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Arbitration From the Viewpoint of the Practicing Attorney: An Analysis of Arbitration Cases Decided by the New York State Court of Appeals From January, 1973 to September, 1985

Cover Page Footnote
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This article is available in Fordham Urban Law Journal: https://ir.lawnet.fordham.edu/ulj/vol14/iss3/2
I. Introduction

Over a period of years, recourse has increasingly been had to arbitration as a method of dispute resolution in both the public and private sectors. There is every indication that this trend will continue and expand in the future. In his opening address at the 1985 Annual Meeting of the American Law Institute last May, Chief Justice Warren Burger urged us to "take a fresh look at the entire structure we have created to resolve disputes" and deplored the fact that "as we now practice it, that system is too costly, too painful, too destructive and too inefficient." At the recent meeting of the American Arbitration Association, the Chief Justice again urged recourse to arbitration.2

The Community Dispute Resolution Centers Program of our state's Unified Court System is expanding each year, with new centers being established across the state. Chapter 156 of the Laws of 1984 made the Program a permanent component of that System,3 and it was expanded by Chapter 91 of the Laws of 1985.4 In June, 1984, the New York State Bar Association released an interesting report, en-
titled "Alternatives to Court Resolution of Disputes," applauding and encouraging the activities of the Program.\(^5\)

The American Bar Association Journal of February, 1985 contained an article describing and promoting "The Arbitration Alternative"\(^6\) and, in its August, 1985 issue reported the adoption by more than 125 chief executive officers and general counsel of major corporations of an "Alternative Dispute Resolution Corporate Policy Statement."\(^7\) This Statement, manifesting a policy to explore out-of-court methods to resolve disputes before pursuing litigation, was signed by American Express, Bristol-Meyers, General Motors, I.T.T., J.C. Penney, and Xerox, among others.\(^8\) The policy is supported by significant elements in national corporate leadership.\(^9\)

In light of these developments, and what the author perceives as the probability of a greatly expanded use of arbitration, it appears that an overall analysis of arbitration cases in the New York State Court of Appeals in the last few years may be useful. The author has been re-examining the court's decisions since January, 1973, when he became a member of the court, a period in which there have been well over two hundred appeals in arbitration cases. He has elected to organize this material in a perspective that he hopes will be of particular advantage to the practicing attorney.

**II. Arbitration Proceedings in General**

Much has been written, and more spoken, on the advantages and disadvantages of recourse to arbitration. It suffices, for the purposes of this Article (the intention is to explicate, not to extol), to speak in broad generalities, with the accompaniment of a caution that each individual dispute is entitled to an independent evaluation in light of its own particular factors and the special context in which it arises.

At the outset, we must understand that "[a]rbitration, despite or because of its many merits, provides a framework for dispute res-

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8. Id.
9. Id. ("The Policy was developed by the Center for Public Resources, which says the National Association of Manufacturers, the Business Roundtable, the American Insurance Association and the American Corporate Counsel Association also support it.")
olution far different from the traditional litigation framework."

The objective of judicial resolution of controversies is to determine the rights of the litigants and to grant attendant relief, both within the confines of carefully prescribed procedures and rules. The role of the arbitrator is to resolve controversies between the parties as dictated by reason and common sense, free from the rigidities of prescribed procedure and rule. An arbitrator "may do justice as he sees it, applying his own sense of law and equity to the facts as he finds them to be and making an award reflecting the spirit rather than the letter of the agreement . . . .""11 "In the final analysis 'Arbitrators may do justice' and the award may well reflect the spirit rather than the letter of the agreement.""12 Depending on one's perspective, the nature and quality of the proof and arguments available, and the ultimate objective sought to be achieved, this may make the prospect of arbitration attractive in varying degrees or, perhaps, a horror to contemplate.

In general, in comparison with judicial litigation, arbitration proceedings are thought to be less expensive and less time-consuming, resulting in expeditious dispositions. A very real aspect of finality attaches to the initial award, without the prospect of endless appellate procedures or the prospect of return to the arbitral forum for a new determination. Awards in arbitration, as a practical matter, are nearly immune from judicial review. The process itself, and thus its end product, is often more readily comprehensible to the client. There is not confronted the sometimes difficult-to-understand constraints of rules of pleading, presentation of evidence, and practice at both the initial and appellate stages. The participation of the client in the decision-making process is both more significant and more satisfying.

With respect to the quality of the decision-making itself, there can often be made available an expertise which is unavailable in judicial proceedings. It is one thing to offer the testimony of competent expert witnesses; it is quite another to infuse the decision-

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reaching with such expertise. This may occur when the issues at stake include the adequacy of performance of agreements for construction, for manufacture, or for purchase and sale of merchandise and where commercial practice, trade usage, and the reasonable expectations of the parties have a legitimate bearing. Problems of valuation of real and personal property, problems in admiralty, and patent licensing often lend themselves to resolution in arbitration. In labor relations, considerations of the ongoing relationships of the parties may make arbitration especially suitable. Therefore, the parties may desire and find arbitration the more acceptable, equitable, and fair method to resolve their differences, free from judicial rigidities, both in the determination of the merits of their dispute and in the fashioning of remedies.

Arbitration offers the very great advantage of confidentiality and the preservation of privacy, as to both the fact of controversy and the details of its resolution. Other advantages in the context of particular relationships and particular disputes will come to mind.

For one schooled and experienced in the judicial process, however, the prospect of arbitration inescapably presents the spectre of being cut adrift, as it were, and triggers understandable anxieties. There is nothing, except—perhaps—experience, to equal the confidence we have in the fairness and protection to be found in the judicial system, both at nisi prius and, more particularly, in the present context, in the procedures for appellate review and rectification of error. Those of us trained and experienced in the law and the legal system legitimately take great comfort on behalf of our clients (as well as ourselves!) in the identification and containment of issues, the assurances of predictability of the presentation of evidence, the guarantee of procedural due process, the availability of appellate review for correction of error, and the possibility of a second chance at an initial determination (with the accompanying extended opportunities for negotiated settlements), and in general, protection against the risks of an unstructured, free-wheeling, non-reviewable determination.

