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Cover Page Footnote
Resident Counsel, Hiscock & Barclay; Associate Judge, New York State Court of Appeals, 1973-84; A.B., 1935, LL.D., 1974, Hamilton College; J.D., 1939, Harvard Law School; LL.D., 1981, Albany Law School; Member of the American Bar Association (House of Delegates, 1971-72); New York State Bar Association (President, 1971-72; Member, Executive Committee 1961-72; Member, House of Delegates 1972-to date; Chairman, Committee on Professional Ethics, 1959-63; Chairman, Tax Section, 1967) and Oneida County Bar Association (President, 1962), and of the Association of the Bar of the City of New York; Member, American Law Institute, 1974-to date; Adviser, Restatement, Restitution 2d, 1981-86

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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

*Judge Hugh R. Jones**

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 the 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."[1] 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-

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1. *Remarks and Addresses at the 62nd Annual Meeting*, May 14-17, 1985 A.L.I. 4, 8.

2. N.Y. Times, Aug. 22, 1985, at A21, col. 1; Arb. Times, Fall 1985, at 1, col. 1.

3. 1984 N.Y. Laws ch. 156.

4. 1985 N.Y. Laws ch. 91.

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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5. Greenawalt, *Alternatives to Court Resolution of Disputes: Report of NYSBA's Special Committee*, 56 N.Y. ST. B.J., Oct. 1984, at 36.

6. Meyerowitz, *The Arbitration Alternative*, 71 A.B.A. J., Feb. 1985, at 78.

7. Gold, *Let's Talk*, 71 A.B.A. J., Aug. 1985, at 25.

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."[10] 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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10. Port Washington Union Free School Dist. v. Port Washington Teachers Ass'n, 45 N.Y.2d 411, 422, 380 N.E.2d 280, 285, 408 N.Y.S.2d 453, 458 (1978) (Breitel, C.J., concurring).

11. Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 308, 461 N.E.2d 1261, 1266, 473 N.Y.S.2d 774, 779 (1984) (*cited with approval in* Haverstraw v. Rockland County Patrolmen's Benevolent Ass'n, 65 N.Y.2d 677, 678, 481 N.E.2d 248, 248, 491 N.Y.S.2d 616, 616 (1985)).

12. 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) (citation omitted).

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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13. Maye v. Bluestein, 40 N.Y.2d 113, 118, 351 N.E.2d 717, 720, 386 N.Y.S.2d 69, 72 (1976); Professional Staff Congress/City Univ. of N.Y. v. Board of Higher Educ., 39 N.Y.2d 319, 325, 347 N.E.2d 918, 922, 383 N.Y.S.2d 592, 596 (1976).

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.[14] Differences of position which arise in labor relations between employee and employer fall into two categories: grievance arbitration[15] and interest arbitration.[16] 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"),[17] but its use is restricted in some consumer transactions.[18] In each case, the statutory prescription is controlling.

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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.").

18. *See, e.g.*, N.Y. GEN. BUS. LAW § 198-a (McKinney Supp. 1986); 15 U.S.C. § 2310 (1982).

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."[19] 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."[20] 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.[21]

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-

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19. Port Washington Union Free School Dist. v. Port Washington Teachers Ass'n, 45 N.Y.2d 411, 421-23, 380 N.E.2d 280, 285-86, 408 N.Y.S.2d 453, 458-59 (1978) (Breitel, C.J., concurring) (*cited with approval in* Board of Educ. v. Glaubman, 53 N.Y.2d 781, 782, 422 N.E.2d 567, 568, 439 N.Y.S.2d 907, 908 (1981)).

20. Sprinzen v. Nomberg, 46 N.Y.2d 623, 631, 389 N.E.2d 456, 460, 415 N.Y.S.2d 974, 978 (1979) (*cited with approval in* Haverstraw v. Rockland 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)).

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

22. County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 9, 409 N.E.2d 951, 954-55, 431 N.Y.S.2d 478, 482 (1980); United Nations Dev. Corp. v. Norkin Plumbing Co., 45 N.Y.2d 358, 364, 380 N.E.2d 253, 255-56, 408 N.Y.S.2d 424, 427-28 (1978).

23. Waldron v. Goddess, 61 N.Y.2d 181, 461 N.E.2d 273, 274, 473 N.Y.S.2d 136, 137 (1984).

24. *See* Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 310, 461 N.E.2d 1261, 1267, 473 N.Y.S.2d 774, 780 (1984).

25. *See* Diaz v. Pilgrim State Psychiatric Center, 62 N.Y.2d 693, 465 N.E.2d 32, 476 N.Y.S.2d 525 (1984).

review procedures and, if so, whether provision should be made for reconciliation of possibly inconsistent results;[26] (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);[27] (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;[28] and (8) whether, and to what extent, the arbitration award is to have preclusive effect in subsequent arbitration or judicial proceedings between the parties.[29]

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

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26. *See* Port Auth. v. Port Auth. Police Benevolent Ass'n, 49 N.Y.2d 781, 403 N.E.2d 448, 426 N.Y.S.2d 725 (1980).

