

May 2013

Arbitration--Incorporation of an Arbitration Clause by Reference Denied (Matter of Riverdale Fabrics Corp., 306 N.Y. 288 (1954))

St. John's Law Review

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Recommended Citation

St. John's Law Review (2013) "Arbitration--Incorporation of an Arbitration Clause by Reference Denied (Matter of Riverdale Fabrics Corp., 306 N.Y. 288 (1954))," *St. John's Law Review*: Vol. 29: Iss. 1, Article 10.
Available at: <http://scholarship.law.stjohns.edu/lawreview/vol29/iss1/10>

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which occurred in the present case, discharges the guarantor's liability for damages. It may be argued that these factors worked to heal the breach of the guaranty obligation. Therefore, the new contract following the cancellation of the original contract, if it be treated as a modification,²² would not deprive the agent-guarantors of their commissions on performance of the new contracts. Yet such a rule may lead to injustice where the principal, in face of a wilful refusal by the agent-guarantors to pay, prejudicially changes his position.

Although in this case it appears that punctual payment on the conditional sales contract may have been a material consideration for the commissions, nevertheless the Court's decision may be justified because there was nothing expressed in the agency-guaranty contract that punctuality was essential and because there was no proof that the agents refused or otherwise wilfully failed to pay on the guaranty before the new contracts were made.



ARBITRATION—INCORPORATION OF AN ARBITRATION CLAUSE BY REFERENCE DENIED.—Plaintiff moved for an order to stay arbitration proceedings, contending that he had not intended to restrict his remedies to arbitration by the signing of a contract which failed to mention arbitration, but was, by its terms, "subject to the Cotton Yarn Rules of 1938." These Rules provided for arbitration as an exclusive remedy. In reversing the Appellate Division,¹ the Court granted plaintiff's motion, *holding* that the words in the contract did not evince a clear intent to make arbitration the exclusive remedy. *Matter of Riverdale Fabrics Corp.*, 306 N.Y. 288, 118 N.E.2d 104 (1954).

Prior to the enactment of the New York Arbitration Law in 1920,² the New York courts applied the common-law rule which denied the remedy of specific enforcement to arbitration contracts.³ It was the judicial view at that time that disputes regarding contracts should be settled under the auspices of the law courts, and not by arbitration.⁴ However, subsequent to 1920, and due, in large measure,

see Siedentopf v. Braune, 273 App. Div. 791, 75 N.Y.S.2d 326 (2d Dep't 1947).

²² See notes 12, 13 and 14 *supra*.

¹ 281 App. Div. 983, 121 N.Y.S.2d 261 (2d Dep't 1953) (On the basis of the Court of Appeals decision in *Matter of Level Export Corp.*, 305 N.Y. 82, 111 N.E.2d 218 (1953), the Appellate Division affirmed the order of the trial court that dismissed the petition and directed that the controversy proceed to arbitration.).

² Laws of N.Y. 1920, c. 275. This statute is presently N.Y. CIV. PRAC. ACT, Art. 84, §§ 1448-1469.

³ *Greason v. Keteltas*, 17 N.Y. 491 (1858); *see* *Matter of Feuer Transp., Inc.*, 295 N.Y. 87, 91, 65 N.E.2d 178, 180 (1946).

⁴ *See* Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. OF PA. L. REV. 160, 162 (1934); Note, 24 ST. JOHN'S L. REV. 254, 255 n.5 (1950).

to congested court calendars and extensive litigation involving commercial disputes, an increasingly favorable view has been maintained by the courts and the Legislature towards the more expeditious relief realized through arbitration.⁵

The Arbitration Law requires that a contract to submit an existing controversy to arbitration must be in writing and subscribed by the party to be charged, but that a contract to submit a future controversy need only be in writing.⁶ By judicial decision, it is not required that the contract specifically mention arbitration, as no particular terminology is necessary.⁷ However, due to the nature of the arbitration contract, the courts are still reluctant to require a party to arbitrate,⁸ unless it can be shown, by clear and convincing language, that such party intended to restrict his remedy to arbitration.⁹ The proposed Uniform Commercial Code, though not specifically mentioning arbitration, presents an interesting point of view on this matter. Under the Code, parol evidence is admissible to show custom and usage of the trade, and also, any prior dealings between the parties, even though the contract be clear and unambiguous on its face.¹⁰ Since the courts presently restrict the use of parol evidence even where ambiguity exists—apparently resolving any ambiguity against the possibility that the parties agreed to arbitrate¹¹—the proposed Code, if adopted, would probably not be applied to questions of arbitration submission.