There can be no general rubric and no set of rubrics which may be laid over a controversy, in the manner of a template, to dictate the choice or rejection of arbitration. Each controversy or set of controversies merits its own evaluation with respect to the desirability and feasibility of recourse to arbitration.13

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In the material which follows, certain distinctions should be borne in mind, although specific reference to them has been incorporated in the text at some points. There is a difference between submission of an existing controversy to arbitration for resolution and an agreement to submit future disputes to resolution by arbitration. Differences of position which arise in labor relations between employee and employer fall into two categories: grievance arbitration and interest arbitration. Finally, there are procedural differentiations to draw between voluntary and compulsory arbitration, with a slightly expanded scope of judicial review of awards made in compulsory arbitration.

III. The Arbitration Agreement

The practicing attorney has heavy threshold responsibilities in advising whether the particular matter, whether by way of submissions or agreements to arbitrate in the future, should go to arbitration or be left to judicial resolution.

A. Is a Choice Available?

The first question the attorney must ask is whether arbitration is mandated by statute. For example, arbitration of claims is compulsory under the Automobile Accident Indemnity Act (so-called "No Fault"), but its use is restricted in some consumer transactions. In each case, the statutory prescription is controlling.

14. However, New York's Civil Practice Law and Rules appear to draw no procedural distinctions between these discrete proceedings. N.Y. Civ. Prac. Law § 7501 (McKinney 1980).

15. Grievance arbitration involves the resolution of specific grievances which have arisen. See D. Siegel, New York Practice § 586, at 829 n.23 (1978) (interest arbitration "is in contrast with the more usual situation, in which a dispute under an existing agreement is arbitrated—'grievance' arbitration in labor terminology") [hereinafter cited as Siegel].

16. Interest arbitration involves the resolution of terms and provisions of prospective collective bargaining agreements and employment contracts. See Siegel, supra note 15, § 586, at 829 n.23 ("When after an impasse these matters go to arbitration, labor parlance calls it 'interest' arbitration, in which the arbitrators actually write a contract for the parties").

17. N.Y. Ins. Law § 5105(b) (McKinney 1985) ("The sole remedy of any insurer or compensation provider to recover on a claim arising pursuant to subsection (a) hereof, shall be the submission of the controversy to mandatory arbitration pursuant to procedures promulgated or approved by the superintendent. Such procedures shall also be utilized to resolve all disputes arising between insurers concerning their responsibility for the payment of first party benefits.").

Second, the attorney must consider whether arbitration of the particular subject matter or the remedy sought is barred by considerations of public policy. Here, predictability is less certain. A public policy to bar access to arbitration must be "strong," "substantial," or involve matters of "gross illegality or its equivalent," or of a non-delegable "statutory or constitutional authority." The courts will intervene only where the policy is such as to "prohibit, in an absolute sense, particular matters from being decided or certain relief being granted by an arbitrator." Frequent resorts to and incantations of public policy as calling for vacatur of arbitration awards have been regularly rejected by the Court of Appeals; public policy is not a promising predicate on which to base arguments in opposition to arbitration.

Because, in general, considerations of public policy normally arise after the submission or agreement to arbitrate has been concluded, either pre-award or post-award, the relevant cases are discussed at a subsequent point.

**B. Is Arbitration Appropriate?**

If a choice is available, initial advice must be offered as to whether the particular controversy or series of prospective controversies should be resolved in arbitration or left to judicial determination. The advantages and disadvantages of arbitration should be canvassed. Consideration should be given to the nature of the controversy and to the remedy sought, to the positions and attitudes of the parties, to prognostications of success in the outcome, to the risks of failure, and to any special or peculiar factors.

**C. Considerations in Drafting the Arbitration Clause**

If, after weighing the prospective advantages and disadvantages of arbitration and judicial proceedings, it is decided to have recourse to arbitration, inasmuch as such arbitration will wholly be the crea-


21. See infra notes 56-69 and accompanying text.
ture of voluntary agreement, great care must then be taken in drafting the arbitration clause. By specification in their submission or agreement, the parties can almost completely control the arbitral process. Experience shows that much too little attention has been focused at this critical stage of the process.

Fundamental consideration must be addressed, of course, to the scope of the arbitration clause—whether it is to be a so-called "broad" arbitration clause or whether its scope is to be somehow limited or restricted. Thus, what precisely are the issues which the parties intend to be submitted to the arbitrator? The arbitration clause should be analyzed both as a choice of forum and as a delineation of issues. It is at the conclusion of this analysis and on the formulation of the desired scope of arbitration that the draftsmen of arbitration clauses all too often rest. Again, experience shows that thoughtful anticipation and careful expression can avoid questions which may otherwise be left to future resolution.

Issues to be considered in drafting the arbitration clause include: (1) whether compliance with contractual specifications as to time and manner of instituting arbitration proceedings and as to procedures prior to arbitration is to be determined by the arbitrator in the course of and as incident to the management of the arbitration proceeding or by the courts as an explicitly stated condition precedent to access to the arbitration forum;\(^{22}\) (2) whether there must be mutuality of the right to arbitration, that is, may one party have the right to arbitrate irrespective of whether the other or another has a corresponding right;\(^{23}\) (3) if the rights of third parties may be implicated, whether the arbitrator may resolve the issues between the parties to the arbitration agreement and grant a remedy irrespective of the non-participation of such third parties;\(^{24}\) (4) in a collective bargaining agreement, whether the right to grieve or to seek arbitration, or both, should be accorded the individual employee as well as the union;\(^{25}\) (5) whether duplicative review of disciplinary action should be permitted by both arbitration and departmental

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review procedures and, if so, whether provision should be made for reconciliation of possibly inconsistent results;\(^6\) (6) in a document modifying or terminating the substantive provisions of their agreement, whether the parties also should expressly revise their arbitration clause (if not, the interpretation and application of their document of modification of termination will be for the arbitrator and not the courts to determine);\(^7\) (7) whether there are to be any limitations on the power of the arbitrator, either in resolving the substantive issues or in fashioning the remedies;\(^8\) and (8) whether, and to what extent, the arbitration award is to have preclusive effect in subsequent arbitration or judicial proceedings between the parties.\(^9\)

Other instances in which explicit provisions relating to the access to the arbitral forum, the conduct of the arbitration proceeding, the available remedies, or the consequences to attend the arbitration award may be thought desirable will occur to the careful, forward-looking draftsman. The author’s impression is that altogether too little attention has customarily been devoted to the drafting of the arbitration clause—literally a determinative stage in the arbitration process.