27. Schlaifer v. Sedlow, 51 N.Y.2d 181, 185, 412 N.E.2d 1294, 1296, 433 N.Y.S.2d 67, 69-70 (1980) (per curiam).

28. Board of Educ. v. Barni, 49 N.Y.2d 311, 315, 401 N.E.2d 912, 913-14, 425 N.Y.S.2d 554, 556 (1980); North Syracuse Cent. School Dist. v. North Syracuse Educ. Ass'n, 45 N.Y.2d 195, 200, 379 N.E.2d 1193, 1196, 408 N.Y.S.2d 64, 67 (1978). If limitations on the arbitrator's power to resolve substantive issues or to fashion remedies are intended, such limitations must be contained in the arbitration clause itself—not in the substantive provisions of the agreement—if their enforcement by judicial action is desired. Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 302, 461 N.E.2d 1261, 1263, 473 N.Y.S.2d 774, 776 (1984).

29. American Ins. Co. v. Messinger, 43 N.Y.2d 184, 189, 371 N.E.2d 798, 801, 401 N.Y.S.2d 36, 39 (1977).

30. Meacham v. Jamestown, F. & C. R.R. Co., 211 N.Y. 346, 351, 105 N.E. 653 (1914).

policy, interfere as little as possible with the freedom of consenting parties to resolve their disputes by that means.[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).[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?[33] If these questions are not raised by a timely application on behalf of the party opposing arbitration, they are waived.[34] The application for a judicial stay on any of these grounds must be made within twenty days after service of the demand[35] if an appropriate statement to that effect is included in the demand for arbitration.[36] The courts are powerless to extend this statutorily prescribed time period.[37]

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31. Sprinzen v. Nomberg, 46 N.Y.2d 623, 629, 389 N.E.2d 456, 458-59, 415 N.Y.S.2d 974, 976-77 (1979); Siegel v. Lewis, 40 N.Y.2d 687, 689, 358 N.E.2d 484, 485, 389 N.Y.S.2d 800, 801 (1976); *cf.* N.Y. CIV. PRAC. LAW §§ 7501-14 (McKinney 1980) (statute limits scope of judicial inquiry and recognizes enforceability of arbitration agreements).

32. N.Y. CIV. PRAC. LAW §§ 7501-14 (McKinney 1980).

33. N.Y. CIV. PRAC. LAW § 7503 (McKinney 1980); *see* County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 6-8, 409 N.E.2d 951, 953-54, 431 N.Y.S.2d 478, 480-81 (1980).

34. N.Y. CIV. PRAC. LAW § 7503 (McKinney 1980); Tilbury Fabrics, Inc. v. Stillwater, Inc., 56 N.Y.2d 624, 625, 435 N.E.2d 1093, 450 N.Y.S.2d 478 (1982); American Ins. Co. v. Messinger, 43 N.Y.2d 184, 191, 371 N.E.2d 798, 803, 401 N.Y.S.2d 36, 40 (1977); Rochester City School Dist. v. Rochester Teachers Ass'n, 41 N.Y.2d 578, 583, 362 N.E.2d 977, 981, 394 N.Y.S.2d 179, 182 (1977). *But see* James Talcott, Inc. v. M. Lowenstein & Sons, Inc., 33 N.Y.2d 924, 309 N.E.2d 124, 353 N.Y.S.2d 721 (1973).

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).

37. Spychalski v. Continental Ins. Cos., 45 N.Y.2d 847, 849, 382 N.E.2d 765, 766, 410 N.Y.S.2d 65, 66 (1978); Aaacon Auto Transp., Inc. v. State Farm Mut.

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.[38] 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.[39] 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.[40]

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"[41] 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.[42]

Auto. Ins. Co., 41 N.Y.2d 951, 952, 363 N.E.2d 359, 394 N.Y.S.2d 635, *cert. denied*, 434 U.S. 859 (1977); Aetna Life & Casualty Co. v. Stekardis, 34 N.Y.2d 182, 183-84, 313 N.E.2d 53, 356 N.Y.S.2d 587, 589 (1974); Raisler Corp. v. New York City Hous. Auth., 32 N.Y.2d 274, 280, 298 N.E.2d 91, 93, 344 N.Y.S.2d 917, 920-21 (1973).

38. Crawford v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 35 N.Y.2d 291, 296, 319 N.E.2d 408, 410, 361 N.Y.S.2d 140, 143-44 (1974).

39. Matarasso v. Continental Casualty Co., 56 N.Y.2d 264, 436 N.E.2d 1305, 451 N.Y.S.2d 703 (1982).

40. Initial Trends, Inc. v. Campus Outfitters, Inc., 58 N.Y.2d 896, 447 N.E.2d 448, 460 N.Y.S.2d 500 (1983).

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.[43] 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.[44] This requirement of a writing is met, of course, by manifestation of the agreement in a single document.[45] It may also be satisfied by an amalgam of several paper writings.[46] 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.[47]

> 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.

Acting Superintendent of Schools v. United Liverpool Faculty Ass'n, 42 N.Y.2d 509, 512, 369 N.E.2d 746, 748, 399 N.Y.S.2d 189, 191 (1977) (citations omitted).

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.

44. Crawford v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 35 N.Y.2d 291, 299, 319 N.E.2d 408, 412, 361 N.Y.S.2d 140, 146 (1974).

45. I.J.S. Fabrics, Inc. v. Dan River, Inc., 56 N.Y.2d 755, 437 N.E.2d 260, 452 N.Y.S.2d 1 (1982) (signature of document containing arbitration clause after deletion by signer of warranty provision therein); American Utex Int'l, Ltd. v. ICC Corp., 52 N.Y.2d 888, 418 N.E.2d 1323, 437 N.Y.S.2d 304 (1981) (signature by both parties of sales note).

