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Arbitration - Jurisdiction from Participation - Hot Springs County School District No. 1 v. Strube Construction Company

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ARBITRATION—Jurisdiction from Participation. ***Hot Springs County School District No. 1 v. Strube Construction Company,*** **715 P.2d 540 (Wyo. 1986).**

Hot Springs County School District No. 1 (School) contracted with Strube Construction Company (Strube) for excavation work.[1] Strube provided additional materials and labor not called for in the written contract.[2] A dispute arose over payment for the additional work.[3] The School initially demanded arbitration claiming that the contract incorporated the arbitration section of the Wyoming Public Works Standard Specifications.[4] Strube eventually agreed voluntarily to submit to arbitration although it objected to the incorporation of the arbitration section of the Wyoming Public Works Standard Specifications.[5] By the time Strube agreed to arbitrate, the School opposed arbitration claiming that Strube's demand was not timely.[6] Despite the School's claim, both parties participated in arbitration, resulting in an award for Strube.[7] The School sued to vacate the award in the district court.[8] The district court confirmed the award, and the School appealed.[9]

The Wyoming Supreme Court held that participation in the arbitration proceeding waived the right to contest the subject matter jurisdiction of the arbitration proceeding.[10] Participation was a waiver even though there was no written agreement to arbitrate. However, the court held that, by explicit objection, a party may preserve the issue of arbitrability for a full court review.[11] The court affirmed the district court's decision that there was an agreement for binding arbitration and that the School failed to explicitly object to arbitrability.[12] This casenote will explore whether participation in arbitration should waive a party's right to a full judicial review of subject matter jurisdiction and will delineate the courses of action available to a party that has not agreed to arbitrate.

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1. Hot Springs County School Dist. No. 1 v. Strube Constr. Co., 715 P.2d 540, 541 (Wyo. 1986).
2. *Id.*
3. *Id.*
4. *Id.* at 542. WYO. PUB. WORKS STANDARD SPECIFICATIONS § 101.16 (1979) states in part:

> All claims disputes and other matters in question arising out of, or relating to, this Agreement or the breach thereof except for claims which have been waived by the making or acceptance of final payment . . . shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association then obtaining. This agreement so to arbitrate shall be specifically enforceable under the prevailing arbitration law. The award rendered by the arbitrators shall be final, and judgment may be entered upon it in any court having jurisdiction thereof.

5. *Hot Springs,* 715 P.2d at 542.
6. *Id.* at 543. Any party wishing to arbitrate must demand arbitration within 30 days. WYO. PUB. WORKS STANDARD SPECIFICATIONS § 101.16 (1979) (requires the demand); *id.* § 101.09.07 (defines the 30-day period).
7. *Hot Springs,* 715 P.2d at 543.
8. *Id.*
9. *Id.*
10. *Id.* at 546.
11. *Id.*
12. *Id.* at 541.

BACKGROUND

The Wyoming Legislature has provided for arbitration[13] as the Wyoming Constitution allows.[14] Wyoming courts favor arbitration as an inexpensive and expeditious method of voluntary dispute resolution.[15] Although favored, arbitration is a contractual matter, and parties are not required to submit any dispute to arbitration which they have not agreed to submit.[16]

Before *Hot Springs*,[17] Wyoming courts had not directly addressed whether a party waives its right to judicial review of arbitrability by participating in arbitration. Other courts treat the issue in three ways.[18]

Some courts treat the issue like a judicial proceeding where a party challenges in personam jurisdiction.[19] When a party submits the merits to the arbiters but at the same time challenges arbitrability and reserves the right to challenge in court an adverse ruling on arbitrability, the court decides the arbitrability issue de novo. If the arbiters find they have jurisdiction, the parties proceed to the dispute's merits, maintaining a right to reassert a jurisdictional challenge on appeal. This procedure does not require an objecting party to enjoin arbitration or to withdraw from the proceeding. It does require the party to make an objection.

The second treatment of the issue allows for full judicial review of arbitrability without requiring a party to object during arbitration or withdraw from the proceeding.[20] This procedure treats arbitrability like a question of judicial subject matter jurisdiction which may usually be raised on appeal. In any subsequent court action, either to confirm or vacate the award, the court makes an independent determination of arbitrability.

