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Judicial Review of Arbitral Proceedings

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Abstract

This paper will examine judicial review of the arbitration process from the viewpoint of the arbitrator, who is professionally interested in careful and fair procedures leading to an award that will not be overturned by the courts. The principle area of study will be the maritime arbitrations to which the Federal Arbitration Act (the statute) applies to.

JUDICIAL REVIEW OF ARBITRAL PROCEEDINGS

Joseph C. Sweeney*

INTRODUCTION

This paper will examine judicial review of the arbitration process from the viewpoint of the arbitrator who is professionally interested in careful and fair procedures leading to an award which will not be overturned by the courts. To understand that viewpoint, it is important to note that the viewpoints of others, parties to the arbitration and counsel, impact greatly on the process and the role of the arbitrators. As a practitioner, for example, my principal interest was often the search for new and unusual grounds to overturn awards in which the arbitrators had made the grievous error of deciding against my client. We should face up to the sober truth that losing parties will always explore and exploit opportunities to overturn arbitral awards. The principal area of study will be those maritime arbitrations to which the Federal Arbitration Act (the statute) applies.¹

Despite the tendency of American courts and lawyers to be overly technical as a general rule, when it comes to arbitration our courts will *not* review the procedures, fact findings or statements of the law by arbitrators. They will, however, examine the conduct of arbitrators very closely, if challenged, to see that the arbitration was fair and *appeared* to be fair. It is this aspect of American arbitrations that scholars of comparative law find unique. Our courts simply will not interfere with the conduct of the arbitration, the fact finding, the legal rationale or the issuance of the award unless there is a *defect* which goes to the very heart of the American legal system, the appearance of fairness.

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1. 9 U.S.C. §§ 1-208 (1976).

The legislation was enacted initially in 1925. Act of February 12, 1925, Pub. L. No. 68-401, 43 Stat. 883. Its constitutionality was unsuccessfully challenged but approved by the Supreme Court in *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932).

Unlike judgments of lower courts, the arbitration *award* cannot be reversed by appellate courts because of legal errors in the written award but only because of the misconduct of the arbitrators, described by the Federal Arbitration Act as, "*Evident partiality or corruption in the arbitrators*" or when the award was procured by, "*corruption fraud or undue means*" or arbitrator *misconduct* respecting a fair hearing or arbitrator *misbehavior* which has prejudiced the rights of a party or nullified their award.² There is a very strong presumption in favor of upholding the final and definite award of arbitrators. The consequence of this presumption is that the winning party does *not* have the burden of establishing the perfect qualities of the award. Rather, the burden is on the losing party to bring the award within the grounds for vacating the award established by the statute.

The theory of American arbitration is that the parties to an arbitral agreement knowingly take the risks of error of fact or law committed by the arbitrators and that this is a worthy "trade-off" in order to obtain speedy decisions by experts in the field whose practical experience and worldly reasoning will be accepted as correct by other experts.

Arbitration is created by contract and depends upon the free choice of the parties for the resolution of their disputes by experts rather than the submission to national judicial resolution. This free choice can *never* be totally free of involvement with national courts

2. 9 U.S.C. § 10 (1976).

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

- (a) Where the award was procured by corruption, fraud, or undue means.
- (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
- (d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
- (e) Where an award is vacated and the time within which the agreement required the award to be made had not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Id.

if payment of an award must be exacted from the losing party.³ This paper will examine the extent to which courts in this country intervene in the process of arbitration. It will not address the problems associated with the actual collection of money from the losing party.

It has been said in some decisions that the courts lack the power to interfere with the arbitration until the *award* has been

3. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38. Fifty nations are parties thereto. It was acceded to by the United States on September 30, 1970, to be in force as of December 29, 1970 and incorporated into domestic law in 9 U.S.C. §§ 201-208 (1976). Article V lists a number of reasons for refusing to give recognition and enforcement to such awards, as follows:

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to *Article II* were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present this case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

See also European Convention on International Commercial Arbitration, April 21, 1961, arts. V, IX, 484 U.N.T.S. 364, 370-72, 374-76; Convention for the Execution of Foreign Arbitral Awards, Sept. 26, 1927, arts. I-III, 92 L.N.T.S. 302, 305-06.

made.⁴ This statement may be too broad where the essential fairness of the arbitration has been compromised at the outset. In those situations courts can prevent the arbitrators from a nullity—the unenforceable award—by the use of the court’s inherent powers to protect the arbitration process, for example, by disqualifying an arbitrator before the making of an award.⁵

An argument frequently made by a party not wishing to arbitrate is that he will not appoint an arbitrator since there is no dispute.⁶ This argument is uniformly rejected by the courts as an attempt to determine in advance what only the arbitrators are to consider. The party resisting arbitration can succeed with the “no dispute” argument only where there is no underlying contract or charter party at all between the parties.⁷

Alternatively, courts rely on the principle that there is nothing for courts to consider until an arbitration award has been *presented* for confirmation.⁸

The broad scope of the requirement to arbitrate disputes can be illustrated by the problem of the time bar, whether in the form of the statutory one year time bar of the Carriage of the Goods by

4. *In re Dover S.S. Co.*, 143 F. Supp. 738, 740-42 (S.D.N.Y. 1956). *See also In re Michaels*, 624 F.2d 411, 1980 A.M.C. 1901 (2d Cir. 1980); *Commonwealth Oil Ref. Co. v. Steamship Grand Commonwealth*, 1978 A.M.C. 975 (M.D. Fla. 1978) (where after 40 hearings, a party is requesting court interference because “these proceedings have deteriorated to the point where meaningful and productive arbitration cannot be conducted.” *Id.* at 976. Motion denied so as not to intervene with arbitrators in “midstream” and countenance a “pandora’s box” of delaying tactics).

5. *See In re Astoria Medical Group*, 11 N.Y.2d 128, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962). In this case the court discussed its “inherent power to disqualify an arbitrator before the making of an award.” 11 N.Y.2d at 132.

6. *See generally Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967) (where the Court reserved all matters of substance for the arbitrators while limiting the Court’s preliminary examination to the existence of an agreement to arbitrate on the question of whether the stay of proceedings was to be granted).

7. *McAllister Bros. v. A & S Transp. Co.*, 621 F.2d 519 (2d Cir. 1980) (holding that a dispute must be arbitrated in accordance with the contract even though one of the parties claims that the contract was abandoned). *See also Prima Paint Corp. v. Flood & Conklin Mfg.*, 388 U.S. 395 (1967); *Federal Commerce & Navigation Co. v. Kanematsu-Gosho, Ltd.*, 457 F.2d 387 (2d Cir. 1972) (where the court said that any doubts as to the scope of an agreement submitting a dispute to arbitration should be resolved in favor of coverage). Note, however, 9 U.S.C. § 4 (1976) to the effect that a summary trial of the issue must be held if the making of the arbitration agreement be in issue. *See Interbras Cayman Co. v. Orient Victory Shipping Co.*, 663 F.2d 4 (2d Cir. 1981).