46. Just In-Materials Designs Ltd. v. I.T.A.D. Assocs., Inc., 61 N.Y.2d 882, 462 N.E.2d 1188, 474 N.Y.S.2d 470 (1984) (retention by both parties of documents containing arbitration clauses prepared by a common broker); Bayly, Martin & Fay, Inc. v. Glaser, 60 N.Y.2d 577, 454 N.E.2d 124, 467 N.Y.S.2d 43 (1983) (agreement to arbitrate claims arising under stock purchase agreement found in three interlocking agreements: employment agreement containing arbitration clause; guarantee agreement; and stock purchase agreement).

47. Marlene Indus. Corp. v. Carnac Textiles, Inc., 45 N.Y.2d 327, 333, 380 N.E.2d 239, 240, 408 N.Y.S.2d 410, 411 (1978).

After what was perceived, following the court's decision in *Marlene Industrial Corporation v. Carnac Textiles*,[48] 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[49] or by proof of custom and practice in the industry.[50] 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.[51] 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.[52]

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.[53] In *Lane v. Abel-Bey*,[54] 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.[55]

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48. 45 N.Y.2d 327, 380 N.E.2d 239, 408 N.Y.S.2d 410 (1978).

49. Woodcrest Fabrics, Inc. v. B & R Textile Corp., 61 N.Y.2d 887, 462 N.E.2d 1199, 474 N.Y.S.2d 481 (1984); Michel & Co. v. Anabasis Trade, Inc., 50 N.Y.2d 951, 409 N.E.2d 933, 431 N.Y.S.2d 459 (1980); *see* Schubtex, Inc. v. Allen Snyder, Inc., 49 N.Y.2d 1, 399 N.E.2d 1154, 424 N.Y.S.2d 133 (1979).

50. *See* Schubtex, Inc. v. Allen Snyder, Inc., 49 N.Y.2d 1, 6, 399 N.E.2d 1154, 1156, 424 N.Y.S.2d 133, 135 (1979).

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.

52. Schachter v. Lester Witte & Co., 41 N.Y.2d 1067, 364 N.E.2d 840, 396 N.Y.S.2d 175 (1977).

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).

54. 50 N.Y.2d 864, 407 N.E.2d 1337, 430 N.Y.S.2d 41 (1980).

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*,[56] 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.[57] In *Steigerwald v. Dean Witter Reynolds, Inc.*,[58] 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.[59] Further, in *Muh v. Risher*,[60] an agreement to arbitrate was held to survive expiration of the substantive agreement.[61] Finally, in *New York Times Co. v. New York Typographical Union No. 6*,[62] the court found that an agreement to arbitrate continued pending negotiations for a new labor contract.[63]

In *Travelers Indemnity Co. v. Kammer*[64] and *Liberty Mutual Insurance Co. v. Stollerman*,[65] 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.[66]

Reference should be made at this point to some related holdings of the New York State Court of Appeals. In *Waldron v. Goddess*,[67] 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.[68] In this connection, it may be noted, however, that the availability of al-

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56. 61 N.Y.2d 181, 461 N.E.2d 273, 473 N.Y.S.2d 136 (1984).
57. *Id.* at 185, 461 N.E.2d at 275, 473 N.Y.S.2d at 138.
58. 56 N.Y.2d 621, 435 N.E.2d 1097, 450 N.Y.S.2d 482 (1982).
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.
62. 34 N.Y.2d 555, 310 N.E.2d 537, 354 N.Y.S.2d 940, *cert. dismissed*, 418 U.S. 901 (1974).
63. *Id.* at 556-57.
64. 51 N.Y.2d 792, 412 N.E.2d 1323, 433 N.Y.S.2d 98 (1980).
65. 50 N.Y.2d 895, 408 N.E.2d 920, 430 N.Y.S.2d 591 (1980).
66. Travelers Indemnity Co. v. Kammer, 51 N.Y.2d 792, 412 N.E.2d 1323, 433 N.Y.S.2d 98 (1980) (failure to comply with statutory prescription as to form of notice of cancellation); Liberty Mut. Ins. Co. v. Stollerman, 50 N.Y.2d 895, 408 N.E.2d 920, 430 N.Y.S.2d 591 (1980) (same).
67. 61 N.Y.2d 181, 461 N.E.2d 273, 473 N.Y.S.2d 136 (1984).
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[69] 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.[70]

In *Antinore v. State of New York*,[71] 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.[72] In *Franklin Central School v. Franklin Teachers Association*,[73] 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.[74]

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

(1) Is Arbitration of the Claim Barred by Considerations of Public Policy?[75]

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.[76] 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."[77] The public policy contention

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69. Riccardi v. Modern Silver Linen Supply Co., 36 N.Y.2d 945, 335 N.E.2d 856, 373 N.Y.S.2d 551 (1975).

70. *Compare* Rosenblum v. Steiner, 43 N.Y.2d 896, 374 N.E.2d 610, 403 N.Y.S.2d 716 (1978) (borrower may submit issue of usury to arbitration) *with* Durst v. Abrash, 17 N.Y.2d 445, 213 N.E.2d 887, 266 N.Y.S.2d 806 (1965) (public policy prohibits lender from submitting issue of usury to arbitration).

71. 40 N.Y.2d 921, 358 N.E.2d 268, 389 N.Y.S.2d 576 (1976).

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.

