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Maritime Arbitration and the Federal Courts

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Abstract

This article argues that arbitration offers a valuable and efficient alternative to the judicial resolution of disputes in a variety of areas, particularly in maritime law.

MARITIME ARBITRATION AND THE FEDERAL COURTS

*Wilfred Feinberg**

The courts of the Second Circuit, especially the Court of Appeals and the District Courts for the Southern and Eastern Districts of New York, have historically played a leading role in the development of American maritime law.[1] That is still the case today, although it may be true that novel and important problems now go more frequently to the courts of other circuits, especially with the growing business of the ports of the Gulf Coast and the West Coast states.

My own interest in problems of maritime law, and more specifically in the relations between maritime arbitrators and federal judges, rests partly on a sense of this historic tie, but I also have a more personal interest. I have long believed that arbitration offers a valuable and efficient alternative to the judicial resolution of disputes in a variety of areas, including commercial relations generally,[2] and maritime commercial relations more specifically. Arbitration is a profession—indeed, in some respects an art—that grows each year in stature, in achievement and in demand. I believe this is as it should be. The advantages offered by arbitration become more compelling each year. As more and more cases clog the calendars of the courts, arbitration obviously offers a comparatively speedy approach to resolving disputes—disputes that often involve very substantial amounts of money. Arbitration also offers degrees of flexi-

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* Chief Judge, United States Court of Appeals for the Second Circuit. This article is based upon the text of remarks delivered on October 20, 1981, at the opening session of the Fifth International Congress of Maritime Arbitrators, in New York City. The assistance of David K. Thompson in the preparation of both the original remarks and this article is gratefully acknowledged.

1. Indeed, the importance of the New York-based courts antedates the Revolution. *See, e.g.*, G. ROBINSON, HANDBOOK OF ADMIRALTY LAW IN THE UNITED STATES 7 (1939), pointing out that the practice developed in the pre-Revolutionary New York admiralty court "has widely passed on to all the courts of the United States."

2. *See, e.g.*, Feinberg, *Arbitration and Antitrust—An Introduction*, 44 N.Y.U. L. REV. 1069 (1969).

bility and informality that cannot be matched in court proceedings. Above all, arbitration offers the invaluable benefit of industrial expertise and technical sophistication—qualities that are especially important in a field so heavily shaped by tradition and immemorial custom on the one hand, and the latest advances in the state of the art on the other. Judges rarely possess, as a matter of general background and experience, the same degree of familiarity with the intricacies of maritime commercial relations that arbitrators command.

These are all benefits to the maritime industry, but they are not the only benefits flowing from reliance on arbitration. The fostering of a fully developed regime of maritime arbitration could have an especially positive impact in an area of particular concern to me—the heavy workloads of our country's federal courts.

Between July 1980 and June 1981, more than 180,000 civil actions of all types were filed in federal district courts throughout the nation,[3] an increase of seven percent over the previous year and a 30.1 percent increase over the comparable 1977-1978 period.[4] Of the total, more than 5,100 were cases involving maritime contracts, an increase of eight percent over the previous year, and more than 5,200 were cases involving marine torts.[5] These actions alone thus accounted for almost six percent of the total district court caseload—and the figures do not take into account many other types of maritime actions, including collision, salvage, general average and marine insurance claims.

The statistics become much more dramatic if we look directly at the relatively few districts that hear substantial numbers of maritime cases. The United States District Court for the Southern District of New York not only is the federal district court with the highest number of civil filings in the nation, but also is a principal forum for maritime disputes.[6] In 1980-1981, some 8,000 civil cases were commenced in that court.[7] In the preceding statistical year, of the civil cases filed, more than 1,400 were marine contract cases

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3. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANN. REP. OF THE DIRECTOR 56 (1981).
4. *Id.*
5. *Id.* at 62.
6. *See id.* at A-14 to A-15.
7. *Id.* at A-14.

and some 665 were marine personal injury cases. That is, maritime cases accounted for more than 27 percent of the filings.[8]

I should explain that this figure is a bit misleading: it does not represent the actual workload of the courts in terms of trials and formal decisions. This is so because the great bulk of the filings are cargo damage claims that are settled out of court at some point after a complaint is filed. But this fact in itself is informative, suggesting as it does that a great many cases that are formally submitted to the courts do not raise issues that only courts can resolve.