8. *In re Michaels*, 624 F.2d 411, 1980 A.M.C. 1901 (2d Cir. 1980).

Sea Act⁹ or the doctrine of laches.¹⁰ Despite assertions that exceeding the time bar means that there is no dispute to arbitrate, the view of the courts is that these questions are solely for determination by the arbitrators and not for preliminary determination by the courts.¹¹

The true remedy where no contract exists is to seek a protective order of the courts staying the arbitration.¹²

I. APPOINTMENT OF THE ARBITRAL BODY: PROBLEM OF OWNER ARBITRATORS AND CHARTERER ARBITRATORS

If the two parties to a dispute really have free choice of the arbitrators to be appointed by them, there should be no reason to deny appointment as arbitrator to someone inordinately sympathetic, such as an officer or employee of one of the parties. This

9. 46 U.S.C. § 1304(5) (1976). See *Republic of Korea v. N.Y. Navigation Co.*, 469 F.2d 377 (2d Cir. 1972).

10. In this doctrine the passage of time alone does not bar claims. The passage of time must be accompanied by actual prejudice to the defendant to result in the bar of the action. The Supreme Court has said, "The test of laches is prejudice to the other party." *Gutierrez v. Waterman S.S. Co.*, 373 U.S. 206, 215 (1963).

11. *In re Trafalgar Shipping Co.*, 401 F.2d 568 (2d Cir. 1968). See also *Hanskar Shipping Co. v. Iron Ore Co. of Can.*, 1980 A.M.C. 1249 (S.D.N.Y. 1980).

12. 9 U.S.C. § 3 (1976) (stay of proceedings where issue therein referable to arbitration).

While it was the intent of the specific language to stay court proceedings until arbitration has been concluded, the statutory language is that, "upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration" the court shall stay the trial of the action. *Id.* Accordingly, where the court determines that the issue is not referable to arbitration, then under normal equity practice, upon a showing of irreparable harm, the court can protect its jurisdiction in the trial of the action by an order to stay arbitration.

In *Wilko v. Swan*, 346 U.S. 427 (1953), an action brought by a customer against a securities brokerage firm to recover damages for alleged misrepresentation in the sale of securities, the Supreme Court held the agreement for arbitrating future controversies between the parties to be void under section 14 of the Securities Act of 1933, despite the provision of the Arbitration Act. Under this view, the motion to compel arbitration should have been denied and a motion to stay arbitration should have been granted.

In *Merrill, Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117 (1973), an action brought by a former employee against his former employer concerning a profit sharing plan, the Supreme Court found that California's Wage Earners' Relief Statutes were not preempted by provisions of the Securities Exchange Act of 1934, whereby an arbitration of the dispute would have been required.

Recently, in *Louis Dreyfus Corp. v. Cook Indus., Inc.*, 505 F. Supp. 4 (S.D.N.Y. 1980), petitions to stay arbitration and to compel arbitration were before the court. Petitions to compel were granted. See also *In re J.E. Hurley Lumber Co.*, 148 F. Supp. 144, 1957 A.M.C. 1292 (S.D.N.Y. 1957).

suggestion makes us uneasy because we have an innate feeling that no one should be judge of his own claim.

Our repugnance at the idea of a party arbitrating his own dispute is strengthened by Mr. Justice Black's often-cited dicta in the famous *Commonwealth Coatings* case.¹³ This case indicates that arbitrators should be even more impartial than judges. Justice Black's framing of the question was significant: "whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration."¹⁴ His negative conclusion could be anticipated and summarized in his statement, "[Section 10] show(s) a desire of Congress to provide not merely for *any* arbitration but for an impartial one."¹⁵ Justice Black wrote on the appearance of bias:

It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review . . . any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.¹⁶

13. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 149 (1968). In this case a subcontractor sued the sureties of the prime contractor to recover payments owing. An arbitration, pursuant to the contract whereby a three man board was appointed, had rendered an award in favor of the prime contractor. The subcontractor sought to vacate the award on the ground of evident partiality of the third arbitrator who had had occasional business dealings with the prime contractor, *some of which involved the matter in dispute*, none of which was revealed before the award. The arbitral award was vacated. The decision of the court was four justices for vacation of the award (Black writing the opinion), three justices opposed (Fortas writing the opinion), and two justices concurring with the Black opinion but with an opinion by Justice White who restated the holding as follows: "where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed." *Id.* at 151-52 (White, J., concurring).

Justice White went on to note that if arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award. *Id.* at 152 (White, J., concurring). His attitude is best expressed in the sentence: "I see no reason automatically to disqualify the best informed and most capable potential arbitrators." *Id.* at 150 (White, J., concurring).

14. *Id.* at 145.

15. *Id.* at 147.

16. *Id.* at 148-50.

This language may have misled courts into the belief that the Supreme Court requires a standard beyond actual "partisanship" at the level of "*not even an appearance of partisanship*," an unrealistic standard for industry professionals.

In the maritime industry some arbitrators work for owners while others work for charterers and frequently arbitrators can be found who deal with both sides. As the maritime industry's problems become more complex because of financings of vessels and tax and labor law considerations, it is not unusual to find people whom we normally think of as "owners" acting as charterers and vice versa.

The innate sense of fairness previously mentioned should lead us to say that having agreed that disputes will be arbitrated, the parties do not have absolute free choice with respect to the personnel or the manner in which the arbitration is conducted. Thus, although other legal systems may permit the two-arbitrator award where the arbitration clause provides for a three-person arbitration, in this country the third arbitrator must be appointed.¹⁷

The American legal system expects that the parties will appoint people in whose professional expertise they have confidence. Thus, we customarily have party-appointed arbitrators whose business connections may be wholly non-neutral, in the sense that they are always identified with the exact same economic interests as the party appointing them. The New York Court of Appeals has said that even such a party-appointed arbitrator must act "in a quasi-judicial capacity and should possess the judicial qualifications of fairness to both parties so that he may render a faithful, honest and disinterested opinion."¹⁸

A later opinion has tolerated "partisanship" of party-appointed arbitrators as long as the arbitrator is not "deaf to the testimony or blind to the evidence presented."¹⁹ In that case a party appointed

17. *Western Can. S.S. Co. v. Compania de Navegacion San Leonardo Anglo Can. Shipping Co.*, 105 F. Supp. 452 (S.D.N.Y. 1952). Here, noting the English practice, the two party arbitrators, believing their decision would be unanimous, said that the third arbitrator need not be appointed; vacation of the award was granted.

18. *In re American Eagle Fire Ins. Co.*, 240 N.Y. 398, 405, 148 N.E. 562, 564 (1925).