76. Port Washington Union Free School Dist. v. Port Washington Teachers Ass'n, 45 N.Y.2d 411, 419-25, 380 N.E.2d 280, 285-86, 408 N.Y.S.2d 453, 458-59 (1978) (Breitel, C.J., concurring) (*cited with approval in* Board of Educ. v. Glaubman, 53 N.Y.2d 781, 782, 422 N.E.2d 567, 568, 439 N.Y.S.2d 907, 908 (1981)).

77. Sprinzen v. Nomberg, 46 N.Y.2d 623, 631, 389 N.E.2d 456, 460, 415 N.Y.S.2d 974, 978 (1979) (*cited with approval in* Town of Haverstraw v. Rockland

is evaluated and determined as of the date of the judicial decision.[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.[79] In many more cases, however, the court has rejected assertions of preclusive public policy.[80]

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)).

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

79. Onteora Cent. School Dist. v. Onteora Non-Teaching Employees Ass'n, 56 N.Y.2d 769, 437 N.E.2d 281, 452 N.Y.S.2d 22 (1982) (award vacated where perceived as encroaching upon authority of Commissioner of Education to resolve disputes as to "ordinary contingent expenses" under Education Law § 2024); Honeoye Falls-Lima Cent. School Dist. v. Honeoye Falls-Lima Educ. Ass'n, 49 N.Y.2d 732, 402 N.E.2d 1165, 426 N.Y.S.2d 263 (1980) (maintenance of educational standards fixed by statute, here order of lay-offs, cannot be submitted to arbitration); Wertheim & Co. v. Halpert, 48 N.Y.2d 681, 397 N.E.2d 386, 421 N.Y.S.2d 876 (1979) (sex discrimination claims subject to statutory remedies cannot be resolved in arbitration at insistence of the employer inasmuch as it is against public policy to interfere with right of employee to pursue statutory remedies); Candor Cent. School Dist. v. Candor Teachers Ass'n, 42 N.Y.2d 266, 366 N.E.2d 826, 397 N.Y.S.2d 737 (1977) (tenure determinations may not be reviewed in arbitration, but claimed violation of procedural prerequisite to denial of tenure may be submitted to arbitration). But note that an award sustaining a denial of tenure has been upheld in Simon v. Boyer, 41 N.Y.2d 822, 361 N.E.2d 1037, 393 N.Y.S.2d 388 (1977). Considerations of public policy preclude the substitution of a determination by an arbitrator for the decision of the educational authorities, either to grant or deny tenure, but not an award sustaining the decision of the educational authorities); Board of Educ. v. Areman, 41 N.Y.2d 527, 362 N.E.2d 943, 394 N.Y.S.2d 143 (1977) (board cannot surrender right to inspect employee personnel files); Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976) (punitive damages may not be awarded in arbitration); Cohoes City School Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976) (to the same effect as *Candor*, allowing arbitration of claimed violation of structured evaluation procedures); Aimcee Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968, (1968) (enforcement of New York State's antitrust law represents "public policy of the first magnitude").

80. In the following cases, the assertion of preclusive public policy has been rejected in disputes arising in the field of education: Board of Educ. v. Connetquot Teachers Ass'n, 60 N.Y.2d 840, 458 N.E.2d 373, 470 N.Y.S.2d 132 (1983) (right of teachers' association to use office space in school buildings); Board of Trustees v. Maplewood Teachers' Ass'n, 57 N.Y.2d 1025, 443 N.E.2d 949, 457 N.Y.S.2d 475 (1982) (enforcement after expiration of collective bargaining agreement of provision mandating automatic salary increments); Board of Educ. v. Cattaraugus Teacher's Ass'n, 55 N.Y.2d 951, 434 N.E.2d 262, 449 N.Y.S.2d 193 (1982) (simultaneous pursuits of available remedies under the Education Law and in arbitration, even where potential exists for contrary determinations); Board of Educ. v. Glaubman, 53 N.Y.2d 781, 422 N.E.2d 567, 439 N.Y.S.2d 907 (1981) (N.Y. Educ. Law §§ 2585, 2588, addressing basic rules regarding rehiring practices, do