**IV. Judicial Proceedings With Reference to Arbitration Pre-Award**

**A. In General**

Initially, there was a judicial hostility to arbitration as ousting the courts of their legitimate and traditional adjudicative role.\(^30\) This has now been reversed almost entirely in the courts of New York. Our courts now look with favor on arbitration and, as a matter of


policy, interfere as little as possible with the freedom of consenting parties to resolve their disputes by that means.\(^\text{31}\)

**B. Proceedings to Compel or to Resist Arbitration**

The judicial procedures available both to compel and to resist arbitration are prescribed in Article 75 of the Civil Practice Law and Rules (CPLR).\(^\text{32}\) The practicing attorney should be thoroughly familiar with the provisions of this Article. Little advantage would be realized, for present purposes, in any detailed explication of these provisions. A few scattered comments based on recent decisions of the Court of Appeals, however, may be appropriate.

The statute limits the scope of judicial inquiry and possible intervention to the classic three threshold questions: (1) was there a valid agreement to arbitrate; (2) if so, was that agreement complied with; and (3) is the substantive claim statutorily time-barred?\(^\text{33}\) If these questions are not raised by a timely application on behalf of the party opposing arbitration, they are waived.\(^\text{34}\) The application for a judicial stay on any of these grounds must be made within twenty days after service of the demand if an appropriate statement to that effect is included in the demand for arbitration.\(^\text{35}\) The courts are powerless to extend this statutorily prescribed time period.\(^\text{36}\)

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\(^{35}\) N.Y. Civ. Prac. Law § 7503(c) (McKinney 1980). In Fashion Envelopes, Inc. v. Minsky, 51 N.Y.2d 799, 412 N.E.2d 1325, 433 N.Y.S.2d 100 (1980), the court held that proper service of the demand on the president and sole shareholder was sufficient to give notice to the corporation. 51 N.Y.2d at 801. Service by ordinary mail, however, is insufficient. Yak Taxi, Inc. v. Teke, 41 N.Y.2d 1020, 1021-22, 363 N.E.2d 1372, 1373, 395 N.Y.S.2d 627, 628 (1977).

\(^{36}\) N.Y. Civ. Prac. Law § 7503(b) (McKinney 1980).

Two qualifications on this general proposition should be noted, however. First, the court has held that a misleading demand for arbitration is insufficient to trigger the running of the statutory period. Second, the court has held that the statutory prescription is inapplicable where there is no agreement whatsoever between the parties with reference to arbitration, as distinguished from the situation in which the parties did make an agreement to arbitrate, but the objecting party contends that it is not valid, that it does not include the claim sought to be arbitrated, or that it has not been complied with. Incidentally, the court has held that failure to include the twenty-day statement in the demand for arbitration results only in relieving the objector from the requirement that the stay application be made within a twenty-day period.

1. Was There an Agreement to Arbitrate?

The cases disposing of applications for stays of arbitration on the ground "that a valid agreement was not made" fall into two categories. In the first are those cases in which it is asserted that there was no agreement whatsoever to arbitrate; the second consists of those cases in which it is contended that there was no enforceable agreement to arbitrate the particular claim asserted, either because the issue is one otherwise properly to be decided by the courts, or because the claim did not come within the embrace of the arbitration agreement between the parties.


41. N.Y. CIV. PRAC. LAW § 7503(c) (McKinney 1980).

42. In one case, the New York State Court of Appeals articulated a difference in its approach to resolution of the question whether there was an agreement to arbitrate, depending on the subject matter area in which the question arises: [A] difference in perspective and approach has evolved between arbitration in commercial matters and arbitration in labor relations. In the former it is the rule that the parties will not be held to have chosen arbitration as the forum for the resolution of their disputes in the absence of an express, unequivocal agreement to that effect; absent such an explicit commitment neither party may be compelled to arbitrate . . . . In the
a. Was There Any Agreement?

The statute requires that both an agreement to arbitrate and the submission of a particular dispute to arbitration be in writing. It is not always necessary that the writing be signed, however, so long as there is other proof that the parties actually agreed on it. This requirement of a writing is met, of course, by manifestation of the agreement in a single document. It may also be satisfied by an amalgam of several paper writings. A "battle of forms" in which there has been an exchange of commercial forms, some of which have arbitration clauses and others which do not, may not be sufficient to establish an agreement to arbitrate.

field of labor relations, by contrast, the general rule is the converse. Because of the recognition that arbitration has been demonstrated to be a salutary method of resolving labor disputes, because of the public policy (principally expressed in the Federal cases) which favors arbitration as a means of resolving such disputes, and because of the associated available inference that the parties to a collective bargaining agreement probably intended to resolve their differences by arbitration, the courts have held that controversies arising between the parties to such an agreement fall within the scope of the arbitration clause unless the parties have employed language which clearly manifests an intent to exclude a particular subject matter.


43. N.Y. CIV. PRAc. LAW § 7501 (McKinney 1980). Section 7501 provides:

A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award.

In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.

Id.


After what was perceived, following the court's decision in *Marlene Industrial Corporation v. Carnac Textiles*, as ambivalence, the court has concluded that the existence of an agreement to arbitrate may be established by proof of a prior course of dealing or by proof of custom and practice in the industry. Although the doctrinal predicate for these decisions may be said to be that familiar to the law of contracts in general, there is a more demanding standard of proof in arbitration cases because of the general requirement that an agreement to arbitrate must be express and unequivocal. Where the moving papers fail to demonstrate that there is a substantial question as to the existence of a valid agreement to arbitrate, an application for a stay will be denied.

Three cases have presented variations on the proposition that, although there may have been an agreement to arbitrate as between certain persons, a third person not a party to that agreement did not derive the benefit of that agreement or was not bound thereby. In *Lane v. Abel-Bey*, the third case, the court concluded that whether the corporation was bound by an agreement to arbitrate executed by all the shareholders was a threshold question which, not having been raised on a timely application for a stay by the corporation, could not later be raised by the corporation or anyone on its behalf.

