University of Baltimore Law Review

Volume 12
Issue 3 *Spring 1983*

Article 12

1983

Casenotes: Contract Law — Waiver of Arbitration Rights by Litigating One Issue Is Not a Waiver of the Same Rights as to Unrelated Issues. Charles J. Frank, Inc. v. Associated Jewish Charities, Inc., 294 Md. 443, 450 A.2d 1304 (1982)

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CONTRACT LAW — WAIVER OF ARBITRATION RIGHTS BY LITIGATING ONE ISSUE IS NOT A WAIVER OF THE SAME RIGHTS AS TO UNRELATED ISSUES. *Charles J. Frank, Inc. v. Associated Jewish Charities, Inc.,* 294 Md. 443, 450 A.2d 1304 (1982).

In 1976, Charles J. Frank, Inc. (the Contractor) contracted with Associated Jewish Charities of Baltimore, Inc. (the Owner) for the construction of a Jewish community center. The contract provided for binding arbitration as the means of resolving all conflicts that arose from the agreement.[1] In the fall of the following year, a dispute arose concerning certain excavation work performed by a subcontractor.[2] Although the issue was arbitrable, the Contractor, the Owner, and the subcontractor litigated the dispute and ultimately settled the problem pursuant to a consent decree.[3] Shortly thereafter, another dispute arose between the Owner and the Contractor, unrelated to the initial excavation suit, over allegedly faulty workmanship. Consistent with his contractual right, the Contractor demanded arbitration.[4] The Owner

1. Charles J. Frank, Inc. v. Associated Jewish Charities, Inc., 294 Md. 443, 445, 450 A.2d 1304, 1305 (1982). The arbitration clause provided, *inter alia,* that "[a]ll claims, disputes and other matters in question arising out of, or relating to, [the] Contract . . . shall be decided by arbitration. . . ." This exact arbitration clause has been the subject of previous litigation before the court of appeals. *See* Frederick Contractors, Inc. v. Bel Pre Medical Center, Inc., 274 Md. 307, 334 A.2d 526 (1975). Arbitration has been broadly defined as:

> [A] contractual proceeding whereby, the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in the place of the tribunals provided by the ordinary processes of law.

M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 1.01 (1968) (citing Gates v. Arizona Brewing Co., 54 Ariz. 266, 269, 95 P.2d 49, 50 (1939)). Arbitration has the same basic goal as civil litigation — the just resolution of a dispute. *See* Comment, *Waiver of the Right to Compel Arbitration—A Directional Analysis,* 16 CAL. W.L. REV. 375 (1980). Arbitration, however, unlike civil litigation, is favored by many commentators because of its imputed speed and economy. M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 20.1 (1968); 5 AM. JUR. 2D *Arbitration and Award* § 1 (1962 & Supp. 1982).

In 1965, the General Assembly enacted the Maryland Uniform Arbitration Act. MD. CTS. & JUD. PROC. CODE ANN. §§ 3-201 to -234 (1974). Subsumed within this enactment was the recognition of arbitration's primary purpose to "discourage litigation and to foster voluntary resolution of disputes in a forum created, controlled, and administered according to the parties' agreement to arbitrate." Bel Pre Medical Center, Inc. v. Frederick Contractors, Inc., 21 Md. App. 307, 320, 320 A.2d 558, 565 (1974) (citing Maretta v. Greenfield, 267 Md. 287, 291, 297 A.2d 244, 246 (1972)), *rev'd on other grounds,* 274 Md. 307, 334 A.2d 526 (1975).

2. *Frank,* 294 Md. at 445, 450 A.2d at 1305. The problem was whether the subcontractor's removal of earth from an adjacent field was additional work entitling him to additional compensation. The subcontractor sought $10,172.00 for his work.

3. *Id.* at 445-46, 450 A.2d at 1305. The consent decree was entered in the Circuit Court for Baltimore County, the Honorable Walter R. Haile presiding. Consolidated Excavators, Inc. v. Charles J. Frank, Inc., No. 112-113-98463 (Balto. Co. Cir. Ct. Jan. 20, 1980).