(2) 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

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not bar arbitration of grievance as to recall procedures of laid-off teachers); United Liverpool Faculty Ass'n v. Board of Educ., 52 N.Y.2d 1038, 420 N.E.2d 386, 438 N.Y.S.2d 505 (1981) (arbitrator may restrict powers of district superintendent to make tenure recommendations); Board of Educ. v. Three Village Teachers' Ass'n, 52 N.Y.2d 750, 417 N.E.2d 570, 436 N.Y.S.2d 276 (1980) (claim of violation of procedural prerequisites to adoption of reading management system); Board of Educ. v. New York State United Teachers, 51 N.Y.2d 994, 417 N.E.2d 89, 435 N.Y.S.2d 977 (1980) (asserted violation of agreement not to discharge during probationary period without just cause); Board of Higher Educ. v. Brown, 49 N.Y.2d 935, 406 N.E.2d 438, 428 N.Y.S.2d 621 (1980) (sufficiency of statement of college president's reasons for refusing reappointment); Wyandanch Union Free School Dist. v. Wyandanch Teachers Ass'n, 48 N.Y.2d 669, 397 N.E.2d 384, 421 N.Y.S.2d 873 (1979) (asserted failure to submit proposed change in educational policy to advisory council for its recommendation); 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) (dispute with respect to payroll deductions pursuant to authorization, withdrawal of which apparently restricted in violation of statute); Board of Educ. v. United Fed'n of Teachers, 46 N.Y.2d 1018, 389 N.E.2d 1057, 416 N.Y.S.2d 535 (1979) (claimed violation of augmented procedural mechanisms preliminary to dismissal); Port Washington Union Free School Dist. v. Port Washington Teachers Ass'n, 45 N.Y.2d 411, 380 N.E.2d 280, 408 N.Y.S.2d 453 (1978) (compliance with procedural prescriptions preliminary to implementation of an educational program and reduction of extra-curricular activities and assignments); Port Jefferson Station Teachers Ass'n v. Brookhaven-Comsewogue Union Free School Dist., 45 N.Y.2d 898, 383 N.E.2d 553, 411 N.Y.S.2d 1 (1978) (assignment of specialist teachers outside area of specialty); Board of Educ. v. New Paltz United Teachers, 44 N.Y.2d 890, 379 N.E.2d 160, 407 N.Y.S.2d 632 (1978) (discontinuance of school district's prior practice of granting free tuition to children of teachers in school system who lived outside district); Board of Educ. v. Yonkers Fed'n of Teachers, 40 N.Y.2d 268, 353 N.E.2d 569, 386 N.Y.S.2d 657 (1976) (job security issues); Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers' Ass'n, 37 N.Y.2d 614, 339 N.E.2d 132, 376 N.Y.S.2d 427 (1975) (reduction of school staff). In this group should be identified the cases allowing arbitration of claims of non-compliance with procedures antecedent to tenure determinations. Candor Cent. School Dist. v. Candor Teachers Ass'n, 42 N.Y.2d 266, 366 N.E.2d 826, 397 N.Y.S.2d 737 (1977); Cohoes City School Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976). *Candor Cent. School Dist.* and *Cohoes City School Dist.*, along with several of the other cases listed immediately above are illustrative of the general principle that, although considerations of public policy may foreclose arbitral review of the ultimate substantive determination, issues as to compliance with procedural agreements preliminary thereto may be submitted to arbitration. Board of Educ. v. Three Village Teachers' Ass'n, 52 N.Y.2d 750, 417 N.E.2d 570, 436 N.Y.S.2d 276 (1980); Board of Educ. v. New York State United Teachers, 51 N.Y.2d 994, 417 N.E.2d 89, 435 N.Y.S.2d 977 (1980), Wyandanch Union Free School Dist. v. Wyandanch Teachers Ass'n, 48 N.Y.2d 669, 397 N.E.2d 384, 421 N.Y.S.2d 873 (1979); Board of Educ. v. United Fed'n of Teachers, 46 N.Y.2d 1018, 389 N.E.2d 1057, 416 N.Y.S.2d 535 (1979); Port Washington Union Free School Dist. v. Port Washington Teachers Ass'n, 45 N.Y.2d 411, 380 N.E.2d 280,

408 N.Y.S.2d 453 (1978); Acting Superintendent of Schools v. United Liverpool Faculty Ass'n, 42 N.Y.2d 509, 369 N.E.2d 746, 399 N.Y.S.2d 189 (1977).

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 New York State Court of Appeals has also rejected assertions that considerations of public policy preclude submission to arbitration in cases arising in fields other than education. *See, e.g.*, Town of Haverstraw v. Rockland County Patrolmen's Benevolent Ass'n, 65 N.Y.2d 677, 481 N.E.2d 248, 491 N.Y.S.2d 616 (1985) (right of incapacitated police officer to overtime compensation as well as regular salary); Security & Law Enforcement Employees Dist. Council 82 v. County of Albany, 61 N.Y.2d 965, 463 N.E.2d 621, 475 N.Y.S.2d 280 (1984) (allowance of attorney's fees for defense of county employees on criminal charges); Waks v. Waugh, 59 N.Y.2d 723, 450 N.E.2d 231, 463 N.Y.S.2d 425 (1983) (claims arising out of settlement agreement between attorneys and clients); Harris v. Shearson Hayden Stone, Inc., 56 N.Y.2d 627, 435 N.E.2d 1097, 450 N.Y.S.2d 482 (1982) (common law claims for breach of fiduciary duties); County of Rockland v. Rockland County Unit of the Rockland County Local of the Civil Serv. Employees Ass'n, 53 N.Y.2d 741, 421 N.E.2d 849, 439 N.Y.S.2d 357 (1981) (compensation for county employees working out of title); Bamond v. Nationwide Mut. Ins. Co., 52 N.Y.2d 957, 419 N.E.2d 872, 437 N.Y.S.2d 969 (1981) (substantial evidence of intoxication as precluding recovery under no-fault policy); Sprinzen v. Nomberg, 46 N.Y.2d 623, 389 N.E.2d 456, 415 N.Y.S.2d 974 (1979) (enforcement of employee's covenant not to compete); Psychoanalytic Center, Inc. v. Burns, 46 N.Y.2d 1002, 389 N.E.2d 832, 416 N.Y.S.2d 237 (1979) (computation of damages based on prior allocation of fees as against public policy as fee-splitting in violation of regulations of Commission of Education); Ryder Truck Lines, Inc. v. Maiorano, 44 N.Y.2d 364, 376 N.E.2d 1311, 405 N.Y.S.2d 666 (1978) (Workers' Compensation Law as bar to submission of employee's claim to arbitration); 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) (discipline of bribe-receiving employee); Rosenblum v. Steiner, 43 N.Y.2d 896, 374

the subject matter of a particular demand did not fall within the embrace of the parties' agreement to arbitrate are relatively few.[81] In one case, the court held that although there existed an agreement to arbitrate, the party seeking arbitration was not within its purview.[82]