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51. In S. Kornblum Metals Co. v. Intsel Corp., 38 N.Y.2d 376, 342 N.E.2d 591, 379 N.Y.S.2d 826 (1976), the court held that the record sustained the verdict of the jury, to which the issue had been submitted, that there was an agreement to arbitrate.
53. Castagna & Son v. Michel Plumbing, Inc., 61 N.Y.2d 841, 462 N.E.2d 139, 473 N.Y.S.2d 962 (1984) (arbitration clause in contract between owner and general contractor did not support demand for arbitration by subcontractor where subcontract contained no arbitration clause); M.I.F. Sec. Co. v. Stamm & Co., 60 N.Y.2d 936, 459 N.E.2d 193, 471 N.Y.S.2d 84 (1983) (arbitration clause in the constitution of American Stock Exchange was not sufficient to bind a limited partnership member to arbitrate claims of an entity which was only a division of limited partnership).
55. Id.
Another series of cases raised issues as to the duration of what concededly was at one time an agreement to arbitrate. In *Waldron v. Goddess*, the court held that an arbitration clause in an employment contract did not survive the expiration of that contract where, although the employment continued, the objecting employee refused to execute a new employment contract. In *Steigerwald v. Dean Witter Reynolds, Inc.*, the court found that an arbitration clause in an application for employment with Reynolds did not commit the employee to arbitrate claims with the corporation into which Reynolds subsequently merged. Further, in *Muh v. Risher*, an agreement to arbitrate was held to survive expiration of the substantive agreement. Finally, in *New York Times Co. v. New York Typographical Union No. 6*, the court found that an agreement to arbitrate continued pending negotiations for a new labor contract.

In *Travelers Indemnity Co. v. Kammer* and *Liberty Mutual Insurance Co. v. Stollerman*, two cases arising under the Insurance Law, the court decided that, inasmuch as there was a failure on the part of one insurer effectively to cancel a policy of insurance, there was no obligation on the part of another insurer to arbitrate with the claimant.

Reference should be made at this point to some related holdings of the New York State Court of Appeals. In *Waldron v. Goddess*, it was held that, where a contractual provision limited the agreement to arbitrate to situations in which there was a mutuality of obligation, arbitration would not be compelled absent such mutuality. In this connection, it may be noted, however, that the availability of al-

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57. Id. at 185, 461 N.E.2d at 275, 473 N.Y.S.2d at 138.
59. Id.
60. 38 N.Y.2d 441, 343 N.E.2d 742, 381 N.Y.S.2d 23 (1975).
61. Id. at 444, 343 N.E.2d at 743, 381 N.Y.S.2d at 25.
63. Id. at 556-57.
64. 51 N.Y.2d 792, 412 N.E.2d 1323, 433 N.Y.S.2d 98 (1980).
68. Id. at 184-86, 461 N.E.2d at 275-76, 473 N.Y.S.2d at 138-39.
ternative remedies will not defeat the right to arbitration and on principle, it would seem that the parties should be able to enter into an express agreement which conferred on one but not another the right to resolve all or specified disputes by arbitration.

In *Antinore v. State of New York,* the court held that an employee not a party to the agreement to arbitrate could not object to arbitration between the parties to the agreement. In *Franklin Central School v. Franklin Teachers Association,* the court held that a school nurse came within the scope of the collective bargaining agreement and was, therefore, entitled to the benefit of the arbitration clause in that agreement.

b. *Is the Claim Within the Scope of the Agreement to Arbitrate?*

(1) *Is Arbitration of the Claim Barred by Considerations of Public Policy?*

The general rule is that to bar judicial enforcement of a voluntary arbitration clause on the ground of public policy, the pertinent public policy must be strong, involving "gross illegality or its equivalent" or a non-delegable constitutional or statutorily prescribed duty. The courts will intervene only where public policy is such as to "prohibit, in an absolute sense, particular matters being decided or certain relief being granted by an arbitrator." The public policy contention

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72. 40 N.Y.2d at 921-22.
73. 51 N.Y.2d 348, 414 N.E.2d 685, 434 N.Y.S.2d 185 (1980).
74. Id. at 355-56, 414 N.E.2d at 688, 434 N.Y.S.2d at 188-89.
75. Objections on the ground that arbitration is precluded by considerations of public policy may be an exception to the general rule that questions of arbitrability must be raised on a timely application for a stay, and if not so raised, are waived. Prudence, however, would dictate no delay.
is evaluated and determined as of the date of the judicial decision.\textsuperscript{78} Although frequent attempts have been made to resist arbitration on the ground of proscriptive public policy, only seldom have they been successful. The New York State Court of Appeals has held that considerations of public policy foreclosed recourse to arbitration in several cases.\textsuperscript{79} In many more cases, however, the court has rejected assertions of preclusive public policy.\textsuperscript{80}

\textsuperscript{78} Board of Trustees \textit{v.} Maplewood Teachers' Ass'n, 57 N.Y.2d 1025, 443 N.E.2d 949, 457 N.Y.S.2d 475 (1982).

\textsuperscript{79} County Patrolmen's Benevolent Ass'n, 65 N.Y.2d 677, 678, 481 N.E.2d 248, 249, 491 N.Y.S.2d 616, 617 (1985).


Is the Subject Matter of the Claim Within the Scope of the Agreement to Arbitrate?

Because of the recurring and often little-considered use of a broad arbitration clause, the cases in which the court has concluded that

Within the general classification of education cases that have rejected assertions of preclusive public policy falls a subcategory of cases arising under the Taylor Law, N.Y. Civ. Serv. Law art. 14 (McKinney 1980), in which the court has adopted a two-level approach to its resolution of the threshold question as to whether there is a valid agreement to arbitrate. "Initially it must be determined whether arbitration claims with respect to the particular subject matter are authorized by the terms of the Taylor Law . . . . If it is concluded . . . that reference to arbitration is authorized under the Taylor Law, inquiry then turns at a second level to a determination of whether such authority was in fact exercised and whether the parties did agree by the terms of their particular arbitration clause to refer their differences in this specific area to arbitration." Acting Superintendent of Schools v. United Liverpool Faculty Ass'n, 42 N.Y.2d 509, 513, 369 N.E.2d 746, 749, 399 N.Y.S.2d 189, 192 (1977). The resolution of the first-level question is based, of course, on considerations of public policy as incorporated in the Taylor Law; that of the second-level question turns on interpretation of the particular arbitration clause. The following are cases in which the disposition by the court has been predicated on this analysis: Franklin Cent. School v. Franklin Teachers Ass'n, 51 N.Y.2d 348, 414 N.E.2d 685, 434 N.Y.S.2d 185 (1980) (grievances with respect to salary and alleged dismissal for cause held arbitrable); Mineola Union Free School Dist. v. Mineola Teachers Ass'n, 46 N.Y.2d 568, 389 N.E.2d 111, 415 N.Y.S.2d 797 (1979) (obligation of school district to make payroll deductions for dues owed by terminated teachers held arbitrable); Binghamton Civil Serv. Forum v. City of Binghamton, 44 N.Y.2d 23, 374 N.E.2d 380, 403 N.Y.S.2d 482 (1978) (disciplinary action against bribe-receiving officer held arbitrable); South Colonie Cent. School Dist. v. Longo, 43 N.Y.2d 136, 371 N.E.2d 516, 400 N.Y.S.2d 798 (1977) (no-reprisal provision as affecting an employee not a member of bargaining unit held arbitrable).

the subject matter of a particular demand did not fall within the embrace of the parties' agreement to arbitrate are relatively few. In one case, the court held that although there existed an agreement to arbitrate, the party seeking arbitration was not within its purview.