Where the written contract includes a clear and unambiguous arbitration clause, there is, of course, no question that the parties actually intend that they be thereafter bound to arbitrate.¹² This follows from the reasoning that parties to a written contract, in the absence of fraud, are conclusively presumed to know and to have assented to the contents of the agreement.¹³ However, in the absence

⁵ See *Matter of Knickerbocker Textile Corp. v. Shiela-Lynn, Inc.*, 172 Misc. 1015, 1018, 16 N.Y.S.2d 435, 438 (Sup. Ct. 1939), *aff'd mem.*, 259 App. Div. 992, 20 N.Y.S.2d 985 (1st Dep't 1940); see Shandalow, *Contract Terms Held Binding by Court*, 8 *ARB. J.* 126 (1953).

⁶ N.Y. CIV. PRAC. ACT § 1449, *Matter of Tanenbaum Textile Co. v. Schlanger*, 287 N.Y. 400, 40 N.E.2d 225 (1942).

⁷ See *Matter of Hub Industries, Inc.*, 183 Misc. 767, 54 N.Y.S.2d 106 (Sup. Ct. 1944).

⁸ See *Matter of Phillip Export Corp.*, 275 App. Div. 102, 104, 87 N.Y.S.2d 665, 667 (1st Dep't 1949).

⁹ See *Matter of Lehman v. Ostrovsky*, 264 N.Y. 130, 132, 190 N.E. 208, 209 (1934) (wherein Chief Judge Pound stated that "[n]o one is under a duty to resort to arbitration unless by clear language he has so agreed.").

¹⁰ UNIFORM COMMERCIAL CODE § 2-202 (1952).

¹¹ See *Matter of General Silk Importing Co.*, 200 App. Div. 786, 792, 194 N.Y. Supp. 15, 20 (1st Dep't), *aff'd mem.*, 234 N.Y. 513, 138 N.E. 427 (1922).

¹² *Matter of Newburger v. Lubell*, 257 N.Y. 213, 177 N.E. 424 (1931); *Matter of General Footwear Corp. v. A. C. Laurence Leather Co.*, 252 N.Y. 577, 170 N.E. 149 (1929).

¹³ *Pimpinello v. Swift & Co.*, 253 N.Y. 159, 170 N.E. 530 (1930).

of any arbitration clause in the contract, under what circumstances may a party be nonetheless bound to arbitrate? It would seem, according to the opinion expressed by the Court in the instant case, that a contract to arbitrate must either include an arbitration clause or provide an "incorporation clause."¹⁴ An "incorporation clause"¹⁵ makes an extrinsic document requiring arbitration part of the contract by a definite reference thereto and results in the conclusion that the parties assented to arbitration.¹⁶ This reasoning results from the application of the doctrine of incorporation by reference, whereby the extrinsic document referred to, is made, in legal effect, an actual part of the written contract.¹⁷

However, the intent of the parties to incorporate must be shown by clear and unambiguous language.¹⁸ Where, as in *Matter of Level Export Corp.*, the contract was ". . . subject to the provisions of STANDARD COTTON TEXTILE SALESNOTE which, by this reference, is incorporated as part of this agreement . . .," the court stated that there was no question that the parties intended the extrinsic document to be, in legal effect, an actual part of the signed contract.¹⁹ The Court, in the instant case, distinguishes the ruling in the *Level* case, in that the phrase used in the present contract, "subject to the Cotton Yarn Rules of 1938," *without any further reference*, did not constitute sufficiently clear and unambiguous language to show an intent by the parties to legally effectuate an incorporation.²⁰ The words, "subject to," being words of condition,²¹ are construed as restricting the terms of the contract, rather than adding to them. They are words of qualification, rather than words of contract.²² Consequently, their use in a contract is not sufficient to show an intent to incorporate within the contract an extrinsic document requiring arbitration.

¹⁴ See *Matter of Riverdale Fabrics Corp.*, 306 N.Y. 288, 290-292, 118 N.E.2d 104, 105-106 (1954); *Matter of General Silk Importing Co.*, 198 App. Div. 16, 21, 189 N.Y. Supp. 391, 395 (1st Dep't 1921).