N.E.2d 610, 403 N.Y.S.2d 716 (1978) (usury defense in arbitration at request of borrower but lender may not submit usury issue to arbitration, Durst v. Abrash, 17 N.Y.2d 445, 213 N.E.2d 887, 266 N.Y.S.2d 806 (1965)); Maye v. Bluestein, 40 N.Y.2d 113, 351 N.E.2d 717, 386 N.Y.S.2d 69 (1976) (dispute as to staffing of Firemen's Funds under legislative scheme); Riccardi v. Modern Silver Linen Supply Co., 36 N.Y.2d 945, 335 N.E.2d 856, 373 N.Y.S.2d 551 (1975) (enforcement of employee's covenant not to compete); Associated Gen. Contractors, N.Y. State Chapter, Inc. v. Savin Bros., Inc., 36 N.Y.2d 957, 335 N.E.2d 859, 373 N.Y.S.2d 555 (1975) (contention that provision for liquidated damages constituted penalty in violation of public policy rejected; arbitrator's holding that it was not penalty upheld).

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 & Whittemore 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).

82. County of Westchester v. Mahoney, 56 N.Y.2d 756, 437 N.E.2d 280, 452 N.Y.S.2d 21 (1982) (right to arbitration limited to college and union did not extend to individual faculty members). *But see* Horseheads Cent. School Dist. v. Horseheads Teachers' Ass'n, 55 N.Y.2d 949, 434 N.E.2d 262, 449 N.Y.S.2d 193 (1982).

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.[83]

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83. Several cases may be collected under the general rubric that questions with respect to the interpretation and application of documents executed subsequent to the initial agreement which contained the arbitration clauses are for the arbitrator. *See, e.g.*, Board of Trustees v. Maplewood Teachers' Ass'n, 57 N.Y.2d 1025, 443 N.E.2d 949, 457 N.Y.S.2d 475 (1982) (whether a new contract between the parties moots the arbitration); Inryco, Inc. v. Parsons & Whittemore Contractors Corp., 55 N.Y.2d 666, 431 N.E.2d 291, 446 N.Y.S.2d 930 (1981) (questions concerning the existence and terms of alleged settlement or modification agreement); Schlaifer v. Sedlow, 51 N.Y.2d 181, 185, 412 N.E.2d 1294, 1296, 433 N.Y.S.2d 67, 69 (1980) (questions under a general release and whether it was the product of economic distress. "Once the parties to a broad arbitration clause have made a valid choice of forum, as here, all questions with respect to the validity and effect of subsequent documents purporting to work a modification or termination of the substantive provisions of their original agreement are to be resolved by the arbitrator."); Black & Pola v. Manes Org., Inc., 50 N.Y.2d 821, 407 N.E.2d 1345, 430 N.Y.S.2d 49 (1980) (questions as to termination or abandonment of initial contract); Elgin Nat'l Indus., Inc. v. Somerset Constr. Co., 45 N.Y.2d 1001, 385 N.E.2d 1073, 413 N.Y.S.2d 146 (1978) (effect of subsequent modifying agreement); Opark Constr. Corp. v. Eureka Constructors, Inc., 42 N.Y.2d 1025, 369 N.E.2d 7, 398 N.Y.S.2d 1008 (1977) (whether settlement agreement effected a release); R.H. Macy & Co. v. National Sleep Prods., Inc., 39 N.Y.2d 268, 347 N.E.2d 887, 383 N.Y.S.2d 562 (1976) (question as to abandonment of contract); Riccardi v. Modern Silver Linen Supply Co., 36 N.Y.2d 945, 335 N.E.2d 856, 373 N.Y.S.2d 551 (1975) (whether third agreement superseded first two). To be distinguished from these cases would be a situation in which it is the contention that the subsequent document effected a cancellation or obliteration of the initial agreement, including its arbitration clause, *ab initio*. *See* Schlaifer v. Sedlow, 51 N.Y.2d 181, 184, 412 N.E.2d 1294, 1295-96, 433 N.Y.S.2d 67, 69 (1980). In several other cases, the court has rejected the contention that the question sought to be arbitrated falls outside the scope of the parties' agreement. *See, e.g.*, Aetna Casualty & Sur. Co. v. Cochrane, 64 N.Y.2d 796, 476 N.E.2d 314, 486 N.Y.S.2d 915 (1985) (whether injury is a "serious injury" under automobile accident indemnity endorsement in claim against uninsured motorist—as part of merits of claim); Bellevue South Assocs. v. Heckler Elec. Co., 62 N.Y.2d 873, 467 N.E.2d 528, 478 N.Y.S.2d 864 (1984) (contention by owner in opposition to arbitration that general contractor was really presenting claim of subcontractor with whom owner had no agreement to arbitrate—as part of merits of claim); Stillman v. Stillman, 55 N.Y.2d 653, 431 N.E.2d 303, 446 N.Y.S.2d 942 (1981) (interpretation of agreement to determine which questions are subject to arbitration and which are not; *see also* Pearl St. Dev. Corp. v. Conduit & Found. Corp., 41 N.Y.2d 167, 359 N.E.2d 693, 391 N.Y.S.2d 98 (1976)); Windsor Cent. School Dist. v. Windsor Teachers Ass'n, 52 N.Y.2d 734, 417 N.E.2d 561, 436 N.Y.S.2d 267 (1980) (effect to be accorded "continuation provision" following expiration of term of collective bargaining agreement); Lane v. Abel-Bey, 50 N.Y.2d 864, 407 N.E.2d 1337, 430 N.Y.S.2d 41 (1980) (claims of failure to enter into employment contract, of breach of fiduciary duties, and of waste by corporate directors); Honeoye Falls-Lima Cent. School Dist. v. Honeoye Falls-Lima Educ. Ass'n, 49 N.Y.2d 732, 402 N.E.2d 1165, 426 N.Y.S.2d 263 (1980) (whether curricular changes initiated by Board of Education constituted a "change in policy or practice" necessitating compliance with contractual procedures); Rosensweig v. Brener, 49