In one case, a challenge on grounds of public policy failed for lack of proof of the factual predicate. Neirs-Folkes, Inc. v. Drake Ins. Co., 53 N.Y.2d 1038, 425 N.E.2d 875, 442 N.Y.S.2d 487 (1981) (contention that it would violate public policy to award damages to claimant for commissions on insurance written in New York because he was not licensed in New York did not prevent confirmation of award which concluded that claimant had not acted as the agent in New York).

81. See Bowmer v. Bowmer, 50 N.Y.2d 288, 406 N.E.2d 760, 428 N.Y.S.2d 902 (1980) (obligation of support; broadly worded arbitration clause modified by reference to specific issues); Fidelity & Deposit Co. v. Parsons & Whittmore Contractors Corp., 48 N.Y.2d 127, 397 N.E.2d 380, 421 N.Y.S.2d 869 (1979) (stay of arbitration granted because surety under performance bond did not agree to arbitrate disputes with general contractor although contract between contractor and subcontractor did contain such a clause); South Colonie Cent. School Dist. v. South Colonie Teachers Ass'n, 46 N.Y.2d 521, 388 N.E.2d 727, 415 N.Y.S.2d 403 (1979) (in disciplinary action under arbitration clause which excluded questions for which a method of review is provided by law, where dispute falls both within broad arbitration clause and a specified exclusion, there is no unequivocal agreement to arbitrate); Aetna Casualty & Sur. Co. v. Bruton, 45 N.Y.2d 871, 382 N.E.2d 1355, 410 N.Y.S.2d 580 (1978) (whether vehicle involved in accident was covered under policy in claim under uninsured motorist endorsement); Board of Educ. v. Lakeland Fed'n of Teachers, 42 N.Y.2d 853, 366 N.E.2d 290, 397 N.Y.S.2d 630 (1977) (questions of assignment for extra duty in connection with co-curricular activities and interscholastic athletics, although related questions of compensation were within agreement limiting arbitration to interpretation of express provisions of collective bargaining agreement); Perkins & Will Partnership v. Syska & Hennessy, 41 N.Y.2d 1045, 364 N.E.2d 832, 396 N.Y.S.2d 167 (1977) (claim by architect for indemnity from engineering consultants with respect to award in favor of owner against architect under restrictive arbitration clause); Gangel v. DeGroot, PVBA, 41 N.Y.2d 840, 362 N.E.2d 249, 393 N.Y.S.2d 698 (1977) (dispute as to coverage of marine insurance policy under agreement to arbitrate disputes as to "execution of the present policy"); Redmond v. Redmond, 32 N.Y.2d 644, 295 N.E.2d 651, 342 N.Y.S.2d 851 (1973) (claims alleging fiduciary wrongdoing as within scope of arbitration clause contained in shareholders' agreement).

In a much larger number of cases, however, the court has held that the demand in question posed an issue within the scope of the parties' agreement to arbitrate.\(^3\)

2. Was the Agreement Complied With?

The recent cases in the court which fall into this classification have involved contentions that there has been a failure on the party seeking arbitration to have complied with an alleged condition precedent. A sharp distinction must be made between two discrete types of conditions precedent—a condition precedent to access to the arbitral process on the one hand and, on the other, a condition precedent, in the arbitration proceeding, to the consideration or determination of the dispute submitted to arbitration. Conceptually, the difference is readily grasped; in practice, its application is sometimes more difficult. If compliance with the specified condition is prerequisite to access to the arbitral forum, the issue must be resolved by the court inasmuch as, until the condition has been met, the

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agreement to arbitrate will not have been complied with. On the other hand, contentions that there have been failures to meet procedural requirements incident to the conduct of the arbitration proceeding itself are to be resolved by the arbitrator.

While in some cases the New York State Court of Appeals has, itself, dealt with the merits of conditions precedent to entry upon arbitration proceedings, it has also held that questions with respect to compliance with conditions precedent relating to the conduct of arbitration proceedings were to be resolved by the arbitrator.


3. Is the Claim Sought to Be Arbitrated Barred by a Limitation of Time?

In this category, the cases are very straightforward: if the claim asserted would be barred in a judicial proceeding in consequence of an applicable statute of limitations, it is barred in arbitration.  

4. Was the Right to Arbitrate Waived?

Although it is not one of the three classic threshold questions to be resolved by the courts, a defense based on alleged waiver of the right to arbitrate is of a similar sort. This defense, too, must be raised at the outset—and if not, it is waived. This question will be resolved by the courts and not referred to the arbitrator. The applicable principle is that an otherwise enforceable right to arbitration may be lost on the basis of waiver in consequence of participation in judicial proceedings for determination of the same issue. The critical factor is the extent of the participation in the
judicial proceedings.\textsuperscript{90} In a closely-related aspect, it is to be noted that the existence of duplicative remedies, and thus the potential for inconsistent results, is not fatal to arbitration.\textsuperscript{91}

V. Judicial Participation In Arbitration Proceedings

Several recent cases in the New York State Court of Appeals may be gathered under this general heading. Some have posed procedural


issues; others have involved questions of substantive law. In some cases, the court has made determinations with respect to procedural aspects in the arbitration proceeding. In general, however, the court holds that questions with respect to procedural aspects of the conduct of proceedings in arbitration are to be addressed to and resolved by the arbitrator. The court has, nevertheless, resolved issues relating to the standing of the party seeking arbitration. With respect to substantive issues which have arisen in arbitration proceedings, the New York State Court of Appeals has sometimes made the determination. Cases in which judicial relief is sought after the award has been made are to be clearly distinguished from those

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95. Todd Shipyards Corp. v. Marine Vessel Leasing Corp., 49 N.Y.2d 809, 403 N.E.2d 964, 426 N.Y.S.2d 980 (1980) (claim that arbitration was barred because U.S. Navy was real party-in-interest rejected); HRH Constr. Corp. v. Bethlehem Steel Corp., 45 N.Y.2d 675, 384 N.E.2d 1289, 412 N.Y.S.2d 366 (1978) (contract provision that determination of a particular issue in another judicial or arbitral proceeding shall be binding constitutes a directive to arbitrator as to how a claim in arbitration is to be resolved and not a limitation on the scope of the arbitration).
cases in which judicial intervention is sought during the course of the arbitration proceedings.