¹⁵ See *Matter of Level Export Corp.*, 305 N.Y. 82, 111 N.E.2d 218 (1953) (wherein an "incorporation clause" was included in the contract).

¹⁶ *Id.* at 86, 111 N.E.2d at 220.

¹⁷ See *Matter of Hines*, 222 App. Div. 543, 226 N.Y. Supp. 562 (1st Dep't 1928); see *Matter of Comm'rs of Washington Park*, 52 N.Y. 131, 134 (1873).

¹⁸ See *Matter of Comm'rs of Washington Park*, *supra* note 17 at 134; see *Western Vegetable Oils Co. v. So. Cotton Oil Co.*, 141 F.2d 235 (9th Cir. 1944).

¹⁹ See *Matter of Level Export Corp.*, 305 N.Y. 82, 86, 111 N.E.2d 218, 220 (1953).

²⁰ See *Matter of Riverdale Fabrics Corp.*, 306 N.Y. 288, 291, 118 N.E.2d 104, 106 (1954).

²¹ See *Berk & Co. v. Derecktor*, 301 N.Y. 110, 112-113, 92 N.E.2d 914, 915 (1950); *Auburn & Syracuse Electric R.R. v. Headley*, 119 Misc. 94, 98, 195 N.Y. Supp. 517, 521 (Sup. Ct. 1922), *aff'd*, 206 App. Div. 653, 198 N.Y. Supp. 899 (4th Dep't 1923).

²² See *S. T. McKnight Co. v. Central Hanover Bank & Trust Co.*, 120 F.2d 310, 320 (8th Cir. 1941).

The courts should not direct the parties to arbitrate unless the terms of the contract clearly indicate that the parties intended to waive their inherent right to resort to the law courts. In an attempt to defeat the prospect of deception being practiced by various business groups on unsuspecting parties, the Court of Appeals has reaffirmed the restrictions set forth in the *Level* case with respect to an attempted incorporation of an arbitration requirement.



DOMESTIC RELATIONS — EFFECT OF CHANGE OF CUSTODY ON SUPPORT PROVISIONS OF SEPARATION AGREEMENTS.—Under the terms of a separation agreement, plaintiff-wife was to have custody of the children and the defendant was to pay plaintiff the lump sum of \$2,500 per month for herself and for the “support, education and maintenance” of the children. When the defendant was awarded custody of the children in a subsequent habeas corpus proceeding,¹ he reduced the monthly payments to the plaintiff by one half. Plaintiff brought this action to recover the full amount due under the agreement. *Held*: The change in custody does not warrant a reduction in the payments since the separation agreement does not provide for any such reduction and the plaintiff in no way breached the agreement. *Nichols v. Nichols*, 306 N.Y. 490, 119 N.E.2d 351 (1954).

Separation agreements are to be construed according to the basic rules of contract construction. If the terms of the agreement are unambiguous, the intent of the parties must be found therein.² The courts will not imply or insert conditions which the parties themselves chose not to insert.³ Moreover, the courts will not modify one provision and leave the rest of the agreement intact.⁴ Accordingly, if one of the parties breaches the agreement, the aggrieved party's remedy is not reformation.⁵ However, adhering to the applicable prin-

¹ The children, having refused to make their home with the mother, went to live with the father. When he refused to return them, the mother instituted the habeas corpus proceeding to regain their custody.

² See *Brainard v. New York Central R.R.*, 242 N.Y. 125, 151 N.E. 152 (1926); *Hartigan v. Casualty Co. of America*, 227 N.Y. 175, 124 N.E. 789 (1919); *Matter of Brown*, 153 Misc. 282, 274 N.Y. Supp. 924 (Surr. Ct. 1934).

³ *Stoddard v. Stoddard*, 227 N.Y. 13, 124 N.E. 91 (1919); see *Raner v. Goldberg*, 244 N.Y. 438, 155 N.E. 733 (1927).

⁴ *Stoddard v. Stoddard*, *supra* note 3; *Johnson v. Johnson*, 206 N.Y. 561, 100 N.E. 408 (1912).

⁵ “Such agreements, lawful when made, will be enforced like other agreements unless impeached or challenged for some cause recognized by law. It is not in the power of either party acting alone and against the will of the other to destroy or change the agreement.” *Goldman v. Goldman*, 282 N.Y. 296, 300, 26 N.E.2d 265, 267 (1940).