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.[84] 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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N.Y.2d 958, 406 N.E.2d 803, 428 N.Y.S.2d 948 (1980) (valuation of stock of disabled or deceased shareholders and ambiguity in provisions for discharge of trustee); Board of Educ. v. Barni, 49 N.Y.2d 311, 401 N.E.2d 912, 425 N.Y.S.2d 554 (1980) (ambiguities with respect to discharge of probationary teacher); Wyandanch Union Free School Dist. v. Wyandanch Teachers Ass'n, 48 N.Y.2d 669, 397 N.E.2d 384, 421 N.Y.S.2d 873 (1979) (grievances relating to Board's alleged failure to submit a change in educational policy to an advisory professional council for its recommendations and the imposition of certain duties on teachers in violation of contract provisions); Board of Educ. v. Roosevelt Teachers Ass'n, 47 N.Y.2d 748, 390 N.E.2d 1176, 417 N.Y.S.2d 252 (1979) (are "*per diem*" teachers "substitute" teachers?); Elgin Nat'l Indus., Inc. v. Somerset Constr. Co., 45 N.Y.2d 1001, 385 N.E.2d 1073, 413 N.Y.S.2d 146 (1978) (dispute as to distribution of escrowed joint venture proceeds); Triborough Bridge & Tunnel Auth. v. Bridge & Tunnel Officers Benevolent Ass'n, 44 N.Y.2d 676, 376 N.E.2d 199, 405 N.Y.S.2d 39 (1978) (compensation of officers for making off-duty arrests as peace officers); Information Sciences, Inc. v. Mohawk Data Science Corp., 43 N.Y.2d 918, 374 N.E.2d 624, 403 N.Y.S.2d 730 (1978) (claims arising out of alleged non-performance, but not questions of collection); Walter A. Stanley & Son, Inc. v. Trustees of Hackley School, 42 N.Y.2d 436, 366 N.E.2d 1339, 397 N.Y.S.2d 985 (1977) (whether "dispute or disagreement in connection with the performance of the work" includes both liability of contractor and determination of damages for delay); Nassau Ins. Co. v. McMorris, 41 N.Y.2d 701, 363 N.E.2d 700, 395 N.Y.S.2d 149 (1977) (in no-fault insurance arbitration, whether policy has been cancelled); Weinrott v. Carp, 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973) (fraud in the inducement of the agreement between the parties). In another case, the court concluded that, although another affected party was not entitled to arbitration under the particular agreement to arbitrate, the party seeking arbitration was so entitled. Horseheads Cent. School Dist. v. Horseheads Teachers' Ass'n., 55 N.Y.2d 949, 434 N.E.2d 262, 449 N.Y.S.2d 193 (1982) (union had right to arbitrate grievance as affecting membership, although affected substitute teacher did not). *Cf.* County of Westchester v. Mahoney, 56 N.Y.2d 756, 437 N.E.2d 280, 452 N.Y.S.2d 21 (1982) (faculty member could not demand arbitration proceedings under agreement intended for the college and union).

84. County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 8-9, 409 N.E.2d 951, 954-55, 431 N.Y.S.2d 478, 482 (1980).

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,[85] 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.[86]

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85. Silverstein Properties, Inc. v. Paine, Webber, Jackson & Curtis, Inc., 65 N.Y.2d 785, 482 N.E.2d 906, 493 N.Y.S.2d 110 (1985) (requirement of thirty days' prior notice of claim under a restricted arbitration clause); Syracuse v. Utica Mut. Ins. Co., 61 N.Y.2d 691, 460 N.E.2d 1085, 472 N.Y.S.2d 600 (1984) (notice-of-claim provisions of Gen. Mun. Law §§ 50-e, 50-i do not apply to arbitration under Ins. Law § 674 where municipality is self-insurer); Geneseo Cent. School v. Perfetto & Whalen Constr. Corp., 53 N.Y.2d 306, 423 N.E.2d 1058, 441 N.Y.S.2d 229 (1981) (filing of notice-of-claim under Educ. Law § 3813 condition precedent to arbitration); Board of Educ. v. Wager Constr. Corp., 37 N.Y.2d 283, 333 N.E.2d 353, 372 N.Y.S.2d 45 (1975) (notice-of-claim provisions of Educ. Law § 3813 condition precedent to submission of claim in arbitration); Opan Realty Corp. v. Pedrone, 36 N.Y.2d 943, 335 N.E.2d 854, 373 N.Y.S.2d 549 (1975) (requirement that dispute be first submitted to partnership for determination condition precedent to arbitration); *see* Liebhafsky v. Construct Assocs., Inc., 62 N.Y.2d 439, 466 N.E.2d 844, 478 N.Y.S.2d 252 (1984) (requirement for prior submission to architect of contractor's claim for change order adjustments—no such condition found, but if it were, resolution apparently would be for the court); New York Tel. Co. v. Speciner, 55 N.Y.2d 1002, 434 N.E.2d 708, 449 N.Y.S.2d 472 (1982) (conditions precedent to arbitration met); County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 409 N.E.2d 951, 431 N.Y.S.2d 478 (1980) (requirement for prior submission to architect of claim for delay damages—no such condition found, but if it were, resolution would be for the court); United Nations Dev. Corp. v. Norkin Plumbing Co., 45 N.Y.2d 358, 380 N.E.2d 253, 408 N.Y.S.2d 424 (1978) (notice-of-claim provisions of Educ. Law § 3813 condition precedent to arbitration, but not at issue in case); Niagara Mohawk Power Corp. v. Perfetto & Whalen Constr. Corp., 40 N.Y.2d 986, 359 N.E.2d 436, 390 N.Y.S.2d 928 (1976) (contractual limitation of time on submission of claim a matter for court resolution, but here no failure to comply); Raisler Corp. v. New York City Hous. Auth., 32 N.Y.2d 274, 298 N.E.2d 91, 344 N.Y.S.2d 917 (1973) (notice-of-claim made precondition to arbitration and compliance initially to be determined by court, but failure to raise on timely application for a stay constitutes a waiver).