VI. Judicial Review of Arbitration Awards

As one would expect, there have been many cases in which the court has been called on to review awards in arbitration. In some, the issue has been raised in the form of a motion to confirm the award; in others, the issue has been raised in the form of a motion to modify or to vacate the award. These cases present questions of two sorts—the first as to the scope of judicial review; the second, assuming the question is within the scope of review, as to the standard of that review.

A. Scope of Judicial Review

The grounds for both modification and vacatur of awards in arbitration are explicitly delineated in Section 7511 of New York's CPLR and contemplate only very limited judicial intervention. Even these grounds are not available, however, if the determination of the arbitrator lies wholly beyond judicial reach. In a number of cases, the New York State Court of Appeals ruled that the question sought to be reviewed was beyond the scope of judicial consideration.

96. See infra notes 100-29 and accompanying text.
97. N.Y. CIV. PRAC. LAW § 7510 (McKinney 1980).
98. N.Y. CIV. PRAC. LAW § 7511 (McKinney 1980).
99. Id.
100. Mobil Oil Indonesia, Inc. v. Asamera Oil (Indonesia) Ltd., 43 N.Y.2d 276, 372 N.E.2d 21, 401 N.Y.S.2d 186 (1977) (no judicial review may be had of an interlocutory determination by an arbitrator—here his determination as to which set of procedural rules is applicable to the conduct of the arbitration proceeding—inasmuch as there has been no "award"); Geneseo Police Benevolent Ass'n v. Geneseo, 59 N.Y.2d 726, 450 N.E.2d 246, 463 N.Y.S.2d 440 (1983) (contention that award is premature is not ground for vacatur of award); United Liverpool Faculty Ass'n v. Board of Educ., 52 N.Y.2d 1038, 420 N.E.2d 386, 438 N.Y.S.2d
of an award, the courts will address and decide this issue, notwithstanding that no application for a stay was made on this ground.101

B. Standards of Judicial Review

The cases in this classification are numerous, and a further subdivision of subject matter will be useful. In two classes of cases, the standard of review is slightly different and contemplates a bit more judicial supervision than usual.

1. Judicial Review of Awards in No-Fault Insurance Arbitration

Here, arbitration on the part of the insurer is compulsory and, once invoked, is subject to statutory and regulatory prescription. Further, the arbitration process proceeds in two stages, first an initial award and then review of that award by a master arbitrator. It is normally the award of the master arbitrator which is the target of judicial review, and the attention of the court must be focused on restrictions on the scope of his review.102 Inasmuch as the arbitration


process is compulsory, the standard of judicial review includes determination of "whether the award is supported by evidence or other basis in reason." As will shortly appear, no such inquiry has any part in the review of awards in voluntary arbitration.

2. Judicial Review of Awards in Arbitration Proceedings Under the Taylor Law

In arbitration under agreements which derive their vitality from the Taylor Law, on post-award review, the applicant seeking vacatur of the award may raise the first-level question, "whether arbitration claims with respect to the particular subject matter are authorized by the terms of the Taylor Law." This issue involves considerations of public policy as reflected in the statute and, as noted above, is not waived by failure to raise it on a timely application for a stay.

In general, the standard of judicial scrutiny in this area of compulsory arbitration is the same as that in other areas of non-voluntary arbitration—whether the award is supported by evidence or other basis in reason; that is, whether it is "rational."

3. Standard of Judicial Review in General

As indicated, judicial review of awards in arbitration is very limited indeed. The New York State Court of Appeals has stated that the only grounds for vacatur of an award are those enumerated in Section 7511 of New York's CPLR. These provisions of New

93, 400 N.E.2d 303, 424 N.Y.S.2d 361 (1979) (court held that arbitrator, in making award of attorney's fees to claimant, could include services in preparation of claim for allowance); Garcia v. Federal Ins. Co., 46 N.Y.2d 1040, 389 N.E.2d 1066, 416 N.Y.S.2d 544 (1979) (arbitrator's requirement of conviction under Vehicle & Traffic Law § 1192 for denial of benefits on ground of intoxication not so irrational as to require vacatur).


104. N.Y. CIV. SERV. LAW art. 14, § 201-14 (McKinney 1980).


107. N.Y. CIV. PRAC. LAW § 7511 (McKinney 1980). Section 7511, entitled "Vacating or modifying award," provides:

(a) When application made. An application to vacate or modify an
York's CPLR envisage only the most minimal judicial disturbance of the resolution of controversies reached in arbitration pursuant to the voluntary, express agreement of the parties. The very strong policy against judicial intrusion on the results of arbitration, articulated by both the legislature and the courts, finds expression in several aspects. It is declared that the courts will not consider the award may be made by a party within ninety days after its delivery to him.

(b) Grounds for vacating.
1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
   (i) corruption, fraud or misconduct in procuring the award; or
   (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
   (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
   (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.
2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:
   (i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or
   (ii) a valid agreement to arbitrate was not made; or
   (iii) the agreement to arbitrate had not been complied with; or (iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

(c) Grounds for modifying. The court shall modify the award if:
1. there was a miscalculation of figures or a mistake in the description of any person, thing or property referred to in the award; or
2. the arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or
3. the award is imperfect in a matter of form, not affecting the merits of the controversy.

(d) Rehearing. Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrator or before a new arbitrator appointed in accordance with this article. Time in any provision limiting the time for a hearing or award shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court.