I have no doubt that a well developed habit of arbitration could go far toward reducing the heavy burden of maritime cases in the Southern District and in similar courts. I do not suggest, of course, that arbitration can replace adjudication in every instance. There are certainly maritime matters that raise questions of law and policy that properly belong in the courts, and that judges must sooner or later resolve. But still, many of these cases can be resolved more quickly, less expensively and just as responsibly, through the machinery of maritime arbitration. The strengthening of this machinery is thus in a very real sense a contribution to the efficiency of the federal courts as well as a benefit to the maritime industry.

I say this as one who believes strongly in the value of arbitration. But it must be recognized that not all judges have viewed the work of maritime arbitrators with quite the same favor. Indeed, courts have not always been eager—or even willing—to share responsibility for dispute resolution with arbitrators in any field. Even though the Supreme Court gave a strong nod of approval to labor arbitration more than 20 years ago in the landmark cases known as the *Steelworkers Trilogy*,[9] courts have not uniformly given the same "hospitable acceptance"[10] to arbitrators' awards.

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8. M. Cohen, A Proposal for Mass Processing of Marine Cargo Claims in the United States District Court for the Southern District of New York 18 n.1 (April 15, 1981) (unpublished manuscript) (on file with the Office of the Circuit Executive for the Second Circuit). *See also* Committee on Federal Courts, *A Proposal for a Pilot Program Concerning Cargo Damage Cases*, 37 REC. A.B. CITY N.Y. 103, 114 n.1 (1982).

9. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

10. International Harvester Co., 138 N.L.R.B. 923, 927 (1962), *enforced sub nom.* Ramsey v. NLRB, 327 F.2d 784 (7th Cir.), *cert. denied*, 377 U.S. 1004 (1964) (referring to the need for the National Labor Relations Board to give "hospitable acceptance" to the arbitral process as part of the collective bargaining process).

I think it is important to understand why courts may not always give arbitration awards the recognition that they perhaps deserve. Several factors underlie this common judicial skepticism. First, it is no doubt true that some judges simply lack faith in the competence and objectivity of arbitrators, or believe that they lack the independence necessary for the full and fair resolution of even the most straightforward disputes. Arbitrators are, after all, dependent on the good will of their employers for their livelihood, even if the work is only part-time, and so there may be a nagging pressure to avoid making either party more unhappy than necessary, to look for the easy solution rather than the correct one. Judges who doubt the ability of arbitrators to resist such pressure are likely to bring to their review of an award a certain presumption of error, or at least taint, that may cloud their own ability to view the award dispassionately.

Once diagnosed, this form of judicial discomfort with arbitration can, fortunately, be treated. Professional organizations of arbitrators, such as the American Arbitration Association and the Society of Maritime Arbitrators, can do much to relieve judicial doubts by promoting the highest standards of responsibility, competence, integrity and independence. International cooperation and consultation can also prove invaluable in the development of universal norms of practice, which are of acute importance in the maritime area. This is, of course, a long process, and one that can never really be completed, but already great progress has been made.

There are, however, more deeply rooted sources of judicial resistance to arbitration, and these may be more difficult to overcome because they are harder to pin down. To speak frankly, I believe one basic factor is simply a sense of turf, a kind of territorial instinct on the part of many, if not all, judges. Judges simply find it difficult to accept the notion that someone other than a judge should resolve the kind of disputes that judges deal with every day. Judges are reluctant to turn over responsibility and power to decide such cases to a non-judge, or, heaven forbid, to a non-lawyer.

This reluctance is naturally heightened when a judge is pressed for relief from an arbitration award that is alleged to be wrong, unfair or unjust. Judges are trained to correct mistakes that give rise to unjust results; it is a very basic part of their job to do so. They are, after all, solemnly charged under the United States Constitution and the laws to seek justice and the proper application of the law in each case. It is often difficult for a judge to remember that in

giving effect to an arbitration award, he or she is still carrying out the commands of the judicial office, serving a recognized national policy of support for arbitration.

I do not mean to suggest that a cautious attitude on the part of judges is wrong. On the contrary, judicial review may properly result in the rejection of some awards—where, for example, arbitrators have exceeded their powers under the arbitration agreement, or where they have acted in manifest disregard of the law,[11] as distinguished from a simple misconstruction of a contract provision.[12] But judges must be careful to review arbitration awards in accordance with these established standards of review, freeing themselves of any unconscious bias against the arbitration process as a whole.