19. *In re Astoria Medical Group*, 11 N.Y.2d 128, 137, 182 N.E.2d 85, 227 N.Y.S.2d 401 (1962). See also Note, *Members of Board of Directors Designated by Corporation as Partisan Arbitrator Not Subject to Disqualification on Ground of Presumptive Bias*, 63 COLUM. L. REV. 374 (1963).

a member of its board of directors as arbitrator, but since the parties had agreed to tripartite arbitration, they thereby agreed to partisan appointees by each other, and most importantly, "neither may object to the other's designation of someone associated with his interest or related to him."²⁰

This New York decision is also reflected in federal cases under the Arbitration Act. Thus, it has been held that the charter language providing for a three man arbitration could permit the naming of two "interested" person arbitrators (for owner: his managing agent; for charterer: the chartering broker), and there would be no ground for vacation of the award.²¹ The key to our tolerance for partisan arbitrators is the *full knowledge* and *agreement* of the parties with the further requirement that the "neutral" arbitrator appointed by the two partisan arbitrators becomes in effect the sole arbitrator, who clearly cannot be partisan in any way.

The law respecting disqualifications of arbitrators from maritime arbitrations can now give rise to much waste and inefficiency when awards are vacated because of disqualified arbitrators. The courts have said that the mere *designation* of an arbitrator does not create a situation for interference by the court.²² Under this view, it is necessary to await the award before the court can interfere.

At the first hearing the arbitrators must be judges of their own impartiality so that a party who contests the impartiality of the third party must put his case against that arbitrator on the record of the hearing, an obviously risky proposition if the challenge is denied. Note that in arbitrations administered by the American Arbitration Association (A.A.A.) the challenges are decided by the

20. 11 N.Y.2d 128, 138 (1962) (Desmond, C.J., dissenting).

21. *Petrol Corp. v. Groupement D'Achat des Carburants*, 84 F. Supp. 446, 1949 A.M.C. 273 (S.D.N.Y. 1949). Caution must be exercised with this case, however, because the party appointed arbitrators acted as advocates and the third arbitrator was the umpire. No objection was raised by the losing party until after the award. *See also* *Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 1963 A.M.C. 1039 (S.D.N.Y. 1962). In this case the court said, "in a tripartite arrangement, where each party to a dispute is given the right to select an arbitrator and the third member is selected by them or by a disinterested party, the arbitrator selected by the disputants cannot be expected to play a wholly impartial part. *They are partisans once removed from the actual controversy.*" 209 F. Supp. at 253, 1963 A.M.C. at 1044 (emphasis added).

22. *In re Dover S.S. Co.*, 143 F. Supp. 738 (S.D.N.Y. 1956); *Albatross S.S. Co. v. Manning Bros.*, 95 F. Supp. 459 (S.D.N.Y. 1951).

A.A.A. administrators, thereby removing the arbitrators from the position of judging their own actions.²³

If maritime arbitration is to remain flexible so that parties to a dispute can continue to enjoy the expertise of fellow members of the maritime profession, then we must be prepared to risk the inefficiency of the existing system described below. To overcome these problems, the only effective solution would be to submit the disputes to the administration of formal arbitral authorities such as the A.A.A. or the Society of Maritime Arbitrators (S.M.A.).

In recent years it has been recognized that it is impossible to have arbitration by shipping industry experts totally insulated from any previous contacts with the parties. This problem is even more extreme in the search for the arbitrator selected "chairman."²⁴ The problems have recently been discussed in an important Second Circuit decision and several lower court opinions.²⁵

The initial proposition to be recognized is that the third arbitrator can not have any direct and substantial financial relationship with a party nor any professional or attorney-client relationship with a party.²⁶

The recent case of *The Ross Isle*²⁷ shows that after more than sixty years of experience with arbitration statutes it is not yet clear whether an arbitrator is a *juror*, who must be kept isolated from a dispute until the hearing, or a *judge*, whose professional training

23. See AM. ARB. ASS'N R. § 18. Section 9 of the Rules of the Society of Maritime Arbitrators requires that not later than the commencement of the first hearing, an Arbitrator must disclose "any circumstance tending to raise a presumption of the bias or which he believes might disqualify him as an impartial Arbitrator, including close personal ties or business relations." Thereafter the parties shall declare if they are willing to proceed, and if either party declines to waive a presumptive disqualification "the vacancy thus created shall be filled in accordance with the applicable provisions of these Rules" (i.e. § 14).

24. The disqualifying "evident partiality," however, applies to every member of the panel and not just the "chairman." *Standard Tankers (Bahamas) Co. v. M/T Akti*, 438 F. Supp. 153 (E.D.N.C. 1977).

25. *International Produce, Inc. v. A/S Rosshavet*, 638 F.2d 548 (2d Cir. 1981) (*The Ross Isle*); *In re Sanko S.S. Co.*, 495 F.2d 1260, 1973 A.M.C. 2088 (2d Cir. 1973); *In re Cook Indus.*, 449 F.2d 106 (2d Cir. 1971); *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967); *In re Transmarine Seaways Corp.*, 480 F. Supp. 352, 1979 A.M.C. 1496 (S.D.N.Y. 1979).

26. See *In re Sanko S.S. Co.*, 495 F.2d 1260, 1973 A.M.C. 2088 (2d Cir. 1973). It was claimed that the third arbitrator had an undisclosed financial relationship with a party. The appellate court returned the record to the trial court for a factual hearing.

27. 638 F.2d 548 (2d Cir. 1981).

and oath of office permits the fact that he may have acquired information about a dispute outside the hearing to be disregarded.

In *The Ross Isle* case, a unanimous arbitration award had been vacated by the district court because of the failure of the panel chairman, appointed by the two party-designated arbitrators, to disqualify himself during the arbitration.²⁸ That vacation was reversed by the court of appeals.²⁹

The arbitration hearing began with disclosures in accordance with the S.M.A. rules, during which the panel chairman disclosed that counsel for the owners was, "handling one P & I case of ours."³⁰ Nevertheless, counsel for charterers accepted the panel.

A second hearing was held, at which the master and pilot testified before the panel chairman and the charterer-appointed arbitrator. Due to illness, the owner-appointed arbitrator did not read the transcript until later.

Before the third hearing, however, an incident occurred involving a vessel managed by the firm of which the panel chairman was a vice president. The panel chairman was personally involved in negotiations with charterers. The charterers were represented by another attorney in the same law firm which was representing charterers in the subject arbitration. Counsel for owners represented the panel chairman's firm. As a result of unsuccessful negotiations, arbitration was demanded in the new incident, and it appeared that the panel chairman might be called as a witness in the new arbitration dispute and be subject to cross examination by charterers. At that point counsel for charterers demanded that the panel chairman withdraw because of a presumption of bias resulting from the "adversary-type" roles which might be assumed in the new arbitration.³¹

The panel chairman declined to remove himself suggesting that counsel for charterers withdraw from the second arbitration.³² The panel chairman was prepared to proceed with the first arbitration on condition that a lawyer associated with the firm

28. *In re International Produce, Inc.*, 504 F. Supp. 736 (S.D.N.Y. 1980).