(e) Confirmation. Upon the granting of a motion to modify, the court shall confirm the award as modified; upon the denial of a motion to vacate or modify, it shall confirm the award.


merits of the dispute, that errors of law or fact are beyond the reach of judicial review, and that interpretation and construction of writings is for the arbitrator and not for the courts. The court not infrequently states that it will vacate an award only if it is "completely irrational." The vitality of this latter test is itself subject to serious question, however, when it is recognized, as Judge Kaye recently observed, that a "totally irrational result, [has] yet to be found by this court."109

The relevant holdings of the court in this area may be assembled in categories: (a) "the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute;"110 (b) errors of law and fact are beyond judicial review;111 (c) questions of interpretation and


construction of writings are for the arbitrator and are not subject to judicial review;\(^{112}\) (d) although in compulsory arbitration the court will set aside an award which the court concludes cannot be rationally supported on the record; in voluntary arbitration, the court will not vacate an award on the ground of irrationality unless it is "completely irrational;" and as noted, no award has yet come before the court

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which it has found to be completely irrational;\textsuperscript{113} and (e) as differentiated from rulings on matters of substance, the court has made a few rulings with respect to judicial review of procedural determinations.\textsuperscript{114}

Perhaps indicative of the extent to which the court will go in leaving to the arbitrator all questions involving the interpretation or construction of contract provisions are the following cases: Stillman v. Stillman, 55 N.Y.2d 653, 431 N.E.2d 303, 446 N.Y.S.2d 942 (1981) (leaving to the arbitrator to determine which issues are subject to arbitration, that is, the scope of the agreement to arbitrate); Pearl St. Dev. Corp. v. Conduit and Found. Corp., 41 N.Y.2d 167, 359 N.E.2d 693, 391 N.Y.S.2d 98 (1976) (leaving to arbitrator to interpret agreement to determine whether there was a condition precedent to access to the arbitral forum which, if found, would be for resolution by the court).


"The path of analysis, proof and persuasion by which the arbitrator reached this conclusion is beyond judicial scrutiny."); Civil Serv. Employees Ass'n v. County of Niagara, 49 N.Y.2d 899, 405 N.E.2d 706, 428 N.Y.S.2d 225 (1980) (finding that grievant was a member of the bargaining unit); Yonkers Fed'n of Teachers v. Board of Educ., 46 N.Y.2d 725, 385 N.E.2d 1300, 413 N.Y.S.2d 373 (1978) (teachers found to be employees within bargaining unit); Yonkers Fed'n of Teachers v. Board of Educ., 44 N.Y.2d 752, 376 N.E.2d 1326, 405 N.Y.S.2d 681 (1978) (award reinstating teachers with full benefits, back pay, and interest not irrational, notwithstanding assertions of municipal inability to pay); Civil Serv. Employees Ass'n v. Lombard, 41 N.Y.2d 915, 362 N.E.2d 1213, 394 N.Y.S.2d 410 (1977) (finding that sheriff did not have "just and sufficient cause" to discharge deputy sheriff); Rochester City School Dist. v. Rochester Teachers Ass'n, 41 N.Y.2d 578, 582, 362 N.E.2d 977, 981, 394 N.Y.S.2d 179, 182 (1977) (general statement).

C. Judicial Review of Remedies

As a separate aspect of the judicial review of awards in arbitration, reference should be made to the cases in which the attack is directed at the remedy granted by the arbitrator as distinguished from the determination of the substantive right of the parties. At the threshold, it should be noted that if it appears at the outset of the arbitration that there is a possibility the arbitrator might grant an impermissible remedy, it is not grounds to stay the arbitration; the arbitration goes forward, and any challenge to the remedy must await issuance of the award. A number of cases stand for the closely-related proposition that although relief by way of specific performance with respect to the issue tendered, such as grant of tenure, cannot be awarded, an award of alternative relief will be upheld.

Generally speaking, the court recognizes that the arbitrator has
broad discretion to fashion remedies\textsuperscript{117} and that this discretion is not limited to the remedies sought by the parties.\textsuperscript{118} In a number of non-tenure cases, the remedy awarded by the arbitrator was upheld.\textsuperscript{119} However, where the parties have imposed an express limitation on the remedies which may be granted by the arbitrator, the court will enforce the limitation.\textsuperscript{120} The New York State Court of

\textsuperscript{117} Board of Educ. v. Yonkers Fed'n of Teachers, 40 N.Y.2d at 268, 276, 353
N.E.2d at 569, 573, 386 N.Y.S.2d at 657, 661 (1976).

\textsuperscript{118} Board of Educ. v. Bellmore-Merrick United Secondary Teachers, 39 N.Y.2d

\textsuperscript{119} Turner v. Booth Memorial Hosp., 63 N.Y.2d 633, 468 N.E.2d 690, 479
N.Y.S.2d 508 (1984) (direction to hospital to restore laundry facility for violation of
contractual provisions by discontinuing laundry and contracting out); Security
and Law Enforcement Employees, Dist. Council 82 v. County of Albany, 61 N.Y.2d
fees in defense of criminal charges for impermissible suspension); Tilbury Fabrics,
(mere possibility that award included consequential damages—award of which was
expressly prohibited in contract—not sufficient to disturb award); Allen v. New
of remedy in disciplinary proceeding over that initially proposed by State); De
suspension only of police officer indicted for official misconduct who pleaded
guilty to disorderly conduct); Board of Educ. v. Hess, 49 N.Y.2d 145, 400 N.E.2d
329, 424 N.Y.S.2d 389 (1979) (reinstatement of former teacher for violation of
evaluation procedures); Fresh Meadows Medical Assoc. v. Liberty Mut. Ins. Co.,
49 N.Y.2d 93, 400 N.E.2d 303, 424 N.Y.S.2d 361 (1979) (award of attorney's fees,
including services in preparation for claim of allowance of attorney's fees); Psy-
choanalytic Center, Inc. v. Burns, 46 N.Y.2d 1002, 389 N.E.2d 832, 416 N.Y.S.2d
237 (1979) (award of damages based on prior allocation of partnership fees); Board
of Educ. v. Yonkers Fed'n of Teachers, 46 N.Y.2d 727, 385 N.E.2d 1297, 413
N.Y.S.2d 370 (1978) (fixing of procedures for granting sabbatical leaves); Board
of Educ. v. Niagara-Wheatfield Teachers Ass'n, 46 N.Y.2d 553, 389 N.E.2d 104,
415 N.Y.S.2d 790 (1979) (lump-sum award not punitive on ground no precise
arithmetical formula stated; sexual discrimination in hiring); Port Washington Union
Free School Dist. v. Port Washington Teachers Ass'n, 45 N.Y.2d 746, 380 N.E.2d
310, 408 N.Y.S.2d 484 (1978) (for violation of agreement as to priorities in filling
vacancies, arbitrator may fill vacancy where only one person qualified); North
N.E.2d 1193, 408 N.Y.S.2d 64 (1978) (negative action of voters no bar to rein-
statement of teachers discharged in violation of contractual job security provision);
Rochester City School Dist. v. Rochester Teachers Ass'n, 41 NY.2d 578, 362 N.E.2d
977, 394 N.Y.S.2d 179 (1977) (determination that leaves of absence should be
granted up to one percent of teachers employed); SCM Corp. v. Fisher Park Lane
Co., 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398 (1976) (reformation of
863 (1974) (award sustaining discharge of employee); British Overseas Airways Corp.
v. International Ass'n of Machinists & Aerospace Workers, 32 N.Y.2d 823, 299