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13. The current arbitration statutes are WYO. STAT. §§ 1-36-101 to -119 (1977).

14. WYO. CONST. art. 19, § 8 provides:

> The legislature may provide by law for the voluntary submission of differences to arbitrators for determination and said arbitrators shall have such powers and duties as may be prescribed by law; but they shall have no power to render judgment to be obligatory on parties; unless they voluntarily submit their matters of difference and agree to abide the judgment of such arbitrators.

15. *In re* Town of Greybull, 560 P.2d 1172 (Wyo. 1977); *In re* Riverton Valley Elec. Ass'n, 391 P.2d 489 (Wyo. 1964).

16. Panhandle E. Pipe Line Co. v. Smith, 637 P.2d 1020 (Wyo. 1981); WYO. STAT. § 1-36-103 (1977).

17. 715 P.2d 540 (Wyo. 1986).

18. *See* Annotation, *Participation In Arbitration Proceedings As Waiver Of Objections To Arbitrability*, 33 A.L.R.3D 1242 (1970); 5 AM. JUR. 2D *Arbitration and Award* §§ 48, 50, 83 (1962).

19. *See* Local 719, Am. Bakery & Confectionery Workers v. National Biscuit Co., 378 F.2d 918 (3d Cir. 1967) (the issue of arbitrability was preserved for judicial inquiry when a party presented its objections to arbitrability to the arbiters and did not clearly show it was willing to forego judicial review).

20. *See* Ben Gutman Truck Serv. Inc. v. Teamsters Local No. 600, 484 F. Supp. 893 (E.D. Mo. 1980) (by participating in arbitration, a party does not waive any objections to arbitrability); Hawkins/Korshoj v. State Bd. of Regents, 255 N.W.2d 124 (Iowa 1977) (a party that participated on the merits of a dispute after the arbiters decided in favor of arbitrability did not forfeit its right to contest arbitral jurisdiction in a judicial forum).

The third approach requires either nonparticipation in the proceeding or requires a party to seek a stay of the arbitration proceeding.[21] This procedure is similar to prohibiting special appearances. If the parties participate until the award, the court's review is severely limited to questions of arbiter fraud, misconduct, or mistake.

Wyoming courts have approached the issue of arbitrability from participation in two cases. In *In re Town of Greybull*,[22] the contractor claimed on appeal that the arbiters exceeded their authority because the contractor was liable under the contract only if the subcontractor was liable. However, the subcontractor's liability was not determined. The contractor fully participated in the arbitration proceeding without raising that specific objection. The court held that not raising an issue in arbitration waives that issue.[23]

However, in *State Highway Commission v. Brasel & Sims Construction Co.*,[24] the court held that the validity of an arbiter's decision depends upon whether the parties have in fact agreed to treat the arbiter's award as final and binding. In an earlier ruling on the same action the court held there was no statutory authority for the State Highway Commission to act as arbiter.[25] In the later action, the court held that while the parties had arbitrated the dispute, they had not agreed to be bound by the arbiter's decision.[26] The court further held that the parties' intention to submit their disputes to a contractually designated agent must be manifested by plain language and that finality of an arbiter's decision may not be implied.[27]

Neither of these cases directly answers whether participation in arbitration waives the right to a full judicial review of arbitrability. The court was free, within statutory limitations,[28] to select one of the three approaches adopted by other courts or to fashion its own.

THE PRINCIPAL CASE

The court agreed with the arbiters and the district court that the parties did not incorporate the arbitration section of the Wyoming Public Works Standard Specifications in their contract.[29] This finding foreclosed the School's contention that the demand for arbitration was untimely.

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21. *See* L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348 (Tex. 1977) (a party is required to withdraw because participation in arbitration until the award is prima facie proof of consent to arbitrate and a waiver of objections to the proceedings); *In re* Nat'l Cash Register Co., 8 N.Y.2d 377, 171 N.E.2d 302, 208 N.Y.S.2d 951 (1960) (party, by participation in arbitration without moving for stay, waived objection to jurisdiction).

