster County.150

The court dealt with the issue of waiver of constitutional rights by quoting from a 1902 decision that "whenever we say that the jurisdiction of courts may be contracted away in advance on any question, we

146. Id. at 654-55, 477 N.W.2d at 580.
148. See supra notes 1-6 and 51-54 and accompanying text.
149. 239 Neb. at 656, 477 N.W.2d at 581.
150. See supra notes 9 and 54.
open a leak in the dyke of constitutional guarantees which might some day carry all away." The opinion calls "irrelevant" the legislative declaration of a public policy in favor of arbitration. It is apparent that only judicial determinations can ascertain or define the nature of "public policy" inherent in the Nebraska Constitution. The facts in this case presented both a legislative determination of "public policy" and the executive branch's policy determination in "voluntarily and willingly" agreeing to have contractual collective bargaining agreement disputes settled by arbitration.

The decision does not acknowledge or consider the statutory restrictions added by the 1987 Legislature to the "future disputes" provisions in section 25-2602 in an effort to comply with the Nebraska constitutional requirements. The statutory provisions for "voluntarily and willingly" and "not a part of a contract of adhesion" were intended to alleviate the rationale upon which the prior judicial precedents were grounded. They were designed to provide criteria for the waiver or limitation of a constitutional right by the affected parties. There is no analysis in the decision of any present day "public policy" with respect to the arbitrability of grievances arising under public employment collective bargaining statutes and agreements. In this respect, the decision may forecast a very restrictive attitude of the supreme court toward other forms of alternative dispute resolution in Nebraska.

Having held the statute unconstitutional on the basis of judicial precedent, the court moved to an issue of whether the State was "equitably estopped from challenging the validity and enforceability of the arbitration clauses in the contract." One inference from this analysis seems to be that even though both the statute and the contractual arbitration provisions are "unconstitutional," the parties may, nevertheless, be equitably estopped from denying the unconstitutionality

151. 239 Neb. at 658, 477 N.W.2d at 582, (quoting Phoenix Ins. Co. v. Zlotky, 66 Neb. 584, 588, 92 N.W. 736, 737 (1902)).
152. Id. at 659, 477 N.W.2d at 582. The open court provisions are continued in Article I, Bill of Rights, and not in Article V, Judicial, of the Nebraska Constitution. Both the state collective bargaining law and the arbitration act involve legislatively established rights. Despite some apparently conflicting prior results, this decision clearly assumes that all statutory rights are subject to the open court provisions. That analysis would seem to invalidate several other statutes allowing arbitration. See supra notes 81-82 and 85 and accompanying text. It might also be noted that the open court provisions, traceable to the Magna Carta, do not, themselves, require enforceable contracts with, or tort actions against, the State of Nebraska.
153. Id. at 655, 477 N.W.2d at 580 (quoting as "relevant" only the general language making the agreement "valid, enforceable, and irrevocable").
154. See supra notes 56, 63-66 and 70-73 and related text.
155. Id. at 659, 477 N.W.2d at 582.
156. Id. at 659-60, 477 N.W.2d at 582 (citations omitted):

The elements of equitable estoppel are, as to the party estopped, (1) con-
of the statute and agreement. The court was able to deal with the equitable estoppel argument easily on the record in this case since the parties had expressly signed a separate agreement reserving the right of the Attorney General to "file a legal action seeking to resolve the constitutionality issue" and stating that "the Union agrees to serve as defendant in such law suit and to pay the costs of defending such law suit."\textsuperscript{157}

The decision does nothing to clarify the question whether a "future disputes" agreement can become an "existing controversy" agreement by action of the parties after a dispute arises.\textsuperscript{158} The opinion is carefully limited to "future disputes". But it also states that "the citizen cannot be held to have bartered that [valid and subsisting cause of action] away by any agreement made before a controversy arises."\textsuperscript{159}

Thus, there remain two significant issues with respect to standard agreements to arbitrate "future disputes". One involves the circumstances, if any,\textsuperscript{160} in which the actions of a party to a "future disputes" arbitration agreement might constitute an equitable estoppel. The other is whether actions of the parties pursuant to "unconstitutional" "future disputes" statutes and contractual provisions can somehow resuscitate the arbitration clause as an "existing controversy" agreement, or can otherwise constitute a separate binding agreement to submit an existing controversy to arbitration.

The court appears to have missed the main thrust of the Association's argument concerning judicial review of an arbitrator's decision. The court found it "unnecessary for us to consider" that issue since the agreement to arbitrate future disputes was held to be unconstitutional.\textsuperscript{161} The argument, however, appears to have been directed to the proposition that a "meaningful" judicial review of an arbitrator's decision can constitute compliance with the constitutional open court

\textsuperscript{157} Id. at 656, 477 N.W.2d at 580 (quoting the separate letter of agreement required by the State prior to execution of the collective bargaining agreement).

\textsuperscript{158} See supra notes 3-6 and accompanying text and notes 32-34 and accompanying and following text.

\textsuperscript{159} 239 Neb. at 658, 477 N.W.2d at 582.

\textsuperscript{160} See supra note 156 (stating the requirements for an equitable estoppel).

\textsuperscript{161} Id. at 660, 477 N.W.2d at 583.
requirements. The Attorney General’s Opinion to the Legislature addressed this issue directly and concluded that the statutory standards for judicial review of an arbitration decision “are so narrow as to effectively deny parties to the arbitration the assistance of the courts.” Either the court did not understand the Association’s argument to have been made in that sense or there is implicit in the decision a holding that judicial review alone could never be accepted as compliance with the open court requirements.

162. See supra note 53 (quoting this portion of the Attorney General’s Opinion).