4. *Frank,* 294 Md. at 446, 450 A.2d at 1305. The American Arbitration Association

responded by filing suit against the Contractor, the contractor's surety, and the project architect. The contract between the architect and the Owner did not contain an arbitration clause.[5] In addition, the Owner moved to stay the arbitration proceedings alleging that the Contractor waived his right to demand arbitration when he participated in the initial litigation. The Owner further asserted that if he were forced to arbitrate with the Contractor on the one hand, and litigate with the architect on the other, the Owner could be faced with inconsistent decisions. The trial court agreed with the Owner and held that the Contractor waived his right to demand arbitration for *all* purposes under the contract. Accordingly, the lower court granted the Owner's motion to stay the arbitration proceedings.[6] The Court of Appeals of Maryland reversed[7] and held, as a matter of first impression, that the waiver of the right to arbitrate one issue by pursuing litigation does not necessarily constitute a general waiver of the right to arbitrate other unrelated issues arising from the same contract.[8] The court further ruled that the Contractor has a right to demand arbitration even though the Owner may be forced to litigate the same or similar issues with the project architect.[9]

The threshold question in *Charles J. Frank, Inc. v. Associated Jewish Charities, Inc.*,[10] was whether the litigation of one arbitrable issue constitutes a waiver[11] of the right to demand arbitration as to other

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served formal notice of the demand for arbitration on March 31, 1980. The dispute concerned final payment under the contract in the amount of $139,579.11. *Id.*

5. *Id.* In fact, provisions in the architect's contract providing for arbitration were intentionally deleted. *Id.* at 455, 450 A.2d at 1310.
6. *Id.* at 446-47, 450 A.2d 1305-06. The lower court held that it was not the potential for inconsistent results which required the waiver but rather its belief that once any waiver of an arbitration right was effectuated, it extended to all other matters arising from the contract. *Id.*
7. *Id.* at 445, 450 A.2d at 1310.
8. *Id.*
9. *Id.* at 459-60, 450 A.2d at 1312.
10. 294 Md. 443, 450 A.2d 1304 (1982).
11. The right to arbitration is strictly a contractual one. In C.W. Jackson & Assoc., Inc. v. Brooks, 289 Md. 658, 426 A.2d 378 (1981), Judge Smith stated the right as follows: "Arbitration is a matter of contract. In this case the parties contracted when they agreed to submit their dispute to the arbitrator for resolution. In the absence of contract there was no way for the matter to go to arbitration." *Id.* at 666, 426 A.2d at 382; *see also* United Steelworkers v. Warriors & Gulf Navigation Co., 363 U.S. 544, 582 (1960) (the right of arbitration is strictly contractual).

However, as with other contractual rights, a waiver may be found. In Maryland, waiver is defined as "the intentional relinquishment of a known right." St. Paul Fire and Marine Ins. Co. v. Molloy, 291 Md. 139, 145, 433 A.2d 1135, 1138 (1981); *see also* M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 19.01 (1968). The legal burden to show a waiver of a written contractual term is by preponderance of the evidence. *See* University Nat'l Bank v. Wolfe, 279 Md. 512, 522, 369 A.2d 570, 576 (1977); S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 623 (1979).

disputes that arise out of the same contract.[12] Some courts hold that the waiver of arbitration in the first instance extends to all other matters arising out of the original agreement.[13] However, an analysis of these decisions reveals that the initial waiver and the subsequent request for arbitration concern the same or a closely related issue. For example, in *Midwest Window Systems, Inc. v. Amcor Industries, Inc.*,[14] the seller entered a consent judgment on a note given by the buyer. The buyer countered by filing an affirmative suit against the seller and moved to vacate the consent judgment.[15] The seller, in accordance with this contractual right, demanded arbitration of the issues raised in the affirmative suit and the lower court granted the motion.[16] The United States Court of Appeals for the Seventh Circuit reversed and held that the seller waived his right to demand arbitration when he initially chose a judicial forum. The court noted that, in actuality, only *one* controversy existed between the parties and that an attempt to bifurcate the matter would only complicate the single issue.[17]

The *Frank* court distinguished *Midwest Window* and other "single issue" theory cases by implicitly finding that the initial litigation and the subsequent request for arbitration in *Frank* concerned issues that were separate and distinct.[18] Since Maryland lacked any cases of precedential value, the court of appeals turned to other jurisdictions for guidance to determine the extent of the waiver of arbitration when two issues are unrelated.

Courts which have faced the issue of unrelated disputes similar to that raised in *Frank* hold that the initial waiver extends only to the