29. *The Ross Isle*, 638 F.2d at 552.

30. 504 F. Supp. at 737.

31. *Id.* at 738.

32. *Id.* This suggestion might properly be regarded as a declaration of war. Arbitrators must surely resist the temptation to write letters to counsel or parties in a proceeding before them unless merely to confirm a hearing date.

representing owners who had worked on both cases be withdrawn from the new dispute, which was done. A final hearing in the subject arbitration was held and a unanimous award rendered. The panel chairman was called as a witness in the new dispute and was subjected to a "vigorous cross-examination" by an attorney from the firm representing the charterers in the subject arbitration.³³

The district court's decision to vacate the award was based on the appearance of bias. The court noted that disclosure alone does not discharge the arbitrator's responsibility to avoid the appearance of partiality in view of the fact that it is "[easy and costless] to replace an arbitrator when proper disclosure is made and exception taken at the outset of arbitration."³⁴ In the district court's view there was not only a potential bias in favor of the owner but also a potential bias against the charterers which was aggravated by the cross examination because "[t]he arbitrator's exposure to the facts and issues in arbitration . . . is through the attorneys and not through the parties" and, "his rapport and ability to communicate with the attorneys may well have a substantial impact on the course of a proceeding."³⁵ Thus, the "unusual conjunction of contacts . . . with both law firms participating in the arbitration before him brings this within that special class of cases requiring vacation."³⁶

The district judge shared the concerns of earlier decisions over the small size of the maritime community and the inevitability that arbitrators will be drawn from active business practice so that a certain measure of interrelationship between arbitrators and parties or their counsel may exist or develop. He concluded, however, that the extent and nature of the interrelationships in this case were not susceptible to the normally effective practice of disclosure and waiver, and vacated the award.

The lower court decision, vacating a unanimous award, caused consternation among New York maritime arbitrators because of the supposed impossibility of obtaining learned and experienced arbitrators who had no speculative conflicts of interest and had never in the past become involved commercially with the parties in a dispute. It was feared that *The Ross Isle* case repre-

33. *Id.*

34. *Id.* at 739 n.2 (referring to the opinion of Judge Frankel in *Miserocchi v. Peavey Int'l Inc.*, No. 78 Civ. 1571 (S.D.N.Y. Sept. 15, 1978)).

35. *Id.* at 739.

36. *Id.* at 740.

sented an imaginary and unnecessary standard of non-involvement which might harm the development of maritime arbitration in America.

The Court of Appeals for the Second Circuit has now reversed the decision on the basis that the standard of "appearance of bias" used to disqualify the arbitrator in the lower court was a higher standard than Congress had developed in section 10 of the Statute, which required the vacation of an arbitration award where there had been *evident* partiality or corruption.³⁷

Reviewing the facts, the appellate court considered that the third arbitrator came to stand in the position of a non-party witness in a non-related arbitration between parties who were represented by the same law firms appearing before him in the challenged arbitration. The court noted both that the other arbitrators had strongly discouraged the resignation of the challenged arbitrator and that even the challenging attorney had expressed confidence that the challenged arbitrator could continue to act judiciously and objectively without partiality or bias. Thus the court concluded that there was no substantial basis for finding an appearance of bias; *a fortiori*, there was no evident partiality.³⁸

In a 1979 challenge to an arbitration award Judge Haight of the Southern District of New York had dealt with the question of the appearance of bias in an allegation that an arbitrator was disqualified because his company had previously represented another company in a claim wholly unrelated to the subject arbitration.³⁹ The earlier unrelated claim had also involved allegations of arbitrator bias.⁴⁰

Judge Haight reached his conclusions by way of the United Nations Convention on the Recognition and Enforcement of For-

37. *The Ross Isle*, 638 F.2d at 551.

38. *Id.* at 552.

39. *In re Transmarine Seaways Corp.*, 480 F. Supp. 352, 1979 A.M.C. 1496 (S.D.N.Y. 1979).

40. *In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 1978 A.M.C. 2108 (2d Cir. 1978). There, after the award, a party sought to vacate on grounds of bias of arbitrator, unknown to the party before arbitration began. The District Judge refused to permit discovery examination of the arbitrators, holding that only judicially supervised questioning of arbitration could take place, and then only on condition of the previous presentation of clear evidence of impropriety. No such clear evidence of impropriety was found where the moving party did not allege a direct financial stake in the outcome on the part of an executive of the firm operating the vessel (which was the subject of arbitration) who was a "close personal friend" of the challenged arbitrator. The allegation of close personal friendship was doubted in that it was based on service together on 19 arbitration panels. *Id.* at 701.

eign Arbitral Awards (article V of the Convention, incorporated in section 207 of the statute),⁴¹ whereby enforcement can be denied where it would be contrary to public policy as set forth by the Supreme Court in *Commonwealth Coatings*.⁴² Judge Haight concluded that the challenged arbitrator had no financial interest in the party (owner) and saw the charterer's complaint as solely that of the arbitrator's company (of which he was the President) representing another company that had previously asserted an unrelated claim against the charterer.⁴³ The charterer claimed that this relationship was giving "the appearance of bias," but the court determined there was no authority in the cases for so subjective a standard, noting that "[b]lemishes, like beauty, lie in the eyes of the beholder."⁴⁴ Accordingly, since there was no direct financial relationship and no challenge to personal integrity, the allegation of appearance of bias must be rejected.

Surely businessmen (and lawyers) have too much of their own work to do to waste their time in arbitration proceedings where they have been challenged for bias. There can be no financial attraction in remaining on such a panel for the arbitrator may not live long enough to collect a fee in such a case.

II. DISCLOSURES

Since free choice of the parties is the essence of the arbitral process, our courts will *not* protect the party who *knowingly consents* to the appointment of an arbitrator or panel chairman who may be partisan. In this light, *full disclosure* by the arbitrators of their relevant past histories, business connections and social acquaintances becomes the most important part of the first meeting of the arbitration. In order to protect the position of the parties with respect to items of which it could be chargeable with knowledge, parties must put questions to the arbitrators to elicit responses *on the record* and the arbitrator must himself insure that his responses are part of the record.⁴⁵

41. See *supra* note 3.

42. See *supra* note 13 and accompanying text.

43. 480 F. Supp. at 357-58.

44. *Id.* at 358.

45. *In re Ilios Shipping & Trading Corp.*, 148 F. Supp. 698, 1957 A.M.C. 1294 (S.D.N.Y.), *aff'd mem.*, 245 F.2d 873 (2d Cir. 1957).