\textsuperscript{120} Local 345 of Retail Store Employees Union v. Heinrich Motors, Inc., 63
Appeals has recently made it clear that if the parties intend to impose limits or restrictions on the authority of an arbitrator to fashion remedies, the limitation or restriction must be contained in the arbitration clause itself; the court will not give effect to limitations incorporated in the substantive provision of the contract.\(^\text{121}\) But, even if the limitation is incorporated in the arbitration clause, its benefit will be waived unless the limitation is brought to the attention of the arbitrator or timely raised in the judicial proceeding.\(^\text{122}\) If the limitation or restriction is contained in the substantive provisions of the contract, it constitutes only a direction to the arbitrator as to how to conduct the arbitration proceedings,\(^\text{123}\) for error in the observance of which there could be no judicial relief inasmuch as that would involve the courts in the merits of the dispute in violation of the legislative mandate.\(^\text{124}\) In a few cases, the court has addressed procedural aspects of the awarding of remedies.\(^\text{125}\)

D. Judicial Review of the Status or Conduct of the Arbitrator

In this category fall the cases in which attempts are made to vacate awards on the ground that the rights of the applicant were prejudiced by "misconduct in procuring the award" or "partiality of an arbitrator."\(^\text{126}\) This has not proven to be a rewarding avenue of attack on awards. In many cases, the contention advanced as


\(^{125}\) Id. at 310, 461 N.E.2d at 1267, 473 N.Y.S.2d at 780 (that there may be third persons, not parties to the arbitration, whose rights will be affected by award is no ground to deny confirmation of award as between parties to the arbitration proceeding); Long Island Univ. Faculty Fed'n v. Board of Trustees, 60 N.Y.2d 855, 857, 458 N.E.2d 381, 381, 470 N.Y.S.2d 140, 140 (1983) (failure to include remedy in award is not fatal to award and is waived if omission is not objected to; where award granted only declaration of rights of parties without award of money damages, court cannot supply omission); Board of Educ. v. Niagara-Wheatfield Teachers Ass'n, 46 N.Y.2d 553, 553, 389 N.E.2d 104, 107, 415 N.Y.S.2d 790, 793 (1979) (interest on award runs from date of award).

\(^{126}\) N.Y. Civ. PRAC. LAW § 7511(b)(1)(i), (ii) (McKinney 1980).
grounds for vacatur has been rejected.\textsuperscript{127} On the other hand, in cases in this category, on occasion, the court has found sufficient grounds for vacatur of the award.\textsuperscript{128} For vacatur based on bias of one serving as an impartial arbitrator, there must be proof, not only of the appearance of bias, but of actual bias as well.\textsuperscript{129}

In summary, it bears repeating that judicial intervention in arbitration proceedings in the guise of judicial review is very, very limited. The possibility of obtaining judicial relief from an adverse award in arbitration is so remote as never safely to be relied on in prospective planning.

\section*{VII. Miscellaneous Cases}

The New York State Court of Appeals has decided several cases which touch on arbitration, but which do not fall within any of the foregoing classifications. Some of these cases may be placed in a category as decisions relating to the effect in judicial proceedings of awards in arbitration. In several instances, the court has held that, under res judicata principles, an award in arbitration is to be given the same preclusive effect as it would have had had it been a final judgment in a prior judicial proceeding.\textsuperscript{130} In \textit{Allied Building

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Inspectors International Union of Operating Engineers v. Office of Labor Relations, the court held that an agreement to arbitrate is not a defense to a judicial action, nor does it provide a predicate for dismissal of the action. It does, however, provide the basis for an order compelling arbitration and for a stay of the judicial proceedings pending arbitration.

VIII. Conclusion

As with any specially designed tool, arbitration should be well understood by those who would use it. It is not to be thought of as a blunt implement. It is not suited to all purposes; it is peculiarly well-suited to some. Unlike many means available for the resolution of disputes, each proceeding in arbitration can be individually structured to identify the precise question or questions to be resolved, the framework for their resolution, and the broad range within which remedies can be fashioned. By counterbalance, it is open to the parties to stipulate the prerequisites that must be met before arbitration can be invoked, the constraints which must be observed in the conduct of the arbitration proceeding or in the selection of remedies, and even the limited consequences which will attach to the award. Arbitration should be recognized as an enormously flexible instrument.

It is all these factors which make it incumbent on the practicing attorney carefully to familiarize himself or herself not only with the rules and procedures in general, but as well with the treatment accorded arbitration proceedings and awards in the courts and the judicially sanctioned opportunities which exist for individual design.


132. Id. at 738, 380 N.E.2d at 305, 408 N.Y.S.2d at 478.

133. Id. at 738, 380 N.E.2d at 305, 408 N.Y.S.2d at 479. The court has also considered the rights of infants in arbitration. See, e.g., Prinze v. Jonas, 38 N.Y.2d 570, 345 N.E.2d 295, 381 N.Y.S.2d 824 (1976) (when age of majority was twenty-one, arbitration agreement by nineteen year old upheld as reasonable application of N.Y. GEN. OBL. LAW § 3-105); Aetna Life & Casualty Co. v. Stekardis, 34 N.Y.2d 182, 313 N.E.2d 53, 356 N.Y.S.2d 587 (1974) (failure to obtain an order under CPLR § 1209 prior to submission to arbitration not fatal, provided such an order is obtained before opening of arbitration hearing; N.Y. CIV. PRAC. LAW § 1209 (McKinney Supp. 1986) provides: "[a] controversy involving an infant, person judicially declared to be incompetent or conservatee shall not be submitted to arbitration except pursuant to a court order made upon application of the representative of such infant, incompetent or conservatee").