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12. There was no question that by litigating the initial dispute to a conclusion, a waiver as to that issue was effectuated. *Frank,* 294 Md. at 450, 450 A.2d at 1307.
13. *See, e.g.,* Midwest Window Systems, Inc. v. Amcor Indus. Inc., 630 F.2d 535 (7th Cir. 1980); Seville Condominium #1, Inc. v. Clearwater Dev. Corp., 340 So.2d 1243 (Fla. Dist. Ct. App. 1976), *cert. denied,* 348 So. 2d 945 (Fla. 1977).
14. 630 F.2d 535 (7th Cir. 1980).
15. *Id.* at 536.
16. *Id.*
17. *Id.* at 537. Similarly, in Seville Condominium #1, Inc. v. Clearwater Dev. Corp., 340 So. 2d 1243 (Fla. Dist. Ct. App. 1976), *cert. denied,* 348 So. 2d 945 (Fla. 1977), a management corporation filed suit against eight condominium resident associations seeking the collection of maintenance fees. The residents, in turn, brought a class action suit against the management. The lower court granted the management's motion to compel arbitration and an interlocutory appeal followed. 340 So. 2d at 1244. The appellate court held that by filing the initial suit, the management had waived its right to demand arbitration and set aside the lower court's arbitration order. The court in so ruling found that the dispute for which management sought arbitration involved the same subject matter for which the management instituted the original court proceedings. *Id.*
18. *Frank,* 294 Md. at 453-54, 450 A.2d at 1308-09. The court rejected the Owner's argument that the present dispute and the initial litigation were actually one large issue which arose out of one "unsatisfactory business relationship" between the parties. *Id.* at 455, 450 A.2d at 1310. *See* Brief for Appellee at 10, Charles J. Frank, Inc. v. Associated Jewish Charities, Inc., 294 Md. 443, 450 A.2d 1304 (1982).

particular issue litigated and not to subsequent unrelated disputes.[19] This view was articulated in *Armco Steel Corp. v. Renago Construction, Inc.*[20] In *Armco,* a conflict arose in which the contractor, despite an arbitration clause, sued the owner for $665. The owner pleaded to the merits and demanded a jury trial. Thereafter, the owner demanded arbitration on an unrelated dispute, in the amount of $44,000, arising from the same contract. The issue on appeal was whether the owner's participation in the aforementioned court action caused a waiver of his right to subsequently demand arbitration. The New York court held that because the second dispute was separate and distinct from the issue involved in the litigation, the owner had a right to compel arbitration.[21] Similarly, in *Standard Company of New Orleans, Inc. v. Elliot Construction Co.,*[22] a subcontractor brought suit against the contractor and the owner for the unpaid balance of his contract.[23] The contractor filed a third party claim against the owner. Two months later, the contractor invoked arbitration against the owner under the same contract but on an unrelated matter.[24] The owner filed a motion to block the arbitration, claiming the contractor had waived his right by the initial foray into a judicial forum. The Supreme Court of Louisiana rejected the owner's agreement, found the issues separate, and held that the contractor had not waived his right to demand arbitration.[25]

Through *Frank,* Maryland adopts the logic of *Armco* and *Elliot Construction.* In the case at issue, the court reasoned that participating in a judicial proceeding "in and of itself, is too equivocal to support an inference of an intentional relinquishment of the right to arbitrate issues other than those raised and/or decided."[26] As a buttress, the court cited Maryland's "legislative policy" favoring the enforcement of contractual agreements to arbitrate.[27] Thus, absent additional proof of intent, a party who proceeds to settle an arbitrable matter in a judicial forum does not waive his right to arbitrate unrelated issues arising out of the same contract.

Once the court in *Frank* found that the Contractor had not waived

19. This rationale is best evidenced by the New York courts. *See* Clurman v. Clurman, 52 N.Y.2d 1036, 420 N.E.2d 385, 438 N.Y.S.2d 504 (1981); DeSapio v. Kohlmeyer, 35 N.Y.2d 402, 321 N.E.2d 770, 362 N.Y.S.2d 843 (1974); Denihan v. Denihan, 34 N.Y.2d 307, 313 N.E.2d 759, 357 N.Y.S.2d 454 (1974); Armco Steel Corp. v. Renago Const., Inc., 34 A.D.2d 887, 312 N.Y.S.2d 161 (1970).
20. 34 A.D.2d 887, 312 N.Y.S.2d 161 (1970).
21. *Id.* at 888, 312 N.Y.S.2d at 162.
22. 363 So. 2d 671 (La. 1978).
23. *Id.* at 672.
24. *Id.* at 673.
25. *Id.* at 675-76.
26. *Frank,* 294 Md. at 454, 450 A.2d at 1309.
27. *Id.* at 455, 450 A.2d at 1310. In Aetna Cas. & Sur. Co. v. Insurance Comm'r, 293 Md. 409, 445 A.2d 14 (1982), the court of appeals articulated this legislative policy by stating that, "the Maryland Uniform Arbitration Act, enacted in 1965 . . . embodies a legislative policy favoring enforcement of executory agreements to arbitrate." *Id.* at 421, 445 A.2d at 19.

his right to arbitration, it was forced to decide the related issue of whether the Owner was otherwise entitled to a stay of arbitration. The Owner argued that if he were compelled to arbitrate with the Contractor on the one hand, and to litigate with the architect on the other, he would face the burden of duplicative proceedings and perhaps inconsistent results.[28] Unfortunately, this issue is addressed in only a few reported decisions. Nevertheless, emerging from this limited amount of case law are two persuasive schools of thought. Some jurisdictions conclude that the prospect of multiple proceedings, carrying a potential for inconsistent findings, provides a basis for overriding one party's right to arbitration.[29] In the Illinois case of *J.F., Inc. v. Vicik,*[30] the owners of a house were faced with several pending suits by the general contractor and subcontractors. The general contractor, pursuant to his contract, moved for arbitration over the dispute with the owners and argued that he had a contractual right to arbitrate his claim even if it was factually similar to the issues which the subcontractors sought to litigate. The court rejected this argument and held:

> Where an arbitration agreement involves some, but not all, of the parties to a multi-party litigation, the policy favoring arbitration must be weighed against the policies favoring joinder of claims. Where arbitration would increase rather than decrease delay, complexity, and costs, it should not receive favored treatment.[31]

Accordingly, the general contractor's motion to arbitrate was denied. The underlying rationale of this and other similar opinions is that economy of time and expense, factors which generally sway the court in favor of arbitration, can also be a reason for denying arbitration when it would defeat rather than further these goals.[32]

Other jurisdictions conclude that arbitration should not be stayed regardless of the possibility of inconsistent results.[33] In *Frank,* Maryland adopts this approach. While the court cites three distinct reasons

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28. *Frank,* 294 Md. at 454, 450 A.2d at 1310.
29. J.F., Inc. v. Vicik, 99 Ill. App. 3d 815, 426 N.E.2d 257 (1981); County of Jefferson v. Barton-Douglas Contractors, Inc., 282 N.W.2d 155 (Iowa 1979). In England, a trial court has discretion to deny arbitration if some parties to the action are outside the arbitration agreement and some are within. *See* Tounton-Collins v. Cromie, 1 W.L.R. 633, 635-636 (C.A. 1964); Turnock v. Sartoris, 43 Ch. D. 150 (Ch. 1889).
30. 99 Ill. App. 3d 815, 426 N.E.2d 257 (1981).
31. *Id.* at 820, 426 N.E.2d at 261. This rationale has also been adopted in Prestressed Concrete, Inc. v. Adolfson & Peterson, Inc., 308 Minn. 20, 24, 240 N.W.2d 551, 553 (1976) (where arbitration would increase rather than decrease delay, complexity, and costs, it should not receive favored treatment).
32. *See* Ford Motor Co. v. M/S Maria Gorthon, 397 F. Supp. 1332, 1337 (D. Md. 1975) (dictum).
33. *See* Galt v. Libbey-Owens-Ford Glass Co., 376 F.2d 711, 715-16 (7th Cir. 1967) (applying Illinois law); Town of Danners v. Wexler Constr. Co., 422 N.E.2d 782 (Mass. App. 1981).

for its decision,[34] the most persuasive, and perhaps the underlying rationale for all decisions that permit subsequent arbitration, was articulated by the District of Columbia Circuit Court in *Travel Consultants, Inc. v. Travel Management Corp:*[35]

> Consultants complain of the burden of pursuing two actions concurrently in two different forums, and asks for a ruling that either all or none of the actions be referred to arbitration. That burden falls on Consultants because it signed two different agreements with the same party, one requiring arbitration, and the other containing no arbitration provision. *Consultants shouldered that burden voluntarily, and we see no basis for judicial interposition.*[36]

As stated previously, in *Frank* the Owner signed a contract with the Contractor containing an arbitration clause and a contract with the architect which did not.[37] The court, in accordance with *Travel Consultants,* determined that this voluntary action of the Owner was not a viable reason for removing the Contractor's right to arbitrate. Furthermore, the court stated that an order to "enjoin arbitration under these circumstances is inherently unfair to a party contractually entitled to arbitration."[38]

In *Frank,* the Maryland court of appeals furthered its preferential treatment towards arbitration by serving notice that the waiver of arbitration rights will be severely limited. Moreover, few judicial policies, including the avoidance of multiple proceedings, will outweigh the importance of the right to compel arbitration. The court's well reasoned opinion evidences an intent to foster the use and enforcement of the contractual right to arbitrate.

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34. The three rationales can be summed up as follows: (1) the public policy in favor of arbitration would be frustrated if agreements to arbitrate were not enforced; (2) the enactment of the Uniform Arbitration Act evidences a legislative intent that arbitration not be enjoined to prevent a multiplicity of actions; and (3) it is unfair to deprive a party to an arbitration agreement of its right to arbitrate when the burden of duplicative proceedings and inconsistent results was created by the voluntary action of the party that would bear the burden. *Frank,* 294 Md. at 456, 458, 450 A.2d at 1311.
35. 367 F.2d 334 (D.C. Cir. 1966), *cert. denied,* 386 U.S. 912 (1967).
36. 367 F.2d at 339 (emphasis added).
37. *Frank,* 294 Md. at 454, 450 A.2d at 1310.
38. *Id.* at 459-60, 450 A.2d at 1312.