22. 560 P.2d 1172 (Wyo. 1977).

23. *Id.* at 1179. "He did not even intimate that he considered the entire proceedings to be improper. . . . This was never mentioned or contended for until this appeal. It is now too late. It is waived." *Id.*

24. 688 P.2d 871, 876 (Wyo. 1984).

25. Brasel & Sims Constr. Co. v. State Highway Comm'n, 655 P.2d 265 (Wyo. 1982).

26. *Brasel*, 688 P.2d at 876.

27. *Id.*

28. *See* WYO. STAT. § 1-36-114 (1977).

29. *Hot Springs*, 715 P.2d at 544.

Alternatively, the School contended that, if the Wyoming Public Works Standard Specifications did not apply, there was no agreement to arbitrate, and the arbiters exceeded their powers.[30] The court recited the district court's finding of an agreement to arbitrate apart from the Wyoming Public Works Standard Specifications.[31] It cited authority for the proposition that an agreement to arbitrate need not be in writing and can arise from the parties' conduct.[32] The court also cited authority that participation in the arbitration proceeding may waive objection to arbitrability.[33] Under the circumstances of the case, the court stated it had no difficulty in finding the School's participation to be a waiver of objection to arbitrability.[34] The court also agreed with the district court that a motion to dismiss for untimely filing is not the same as a motion to dismiss for lack of jurisdiction.[35] The first is based on time while the second is based on the lack of an arbitration agreement.

The court highlighted several facts to support the district court's dual finding that the School's participation was an agreement to arbitrate and a waiver of objection to arbitrability. First, the School could have petitioned a court to stay the proceedings.[36] Second, the School knew that Strube contended there was no requirement to arbitrate but was arbitrating voluntarily.[37] Finally, the court pointed out that the School had a full and fair hearing of the entire dispute, including the School's counterclaims.[38] According to the court, the School hoped to win in arbitration. When it lost, the School raised arbitrability in an attempt to avoid the award granted. The court held "that a party who proceeds with arbitration over his explicit objections as to arbitrability is not foreclosed from raising the issue on a motion to confirm or vacate the award, . . . however, the School District did not object."[39] The court recognized the unfairness of allowing a party to change its mind about arbitrability merely because it loses in arbitration.[40]

The School raised the argument that the arbiters' award was not final and binding because the parties had not used "plain language" as required

30. *Id.* at 545; *see also* Brief of Appellant at 16-28, *Hot Springs* (No. 84-250).
31. *Hot Springs*, 715 P.2d at 545.
32. *Id.* (citing 5 AM. JUR. 2D *Arbitration and Award* § 12 (1962); 6 C.J.S. *Arbitration* §§ 8, 17 (1975)).
33. *Hot Springs*, 715 P.2d at 545.
34. *Id.* at 546.
35. *Id.*
36. *Id.* WYO. STAT. § 1-36-104(a) (1977) states:
On application of a party showing an arbitration agreement and the opposing party's refusal to arbitrate, the court shall order the parties to proceed with arbitration. If the opposing party denies the existence of the agreement to arbitrate, the court shall proceed summarily to determine the issue raised and shall order or deny arbitration accordingly.
37. *Hot Springs*, 715 P.2d at 546.
38. *Id.*
39. *Id.*
40. *Id.* "We think it is fundamental law that an individual . . . may not freely participate in the selection of arbitrators, . . . attend the hearing, submit his evidence, hope for a favorable award, and in the event of an adverse finding, seek a review merely because the award is unfavorable to him." *Id.* (quoting People v. Crystal River Corp., 131 Colo. 163, 280 P.2d 429, 432 (1955)).

by the court in *Brasel*.[41] The court distinguished *Brasel* by pointing out that the arbiters in that case were not neutral third parties but one party's agent.[42] The reasons for this distinction were not given.[43] The court reiterated that the parties had agreed to arbitrate and stated that the parties would not intend nonbinding arbitration as that would be a futile act.[44]