The outer limits of the knowledgeable consent doctrine may be the case of *In re San Nicolas S.A.*,⁴⁶ in which the late Wharton Poor, a recognized authority on charter disputes, had been appointed sole arbitrator in a charter party dispute in which his firm was representing the shipowner. When the award was given in favor of the owner, the charterers sought to overturn the award. The court refused to do this in view of the fact that the charterer had full knowledge of Mr. Poor's status when they consented to his appointment. The dicta in the opinion, however, is hardly a letter of recommendation and should be viewed as a warning to the bar not to repeat it.⁴⁷

An important non-maritime arbitration holding now justifies the removal of an arbitrator who was a partner in the law firm representing one of the parties.⁴⁸

The losing party in an arbitration will not be permitted to raise objections for the first time to the arbitration panel *after* the award has been rendered.⁴⁹ Absolute propriety is thus not required of the arbitrators if counsel for the parties passes up the opportunity to challenge their qualifications.⁵⁰ Where the record shows the arbitrator possessed potentially prejudicial information, the court may not ignore this and conclude an absence of actual bias.⁵¹ By mentioning the existence of business dealings between an arbitrator and a party, the entire extent of such relations must be fully disclosed, otherwise the record creates or leaves an impression of bias requiring vacation.⁵² Thus, the fact that two arbitrators are shareholders

46. 21 A.D.2d 43, 248 N.Y.S.2d 143 (1964).

47. The lawyer chosen as arbitrator should have been more sensitive to the fact that being an arbitrator in a matter in which his firm represented one of the litigants would be regarded by many as unseemly. While there was probably no breach of ethics or propriety in any professional sense, the lack of sensitivity to the consequences of such an unlikely selection is regrettable. There are undoubtedly unusual situations where one may be quite justified in assuming such a risky quasi-judicial role, reasonably expecting to avoid any accusation of bias. But this commercial or maritime arbitration was hardly one in which such a happy outcome was to be reasonably expected.

21 A.D.2d at 45.

48. *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972). *But see Dulien Steel Products, Inc. v. M/S Ogeka*, 147 F. Supp. 167 (W.D. Wash. 1956) (award not vacated where third arbitrator had formerly been member of law firm representing a party).

49. *See In re Cook Indus. Inc.*, 449 F.2d 106 (2d Cir. 1971); *In re Garfield & Co.*, 432 F.2d 849 (2d Cir.), *cert. denied*, 401 U.S. 940 (1970).

50. *Overseas Private Inv. Corp. v. Anaconda Co.*, 418 F. Supp. 107 (D.D.C. 1976).

51. *See In re Sanko S.S. Co.*, 495 F.2d 1260, 1973 A.M.C. 2088 (2d Cir. 1973).

52. *Id.*

of the charterer gives rise to a presumption of bias requiring explanation.⁵³

The information elicited from arbitrators, truthfully or untruthfully, at the outset is of very great importance because of the principle that arbitrators' post-award testimony may not normally be used to establish fraud or misconduct in the making of an award.⁵⁴ The *Fukaya* case involved a unanimous award, signed by the three arbitrators, which the unsuccessful party sought to overturn by deposing the arbitrators to inquire into their motives to determine the existence of prejudice. The court ruled that in view of the fact that there was no dissenting arbitrator and the court possessed the transcript of the proceedings together with the written award, there was no basis for deposing the arbitrators since it was obvious that the arbitrators had effected in the award the result which they had intended. The court, however, noted that it might permit deposing the arbitrators to prove an essential mistake, as a result of which it could be argued that the award operated in a way not intended by the arbitrators.

Obviously, after the award, counsel for the parties is no longer concerned with antagonizing the arbitrators. Such is not the case at the Disclosures in the Arbitration Hearing where rigorous cross-examination of the third arbitrator can occur. Too rigorous an examination, however, might result in destroying counsel's hopes of obtaining a favorable award. The suggestion that the *voir dire* examination, practiced in state courts, is appropriate in arbitration ignores the relative impact of a cross-examination. In a rigorous courtroom cross-examination an attorney may offend only one of twelve or six jurors, who could still be persuaded by other jurors. The same vigorous cross-examination in an arbitration, where partisanship of another arbitrator already exists, may be fatal, especially where the arbitrators decide on their own qualifications. The danger for the valid award, whether unanimous or split decision, occurs when the record itself contains *unrefuted* allegations of par-

53. *Standard Tankers (Bahamas) Co. v. M/T Akti*, 438 F. Supp. 153 (E.D.N.C. 1977). Here one party was a subsidiary of Exxon in which two of the arbitrators held, respectively, 50 shares and 41 shares out of 226,000,000 shares outstanding; these interests were considered by the court to be a trivial rather than a substantial interest and therefore not disqualifying. *Id.* at 160.

54. *Fukaya Trading Co. v. Eastern Marine Corp.*, 322 F. Supp. 278, 1971 A.M.C. 905 (E.D. La. 1971).

tianship on the part of the third arbitrator.⁵⁵ Thus, in *Sanko*, the appellate court vacated a unanimous award and sent the case back for an evidentiary hearing on the business relationships between the third arbitrator and the charterer on the ground that there had not been full disclosure.

Prudence dictates that disclosures now begin with a recitation not only of the full details about the arbitrators' relations with the exact parties to the dispute but also the parent or subsidiary status of such parties and the financial interests involved therein, to be followed by arbitrators' disclosures with respect to the present dispute, past dealings with the parties and prior business and social relationships between and among the arbitrators and the attorneys for the parties. Upon conclusion of the "total hang-out" disclosure, the Chairman of the Panel should ascertain for the record that, in light of the disclosures, the Panel is satisfactory to each of the parties. Indeed, regardless of the fact that busy or expensive witnesses may be kept waiting, the Chairman should not proceed while issues concerning challenge to a panel member remained unresolved.

III. CONDUCT OF THE ARBITRATION PROCEEDINGS

With regard to the conduct of the arbitration proceeding, there is statutory language which clearly controls the actions of the arbitrators on the side of extreme caution, despite the natural tendency of busy commercial men to seek quick and efficient modes of proceeding. The most dangerous words in an arbitration hearing are those which suggest that the parties save time or short cut cumbersome requirements. Such approaches never work. The language involved is *misconduct* and *misbehavior* which leads to vacation of the award; the examples given are the failure by arbitrators to postpone a hearing where sufficient cause is shown, their refusal to hear evidence pertinent and material to the controversy or any other misbehavior which prejudices the rights of a party.⁵⁶ It is obviously misconduct where a non-lawyer chairman of an arbitration panel consults his personal attorney before preparing his written award.⁵⁷

55. *In re Sanko S.S. Co.*, 495 F.2d 1260, 1973 A.M.C. 2088 (2d Cir. 1973).