Of course, that may be good advice for judges, but it does not really suggest what arbitrators, individually and as a group, can do to lessen this almost subconscious judicial resistance to arbitration awards. In an ideal world, arbitrators could, of course, decide every dispute with such Solomonic wisdom that no party would dare ask a court to set it aside. But even short of this state of perfection, I suggest that judicial nervousness may be eased over time by a consistent pattern of care and competence in arbitration decisions. I recognize that it is not necessary under our law that an arbitration award be supported by an explanation of the arbitrator's reasoning. Indeed, not too many years ago, our court explicitly so held in *Sobel v. Hertz, Warner & Co.*[13] Nevertheless, it is my belief that an award resting on a carefully written justification will fare better in court in most instances. In this connection, I think the practice of publishing written awards, employed, for example, by the Society of Maritime Arbitrators, is beneficial. Such publication is likely to prove helpful to arbitrators themselves and to courts that are called upon to review their awards.

There is, I realize, a certain risk in publishing an opinion, the risk that a judge may start dissecting an award line by line. But in this circuit, at least, such dissection is not favored. Our governing principle for the review of arbitration awards was stated clearly in

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11. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 436-37 (1953).

12. *See* I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 432 (2d Cir. 1974).

13. 469 F.2d 1211 (2d Cir. 1972). *See also* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. at 598.

Andros Compania Maritima v. Marc Rich & Co.,[14] in which we said: "When arbitrators explain their conclusions . . . in terms that offer even a barely colorable justification for the outcome reached, confirmation of the award cannot be prevented by litigants who merely argue, however persuasively, for a different result."[15] Thus, so long as there are no procedural irregularities or misconduct sufficient to taint the arbitration process, an award that offers a "barely colorable justification" for its outcome should withstand judicial review in the Second Circuit.[16]

Of course, judges are not the only ones who must exercise restraint in order to protect the finality of arbitration awards. It is even more important that the parties who chose arbitration in the first place learn to live with the results, whether they like them or not. They accepted the risk of an unhappy result when they agreed to arbitrate as part of their overall bargain, and they must understand that the terms of the bargain do not change simply because they lost their case. There are, to be sure, some exceptions; they are spelled out in the Federal Arbitration Act,[17] in state law,[18] and in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[19] But these exceptions must be strictly construed.[20] Mere unhappiness with the result of an arbitration proceeding cannot be a sound basis for running to court. Surprisingly, in some cases the trip to court comes even earlier, as an effort to prevent the arbitration from taking place. I have often wondered in such cases why the parties signed an agreement containing an arbitration clause, if they have so little faith in the process.[21]

Obviously, the decision to go to court is not one made by arbitrators; the burden of this decision falls most heavily on the

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14. 579 F.2d 691 (2d Cir. 1978).

15. *Id.* at 704.

16. *Id. See also* Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948, 960 (S.D. Ohio 1981).

17. 9 U.S.C. § 10 (1976).

18. *See, e.g.*, N.Y. Civ. Prac. Law § 7511 (McKinney 1980).

19. *Opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, enforced in United States courts pursuant to 9 U.S.C. § 201 (1976).

20. *Cf.* Andros Compania Maritima v. Marc Rich & Co., 579 F.2d 691, 703 (2d Cir. 1978) ("We have consistently accorded the narrowest of readings to the Arbitration Act's authorization to vacate awards '[w]here the arbitrators exceeded their powers . . . .' ").

21. *Cf.* International Union of Elec., Radio & Mach. Workers v. General Elec. Co., 407 F.2d 253, 258 (2d Cir. 1968), *cert. denied*, 395 U.S. 904 (1969) (labyrinthine arbitration clause rendered questionable any advantages to parties of agreeing to arbitration).

lawyer whose client has lost an award. The client in these circumstances may well feel wronged, and be eager to pursue the issue further, whether to delay or avoid altogether the payment of a monetary award or to vindicate a perceived principle. The easiest course for counsel may be to acquiesce quietly in the client's desire to continue the fight, on the theory that there is relatively little to lose. But lawyers, like judges and arbitrators, must exercise care and restraint if this system is to survive. Lawyers, too, bear a responsibility for the development of arbitration as an effective alternative, not a supplement, to litigation. If litigation becomes the predictable by-product of the arbitral process, the value of arbitration will inevitably disappear.

All of the above makes clear, I think, that the future of arbitration in this country, and the peaceful coexistence of arbitrators and judges, demand a measure of discipline and understanding on all sides. In the long run, judicial restraint in reviewing arbitration awards will prove impossible if the results reached in arbitration proceedings reveal a pattern of caprice, sloppiness or disregard of facts, contract provisions and law. On the other hand, the potential of arbitration as an alternative to the courts will never be realized if judges do not take a firm enough stand in support of the arbitral process and the finality of arbitration awards.