



Sub. H.B. 401

123rd General Assembly
(As Passed by the House)

Reps. Salerno, Mottley, Robinson, Corbin, Cates, Buchy, Amstutz, Jones

BILL SUMMARY

- Eliminates the right of a party aggrieved by the alleged failure of another to perform under an arbitration agreement in a commercial construction contract to have a jury trial of the issue of whether there is an arbitration agreement or whether there is a failure to perform under the agreement for arbitration and provides that the court must hear and determine that issue.
- Provides that only an order that *denies* (not an order that *grants*) a stay of a trial of any action pending arbitration under an arbitration agreement in a commercial construction contract is a final, appealable order.

CONTENT AND OPERATION

Background law--arbitration

Under the Arbitration Law, the following types of contractual provisions or agreements are valid, irrevocable, and enforceable, except upon grounds that exist at law or equity for the revocation of any contract (R.C. 2711.01(A)--not in the bill):

- (1) Generally, a provision in any written contract to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract;
- (2) Any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit from a relationship that then exists between them or that they simultaneously create.

The Arbitration Law (R.C. 2711.01 to 2711.16) does not apply to controversies involving the title to or the possession of real estate, with certain exceptions (see **COMMENT 1**), or to controversies involving international

commercial arbitration or conciliation that are subject to R.C. Chapter 2712. (R.C. 2711.01(B)--not in the bill.)

Enforcing arbitration agreement

Existing law

Under the Arbitration Law, a party who is aggrieved by the alleged failure of another to perform under a written agreement for arbitration may petition any court of common pleas having jurisdiction of the party so failing to perform for an order directing that the arbitration proceed in the manner provided for in the agreement. Five days' notice in writing of the application must be served upon the party in default in the manner provided for the service of a summons. The court must hear the parties, and, upon being satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is *not* in issue, the court must make an order directing the parties to proceed to arbitration in accordance with the agreement.

If the making of the arbitration agreement or the failure to perform it is *in issue* in a petition as described in the preceding paragraph, the court must proceed summarily to the trial of the issue. The court must hear and determine that issue if no jury trial is demanded. On or before the return day of the notice of application, either party may demand a jury trial of the issue of the making of the arbitration agreement or the failure to perform it. If a jury trial is demanded, the court must make an order referring the involved issue to a jury. The jury is called and impaneled in the manner provided in civil actions. If the jury finds that no agreement in writing for arbitration was made or that there is no default in proceeding under the agreement for arbitration, the proceeding on the issue must be dismissed. If the jury finds that an agreement for arbitration was made in writing and that there is a default in proceeding under the agreement for arbitration, the court must make an order summarily directing the parties to proceed with the arbitration in accordance with the agreement. (R.C. 2711.03.)

Operation of the bill

The bill eliminates a party's right to demand a jury trial of the issue of whether there is a written agreement for arbitration or whether there is a failure to comply with the agreement to arbitrate when the party who is aggrieved by an alleged failure to perform under a written agreement for arbitration that is included in a *commercial construction contract* (see "**Definition**," below) files a petition in a court of common pleas for an order directing that the arbitration proceed in the manner provided for in the agreement. The bill provides that if a written agreement for arbitration is included in a commercial construction contract and if the making of the arbitration agreement or the failure to perform it is *in issue* in the petition,

the court must proceed summarily to the trial of that issue, and the *court must hear and determine that issue.* (R.C. 2711.03(C).)

Appealability of court order pertaining to stay of trial

Existing law

Under the Arbitration Law, if any action is brought upon any issue that is referable to arbitration under an agreement in writing for arbitration, the court in which the action is pending must order the *stay of the trial* of the action until the arbitration of the issue has been had in accordance with the agreement if all of the following apply: (a) one of the parties makes an application for stay of the trial, (b) the applicant for the stay is not in default in proceeding with arbitration, and (c) the court is satisfied that the issue involved in the action is referable to arbitration under the agreement in writing for arbitration. An order that *grants* or denies a stay of a trial of any action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a *final order* and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, R.C. Chapter 2505. (Appeals Law). (R.C. 2711.02.)

Operation of the bill

Under the bill, if an action is brought upon any issue that is referable to arbitration under an agreement in writing for arbitration that is included in a *commercial construction contract* (see "**Definition**," below), only an order that *denies* (not an order that *grants*) a stay of a trial of the action pending arbitration, including, but not limited to, an order that is based upon a determination of the court that a party has waived arbitration under the arbitration agreement, is a *final order* and may be reviewed, affirmed, modified, or reversed on appeal pursuant to the Rules of Appellate Procedure and, to the extent not in conflict with those rules, R.C. Chapter 2505. (R.C. 2711.02(D).) (See **COMMENT 2**.)

Definition

For purposes of its provisions, the bill defines "commercial construction contract" as any written contract or agreement for the construction of any improvement to real property, *other than* an improvement that is used or intended to be used as a single-family, two-family, or three-family detached dwelling house and accessory structures incidental to that use (R.C. 2711.02(A)).

COMMENT

1. Under the Arbitration Law exceptions in R.C. 2711.01(B)(1), the following are subject to the Arbitration Law if there is a provision in a written contract to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract:

(a) Controversies involving the amount of increased or decreased valuation of the property at the termination of certain periods, as provided in a lease;

(b) Controversies involving the amount of rentals due under any lease;

(c) Controversies involving the determination of the value of improvements at the termination of any lease;

(d) Controversies involving the appraisal of property values in connection with making or renewing any lease;

(e) Controversies involving the boundaries of real estate.

2. Under the current Arbitration Law not affected by the bill, if a court *grants* a stay of a trial of an action pending arbitration and arbitration proceedings are held, an award may be made in those proceedings. The court may confirm, modify, correct, or vacate the award as provided in the Arbitration Law and must enter judgment in conformity with its order confirming, modifying, correcting, or vacating the award. (R.C. 2711.09 to 2711.14.) An appeal may be taken from a court order confirming, modifying, correcting, or vacating an award made in an arbitration proceeding or from a judgment entered upon an award in an arbitration proceeding (R.C. 2711.15--not in the bill).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	06-24-99	p. 965
Reported, H. Civil & Commercial Law	04-04-00	p. 1753
Passed House (95-0)	05-02-00	pp. 1848-1849

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