56. 9 U.S.C. § 10(c) (1976).

57. *Holliday v. Samuels*, 278 A.D. 687, 103 N.Y.S.2d 338 (1951).

Although technical rules of evidence, applicable in jury trials, are not observed in arbitration proceedings,⁵⁸ it follows from the "misconduct" examples in the statute that the failure by the arbitrators to permit cross-examination at all, or to permit cross-examination to continue, should lead to a charge of misconduct since the opportunity to cross-examine acts like an oath in guaranteeing the truthfulness of testimony. Obviously, this can be abused by counsel. However, there appears to be no alternative for arbitrators but to sit in cheerful silence, exhibiting no signs of exasperation.⁵⁹ It is an open question whether counsel conducting an unsuccessful cross-examination in a lost cause could refrain from saying: "Let the record reflect that Arbitrators A and B were reading the stock quotations in the Wall Street Journal during cross-examination." Of course the most effective cross-examination comes from the difficulty the witness has in giving a truthful, coherent answer and not the vehemence or sarcasm of counsel which will probably not impress "commercial men" anyway.

By statute, failure of the arbitrators to postpone a hearing on request is misconduct,⁶⁰ but it does not follow that the arbitration cannot proceed where one of the parties is so discourteous as not to show up at a scheduled hearing. In such case the arbitrators can proceed without the missing party and even proceed to an award.⁶¹

While orderly procedures should be used, the purpose of the fact finding is to arrive at the truth. Thus, arbitrators should be

58. *Cf. In re Chevron Transp. Corp.*, 300 F. Supp. 179 (S.D.N.Y. 1969) (where the failure of the arbitrators to insure that the ship's logs were fully and timely available to the other side was cited as misbehavior causing prejudice to the opposing party but rejected by the court as insubstantial).

59. *See Dan River, Inc. v. Cal-Togs Inc.*, 451 F. Supp. 497 (S.D.N.Y. 1978) (a non-maritime case showing an abuse of the postponement privilege by a party which did not result in vacation of the award). The chief witness for the day in question was an employee of the party whose appearance had been scheduled months before the witness made a conflicting engagement for the time of his scheduled appearance. The failure of the arbitrators to adjourn did not result in vacation of the award.

60. It is also misbehavior for the arbitrators to fail to notify all parties of the time and place of hearing. *Petrol Corp. v. Groupement d'Achat des Carburants*, 84 F. Supp. 446, 1949 A.M.C. 273 (S.D.N.Y. 1949).

61. *In re Petroleum Transp., Ltd.*, 419 F. Supp. 1233 (S.D.N.Y. 1976); *In re N.V. "Nederland"*, 1945 A.M.C. 43 (S.D.N.Y. 1944) (order of Bright, J.) (*The Silvaplane*); *cf. Standard Tankers (Bahamas) Co. v. M/T Akti*, 438 F. Supp. 153 (E.D.N.C. 1977) (demands for additional cross-examination of a witness who had been directly examined at a previous hearing where the opposing party was absent before becoming ill; the demands were seen as unreasonable after examination on written interrogatories and four hearings examining the demanded witness' subordinate and no showing of the points to be elicited had been made).

prepared to take testimony out of order if it will assist in developing all the facts.⁶² The normal order of procedure might be as follows:

1. Introduction and presentation of claimant's case in chief—both factual and expert witnesses should be preceded by a presentation of all relevant documents.
2. Introduction and presentation of respondent's case in chief—both factual and expert witnesses challenging the claimant's facts.
3. Rebuttal by the claimant—the call or recall of witnesses whose assertions will directly counter those of the respondent.
4. Rebuttal by the respondent of claimant's rebuttal.
5. Optional summary of arguments by opposing counsel, usually followed by the exchange of written briefs.

While flexibility can be permitted on the question of an arbitrator's absence during the taking of testimony on condition that he reads it, it is certain that testimony cannot be received from one party in the absence of the opposing party.⁶³

Lastly, neither statute nor decision requires that an arbitration proceed under fixed rules, and it is the opinion of many experienced admiralty counsel that fixed rules such as the A.A.A. or S.M.A. Rules are not necessary in the hands of experienced arbitrators who can make up the procedures as they go along in order to accommodate the problems of each case as they occur. Novel procedures, radically different from those customarily used in arbitral or judicial proceedings, should not be required without the consent of all parties because of a possible argument of prejudice by a party. Due process is usually an old and familiar process.

62. *Steamship Alexandra*, 1966 A.M.C. 2246, 2252 (1966) (Ferris, Besman & Bush, Arbs.).

63. *Totem Marine Tug & Barge, Inc. v. North Am. Towing Co.*, 607 F.2d 649, 1980 A.M.C. 1961 (5th Cir. 1979). In this case an arbitration award was vacated on the grounds of misbehavior of the arbitrators in consulting owner's counsel to determine the amount of possible charter hire as damages without advising charterer's counsel and on the grounds of exceeding their powers by awarding damages on an issue not submitted to them. The Fifth Circuit found that the arbitrators had erred in excess of their powers by proceeding to base their decision on damages for charter hire, something not claimed by the owner. To obtain information of the vessel's earnings upon which to base charter hire damages the arbitrators consulted owner's counsel by telephone after the hearings had ended and without informing opposing counsel.

The question of arbitrator behavior in the questioning of witnesses should be tested by the statutory language, "evident partiality." Thus, while arbitrators "may" question witnesses to develop uncertainties in the witness testimony, this right should rarely be exercised and then only with extreme caution.⁶⁴

All the previous discussions presuppose a written record—either a verbatim transcript or summaries of testimony. The latter form of record may have been satisfactory in the formative years of arbitration, but it is likely that despite a lack of requirements, no arbitration would be held in New York today without a verbatim transcript.

IV. FORM OF THE AWARD—WITH OR WITHOUT REASONS

The United States Supreme Court has sustained an arbitration award without reasons⁶⁵ and this merely sanctions longstanding practice. While the reasoned award may be the norm in European arbitration systems, our tradition has required quick and relatively informal procedures. It has also long been recognized that to require concurring arbitrators to force themselves to use the exact same words in expressing their reasons might delay the arbitration procedure considerably. Another explanation, usually unexpressed, for not requiring reasoned awards is the desire of businessmen *not* to give the lawyers something on which to base vacation of the award.⁶⁶

The tradition of the award without reasons is so well established that awards with reasons were once suspect even to the courts,⁶⁷ but the courts soon developed ways to insulate the award from the reasons behind it. Thus, we see the idea that the arbitrators' stated opinion can be treated as *surplusage* so long as the

64. See *Cities Serv. Oil Co. v. American Mineral Spirits Co.*, 22 F. Supp. 373, 1937 A.M.C. 1250 (S.D.N.Y. 1937). After the award the third arbitrator was challenged on "evident partiality" because of excessively hostile questioning of a party's expert witnesses on 125 pages of a 731 page transcript. The court denied the challenge on the ground that the arbitrator was himself an expert questioning "in his element." *Id.* at 376.