The dissenters pointed out that the authorities cited by the majority were all cases in which there was a written agreement to arbitrate.[45] The issue in those cases was whether the dispute was within that written agreement.[46] They stated that, because the Wyoming Public Works Standard Specification's section on arbitration was not incorporated into the contract, there was no written agreement to arbitrate as required by statute.[47] They interpreted section 1-36-103 of the Wyoming Uniform Arbitration Act[48] to require a written arbitration agreement before an arbitration award could be valid.[49] The dissenters noted that an agreement, written or oral, requires a meeting of the minds.[50] The dissenters found no agreement because the School never intended to arbitrate except under the Wyoming Public Works Standard Specifications.[51] The dissenters stated that Strube may have tricked the School into arbitrating.[52] Strube may have lulled the School into thinking that the thirty-day filing deadline would be enforced by following the procedural details for arbitration outlined in the Wyoming Public Works Standard Specifications.

ANALYSIS

There are two competing dangers involved in creating jurisdiction because of participation. First, a party may unintentionally lose its right

41. *Hot Springs*, 715 P.2d at 546; State Highway Comm'n v. Brasel & Sims Constr. Co., Inc., 688 P.2d 871, 876 (Wyo. 1984); *see also* Brief of Appellant at 28-29.

42. *Hot Springs*, 715 P.2d at 547.

43. In the distinguished case, the court emphasized that the likelihood of collusion and lack of good faith was increased when the arbiter was in the pay of one of the parties. *Brasel*, 688 P.2d at 876. The court may have reasoned that the increased potential for collusion required the greater protection of a written agreement for the disadvantaged party.

44. *Hot Springs*, 715 P.2d at 547.

45. *Id.* at 549 (Rooney, J., dissenting) (Justice Thomas joined in Justice Rooney's dissenting opinion).

46. *Id.* at 551-52.

47. *Id.* at 549.

48. WYO. STAT. § 1-36-103 (1977) provides:
A written agreement to submit any existing or future controversy to arbitration is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of the contract. This includes arbitration between employers and employees or between their respective representatives unless otherwise provided in the agreement.

49. *Hot Springs*, 715 P.2d at 549 (Rooney, J., dissenting).

50. *Id.* at 550.

51. *Id.*

52. *Id.* (Rooney, J., dissenting). Justice Rooney noted:
Strube attempted to go in the back door for arbitration, after perhaps missing the deadline to do so as set forth . . . . Of interest is the fact that all of the procedural details necessary in an arbitration agreement as set forth in such standard specifications (choosing arbitrators, etc.) were followed except that concerning the 30-day filing deadline.
Id.

to a judicial determination of the dispute. A party loses its right to a full trial when it arbitrates because the judicial review of an award is limited to questions of arbiter misbehavior. Second, if participation does not create jurisdiction, a party may get two chances to prove its case by seeking judicial review after losing in arbitration. If a full judicial review of the arbitration award is given, the party that prevailed in arbitration loses its contractual right to the finality of the arbitration award. The party that prevailed in arbitration also loses the savings of time and expense that arbitration provides. A correct procedure for determining arbitration jurisdiction from participation should insure adequate protection of the right to trial, yet provide for arbitration finality when the parties have agreed to arbitrate. The rules adopted in *Hot Springs* provide adequate protection for both these rights.[53]

An arbitration agreement is contractual; contract law should govern.[54] Under contract law an implied contract normally arises from the parties' behavior.[55] When the parties' behavior manifests a mutual assent to contract, they have contracted as surely as if they had used an express agreement.[56] A party who initiates arbitration is making an offer to the other party to arbitrate. Under contract law a party can accept an offer by accepting the contract's benefits or by acting in accordance with acceptance of the offer.[57] By participating in an arbitration proceeding, a party avails itself of arbitration's lower cost and expediency and acts in accordance with acceptance of the other's offer to arbitrate. A written agreement is preferable to an implied agreement because it provides evidence of the parties' intent to arbitrate. Hopefully, it also contains the specific issues to be arbitrated and how the arbitration is to be conducted. However, a written agreement is unnecessary when there is sufficient evidence of an intention to arbitrate. Requiring a written agreement to arbitrate assures that the parties have actually bargained for arbitration. However, the many procedural protections available to a party who has not agreed to arbitrate also adequately assures that the parties have agreed to arbitrate. Included in the procedural protections is a ban on forced arbitration without a written agreement.[58]