65. *Atkinson v. Sinclair Ref. Co.*, 370 U.S. 238, 244 n.4 (1962).

66. *But see In re Sobel*, 469 F.2d 1211 (2d Cir. 1972) (a nonmaritime case where the court of appeals said that it was safer for arbitrators not to give their reasons).

67. *In re States Marine Corp.*, 127 F. Supp. 943, 1954 A.M.C. 2110 (S.D.N.Y. 1954). In this case the court felt it necessary to note that the fact that the arbitrators stated reasons for the award did not mean that they had exceeded their powers in so doing.

award was directly responsive to the issues.⁶⁸ The practical result of this view is that the clear meaning of the award cannot be controverted by imprecise reasoning since the arbitrators are free to make erroneous statements of the law.

With the establishment of S.M.A.'s published award service and the occasional excerpts of awards in *American Maritime Cases*, *Lloyd's Maritime Law Newsletter* and other publications, it can be expected that reasoned awards will become the norm rather than the exception in future maritime arbitrations. It is highly desirable for a legal system, presumably based on logic, to have available the reasoning of the most qualified members of an industry in the resolution of industry problems.

V. LACK OF UNANIMITY

The use of panels of three rather than two arbitrators seems to presuppose the possibility of disagreement and has been recognized by the United States Supreme Court in the case of *The Edward A. Ryan*,⁶⁹ wherein the Court held that it was proper for the award to be made and confirmed where four of five arbitrators had concurred.⁷⁰

The courts have taken this one step further to permit a majority-based award to be made without the signature of one party arbitrator to the award.⁷¹ In the *Stef* case, the impartiality of the three arbitrators was questioned by counsel during the hearing whereupon one arbitrator immediately resigned. It was held that it did not exceed the powers of the two remaining arbitrators to render an award in the absence of the third.

VI. REVIEW OF THE AWARD FOR ERRORS

Lawyers and laymen both are familiar with the legal maxim *De Minimis non Curat Lex*—"The law does not notice trifles," but every attorney proposing an arbitration clause to be included in a contract for his client (and every client) should be aware of the

68. *Universal Shipping Corp. v. Ionian S.S. Co.*, 1967 A.M.C. 2759 (S.D.N.Y. 1967). See also *Amoco Overseas Oil Co. v. Astir Navigation Co.*, 490 F. Supp. 32, 1980 A.M.C. 2451 (S.D.N.Y. 1979) (where the court said that ambiguity or error in the opinion cannot upset the award because arbitrators are not obliged to give opinions).

69. *Marine Transit Corp. v. Dreyfus*, 284 U.S. 263 (1932).

70. *Id.* at 276.

71. *In re Stef Shipping Corp.*, 209 F. Supp. 249, 1963 A.M.C. 1039 (S.D.N.Y. 1962).

arbitration maxim, *De Maximis non Curat Lex*—"You can't complain after a stupid award." The rationale is that the risks to which the parties have consented are erroneous fact finding⁷² and legally incorrect decision.⁷³ Arbitration in the United States does not "warrant" correct decisions. (Of course, nowhere in the United States Constitution nor in state constitutions is there a provision which states that a citizen has a *right* to have the law decided correctly in the courts.)

Illustrative of this general proposition are the broad statements by two important maritime courts, the United States Courts of Appeals for the Ninth and Second Circuits. The Ninth Circuit has said: "A mere error in the law or failure on the part of arbitrators to understand or apply the law, is not sufficient ground to set aside an award of arbitrators under the Federal Arbitration Act."⁷⁴

To the same intent the Second Circuit has said: "On review, the court may not rejudge the decision of the arbitrators on the merits. The decision may be upset only for fraud, corruption, partiality, ultra vires action or perverse misconstruction of the law."⁷⁵

The broad language will be applied necessarily hundreds of times as awards are brought forward for confirmation in the district courts by the victorious parties where, on motion to confirm, the court's powers are narrowly circumscribed, the court's function being merely to determine whether the arbitrators' award falls within the four corners of the dispute submitted. Thereafter, the award will not be overturned because it is based on a misinterpretation of law or insufficient supporting facts.⁷⁶

72. See *In re South E. Atl. Shipping, Ltd.*, 356 F.2d 189, 1966 A.M.C. 434 (2d Cir. 1966); *In re Harbor Island Spa Inc.*, 314 F. Supp. 471 (S.D.N.Y. 1970).

73. See *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Pan.*, 312 F.2d 299 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963); *Amicizia Societa Navigazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 1960 A.M.C. 2070 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960).

74. *San Martine Compania de Navegacion S.A. v. Saguenay Terminals Ltd.*, 293 F.2d 796, 1962 A.M.C. 333 (9th Cir. 1961).

75. *Amicizia Societa Navigazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 1960 A.M.C. 2070 (2d Cir.), *cert. denied*, 363 U.S. 843 (1960). See also *Saxis S.S. Co. v. Multifacs Int'l Traders, Inc.*, 375 F.2d 577 (2d Cir. 1967).

76. See *Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Pan.*, 206 F. Supp. 777, 1964 A.M.C. 739 (S.D.N.Y. 1962), *aff'd*, 312 F.2d 299 (2d Cir.), *cert. denied*, 373 U.S. 949 (1963).

A. *Finality of Award*

The statutory requirement that the award be "final and definite"⁷⁷ did not foresee the division of proceedings into a decision on liability to be followed by an award of damages. This division has proven its usefulness in judicial proceedings and arbitrations where it permits the parties to arrive at a negotiated settlement after the principal legal issue of liability has been determined. Nevertheless, it is not now possible to use the enforcement powers of the federal courts where an interim award dealt only with the legal issue of the existence of an agency relationship and did not go further to the resulting determination of amounts due.⁷⁸ It is only when there has been a complete determination of all the claims submitted to the arbitrators that it will be possible to obtain enforcement.⁷⁹

B. *Miscalculation*

Where on the face of it the arbitrators have clearly and unintentionally miscalculated the amount of the award, the completed although erroneous award does not deprive the arbitrators of their powers to correct mistakes in calculation and the courts are free to resubmit the award to the same arbitrators for a correct calculation. This distinction of miscalculation, which is correctable, from an error of fact or law, which is not correctable, was made in a lengthy New York State maritime arbitration, involving lost molasses, where the court said that an award could be set aside for palpable errors in the nature of a miscalculation of figures or the use of a false measure or weight which appears on the face of the award.⁸⁰ In the federal courts the resubmission of a miscalculated award is authorized in section 11 of the statute. Despite this autho-

77. 9 U.S.C. § 10(d) (1976). This section empowers the appropriate district court to vacate arbitration awards "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, *final*, and *definite* award upon the subject matter submitted was not made." (emphasis added).

78. *Puerto Rico Maritime Shipping Auth. v. Star Lines Ltd.*, 454 F. Supp. 368 (S.D.N.Y. 1978).

79. *In re Michaels*, 624 F.2d 411, 1980 A.M.C. 1901 (2d Cir. 1980). See also *Amoco Overseas Oil Co. v. Astir Navigation Co.*, 490 F. Supp. 32, 1980 A.M.C. 245 (S.D.N.Y. 1979). The "bifurcated hearing" has been approved as *not*, being an imperfect execution of arbitrators' powers. *Panemena Maritima v. J.E. Hurley Lumber Co.*, 244 F.2d 286 (2d Cir. 1957); see also *Travelers Ins. Co. v. Davis*, 490 F.2d 536 (3d Cir. 1974).

80. *In re First Nat'l Oil Corp.*, 2 Misc.2d 225, 151 N.Y.S.2d 309 (Sup. Ct.), *aff'd*, 2 A.D.2d 590, 157 N.Y.S.2d 313, *appeal denied*, 3 A.D.2d 672, 159 N.Y.S.2d 673, *appeal dismissed*, 2 N.Y.2d 992, 143 N.E.2d 342, 163 N.Y.S.2d 604 (1956).

rization, the provision is permissive, not mandatory, so that the judge has discretion whether to require resubmission of the award if such correction would be inordinately expensive.⁸¹

C. *Manifest Disregard of the Law and Exceeding Powers*

Much has been written on this subject lately and I shall not review it all.⁸² For counsel or client disappointed in the results of an arbitration award, the doctrine has not provided the opportunity to obtain easy reversals; as was once thought. It originated in *Wilko v. Swan*, where the Supreme Court indicated, in dictum, that in addition to the statutory grounds for vacating, an arbitration might be vacated where there was a "*manifest disregard*" of the law.⁸³ This cryptic expression has not been fully tested even now. Manifest disregard of the law has been held to not include the failure to use a previous arbitral award as precedent,⁸⁴ the failure to correctly follow legal decisions,⁸⁵ the misinterpretation of a contract,⁸⁶ or the failure of arbitrators to rule on one of a parties' legal arguments.⁸⁷ No case has yet overturned an arbitral award for manifest disregard.⁸⁸ Speculation is that it will not apply until arbitrators correctly state the law clearly applicable to the problem and then just as clearly indicate a deliberate refusal to follow it for no rational or justifiable reason.⁸⁹ The "frivolous" use of this argument has resulted in a penalty from the Second Circuit.⁹⁰

81. *In re Sociedad Armadora Aristomenis Pan. S.A.*, 184 F. Supp. 738 (S.D.N.Y. 1960). See also *In re South E. Atl. Shipping Ltd.*, 356 F.2d 189, 1966 A.M.C. 434 (2d Cir. 1966).

82. See Bauer, *Manifest Disregard of the Law*, 2 LMCLQ 142 (1972).

83. 346 U.S. 427 (1953). Justice Reed comments, "In unrestricted submissions, such as the present margin agreements envisage, the interpretations of the law by the arbitrators in contrast to *manifest disregard* are not subject, in the federal courts, to judicial review for error in interpretation." *Id.* at 436-37 (emphasis added).

84. *In re Western Sea Transp. Ltd.*, 1978 A.M.C. 1358 (S.D.N.Y.).

85. *Anthony Shipping Co. v. Hugo Neu Corp.*, 482 F. Supp. 965, 1980 A.M.C. 1477 (S.D.N.Y. 1980).

86. *Reynolds Secs. Inc. v. Macquown*, 459 F. Supp. 943 (W.D. Pa. 1978).

87. *Amoco Overseas Oil Co. v. Astir Navigation Co.*, 490 F. Supp. 32, 1980 A.M.C. 2451 (S.D.N.Y. 1979). See also *Parcel Tankers Co. v. Sidomar S.A.*, 1981 A.M.C. 39 (S.D.N.Y. 1980).

88. See *In re I/S Stavborg*, 500 F.2d 424, 432 (2d Cir. 1974) (Mansfield, J., dissenting).

89. See *In re I/S Stavborg*, 500 F.2d 424 (2d Cir. 1974); *Republic of Korea v. N.Y. Navigation Co.*, 469 F.2d 377 (2d Cir. 1972); *Saxis S.S. Co. v. Multifacs Int'l Traders*, 375 F.2d 577 (2d Cir. 1967); *San Martine Compania de Navegacion v. Saguenay Terminals*, 293 F.2d 796, 1962 A.M.C. 333 (9th Cir. 1961); *Fukaya Trading Corp. S.A. v. Eastern Marine Corp.*, 322 F. Supp. 278, 1971 A.M.C. 905 (E.D. La. 1971).

90. *In re South E. Atl. Shipping Co.*, 356 F.2d 189, 1966 A.M.C. 434 (2d Cir. 1966).

The language justifying vacation of an award where "the arbitrators exceeded their powers"⁹¹ has also not yet been excessively tested. A recent case has said that the phrase must be given the narrowest possible reading.⁹²

CONCLUSION

"Overly technical judicial review of arbitration awards would frustrate the basic purposes of arbitration: to resolve disputes speedily and to avoid the expense and delay of extended court proceedings."⁹³

Many people recognize that accomplishment of the dual purpose of arbitration is now only wishful thinking. As society becomes inundated with laws, the obvious consequence is for lawyers to penetrate into all areas of conflict with new rules requiring more lawyers. This is what is happening in the arbitration process. The basic thrust of this paper has been to restate the general principle that since the parties have chosen to arbitrate their dispute rather than engage in judicial proceedings, the courts will not be overly technical as to such essentials as understanding the facts, interpreting the law, or analyzing the evidence. Nevertheless, courts are requiring, to an increasing degree, not only that the entire arbitration *be* fair but *appear* to be fair.

91. 9 U.S.C. § 10(d) (1976).

92. *Mobil Oil Indonesia Inc. v. Asamera Oil (Indonesia) Ltd.*, 487 F. Supp. 63 (S.D.N.Y. 1980). *See also* *Totem Marine Tug & Barge, Inc. v. North Am. Towing Co.*, 607 F.2d 649, 1980 A.M.C. 1961 (5th Cir. 1979); *Molino v. Louis Dreyfus Corp.*, 1979 A.M.C. 1878 (S.D.N.Y. 1979); *States Marine Corp. v. Power S.S. Co.*, 127 F. Supp. 943, 1954 A.M.C. 2119 (S.D.N.Y. 1954).

93. *Federal Commerce & Navigation Co. v. Kanematsu-Gosho, Ltd.*, 457 F.2d 387, 389 (2d Cir. 1972).