The dissenters interpreted the Wyoming Uniform Arbitration Act to require a written agreement.[59] However, section 1-36-114 of the Wyoming Statutes requires the court to vacate an arbitration award when "[t]here was no arbitration agreement, . . . and the applicant did not participate in the arbitration hearing without raising the objection."[60] This section provides for vacating an arbitration award only when there was no arbitration agreement *and* the applicant did not participate without objec-

53. *Id.* at 545-47 (majority opinion).
54. T. & M. Properties v. ZVFK Architects & Planners, 661 P.2d 1040 (Wyo. 1983).
55. 17 AM. JUR. 2D *Contracts* § 3 (1964).
56. J. CALAMARI & J. PERILLO, THE LAW OF CONTRACTS § 10 (1st ed. 1970).
57. 17 AM. JUR. 2D *Contracts* §§ 44-45 (1964).
58. WYO. STAT. § 1-36-103 (1977).
59. *Hot Springs*, 715 P.2d at 549 (Rooney, J., dissenting).
60. WYO. STAT. § 1-36-114(a)(v) (1977).

tion. The participation language is unnecessary if a written agreement to arbitrate is required for a valid arbitration award.

A party that has not agreed to arbitrate has several options in enforcing its right to trial. First, it can petition the court for a stay of the arbitration proceeding.[61] The court will summarily determine if there is a written agreement to arbitrate and whether the dispute is within that agreement. This option is flawed because it requires the party to take the initiative and to wait for the court's decision to settle the issue. However, this option removes all risk of being bound by arbitration when the party has not agreed in writing to arbitrate.

A party may also participate in the arbitration hearing while objecting to the dispute's arbitrability. To give clear meaning to its intentions, the party should object to the dispute's arbitrability and to the arbiters' jurisdiction for hearing the issue of arbitrability. The second objection removes a later contention that the issue of arbitrability was submitted to the arbiters.

The third option, and the most risky, is not to participate in the arbitration proceeding. This option requires no expenditure from a party, but requires vigilance. If the arbiters proceed, as allowed by statute,[62] and reach an award against the party, the party must appeal within ninety days of receipt of the award notice.[63] If the court determines that there was an agreement to arbitrate, the party has lost its defenses on the merits.[64]

In general, a party must remember that jurisdiction for arbitration will recieve a treatment different from judicial subject matter jurisdiction. Because the parties at any time can create subject matter jurisdiction for arbitration, it is treated similar to in personam jurisdiction. In Wyoming, participating without objection is now considered an implied agreement to arbitrate.

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61. *See* WYO. STAT. § 1-36-103 (1977).

62. WYO. STAT. § 1-36-107(a) (1977) provides in part: "The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. . . ."

63. WYO. STAT. § 1-36-114 (1977) provides in part:

> Upon application of a party the court shall vacate an award where . . . [t]here was no arbitration agreement, the issue was not adversely determined by a court as provided by law and the applicant did not participate in the arbitration hearing without raising the objection. . . . An application for vacating an award shall be made within ninety (90) days after delivery of a copy of the award to the applicant, or if predicated upon corruption, fraud or other undue means it shall be made within ninety (90) days after the grounds are known or should have been known.

See also T. & M. Properties v. ZVFK Architects & Planners, 661 P.2d 1040 (Wyo. 1983).

64. WYO. STAT. § 1-36-114(d) (1977) ("If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award.").

CONCLUSION

Wyoming has adopted the rule that arbitration awards are valid if the parties participate in the arbitration proceeding without specific objection, despite the lack of a written agreement to arbitrate. The rule protects the party who has not agreed to arbitrate and also protects the finality of an arbitration award. A party that has not agreed to arbitrate should either petition the court for a stay or object to jurisdiction at the arbitration hearing. The party may also refrain from participating in the arbitration proceeding but that procedure creates unnecessary risks.

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