86. Diaz v. Pilgrim State Psychiatric Center, 62 N.Y.2d 693, 465 N.E.2d 32, 476 N.Y.S.2d 525 (1984) (contractual terms as to time and manner of demanding arbitration); Monroe County Deputy Sheriff's Local 2964 v. County of Monroe, 61 N.Y.2d 1016, 463 N.E.2d 1233, 475 N.Y.S.2d 381 (1984) (procedural stipulations which the parties had collectively agreed to follow during arbitration); Albert Alpert & Sons, Ltd. v. John Mee, Inc., 58 N.Y.2d 950, 447 N.E.2d 82, 460 N.Y.S.2d 533 (1983) (contractual time requirements); Horseheads Cent. School Dist. v. Horseheads Teachers' Ass'n, 55 N.Y.2d 949, 434 N.E.2d 262, 449 N.Y.S.2d 193 (1982) (time for filing of grievance); Dobbs Ferry Union Free School Dist. v. Dobbs Ferry United Teachers, 53 N.Y.2d 1040, 425 N.E.2d 886, 442 N.Y.S.2d 498 (1981)

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.[87]

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.[88] 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.[89] The critical factor is the extent of the participation in the

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(contractual step-by-step grievance procedures); Cooper v. Ateliers de la Motobecane, S.A., 49 N.Y.2d 819, 404 N.E.2d 741, 427 N.Y.S.2d 619 (1980) (contractual ten-day notice requirement); United Nations Dev. Corp. v. Norkin Plumbing Co., 45 N.Y.2d 358, 380 N.E.2d 253, 408 N.Y.S.2d 424 (1978) (provision that demand for arbitration be made within sixty days after claim arose); Triborough Bridge & Tunnel Auth. v. Dist. Council 37, Am. Fed'n of State, County and Mun. Employees, 44 N.Y.2d 967, 376 N.E.2d 199, 408 N.Y.S.2d 328 (1978) (four-step grievance procedure); City School Dist. v. Poughkeepsie Pub. School Teachers' Ass'n, 35 N.Y.2d 599, 324 N.E.2d 144, 364 N.Y.S.2d 492 (1974) (ten-day time limitation on arbitration imposed by collective bargaining agent); *see* Tilbury Fabrics, Inc. v. Stillwater, Inc., 56 N.Y.2d 624, 435 N.E.2d 1093, 450 N.Y.S.2d 478 (1982) (contractual one-year period of limitation).

87. Bowes & Co. v. American Druggists' Ins. Co., 61 N.Y.2d 750, 460 N.E.2d 1353, 472 N.Y.S.2d 917 (1984) (stay of arbitration of claim for rescission on ground of fraud where demand made more than six years after execution of contract and more than two years after discovery of fraud); United Nations Dev. Corp. v. Norkin Plumbing Co., 45 N.Y.2d 358, 380 N.E.2d 253, 408 N.Y.S.2d 424 (1978) (bar of statute of limitations is for court to determine); Naetzker v. Brocton Cent. School Dist., 41 N.Y.2d 929, 363 N.E.2d 351, 394 N.Y.S.2d 627 (1977) (claim cognizable either in contract or in tort not barred by three-year statute of limitations; six-year statute with respect to claims in contract applicable); SCM Corp. v. Fisher Park Lane Co., 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398 (1976) (claim for reformation of lease barred under six-year statute of limitations); Paver & Wildfoerster v. Catholic High School Ass'n, 38 N.Y.2d 669, 345 N.E.2d 565, 382 N.Y.S.2d 22 (1976) (claim against architects, whether in contract or malpractice, not barred under applicable six-year statute of limitations).

88. Sherrill v. Grayco Builders, Inc., 64 N.Y.2d 261, 475 N.E.2d 772, 486 N.Y.S.2d 159 (1985).

89. Participation in arbitration proceedings may likewise constitute a waiver of the right to judicial proceedings. Beagle v. Motor Vehicle Accident Indemnification Corp., 19 N.Y.2d 834, 835, 227 N.E.2d 313, 314, 280 N.Y.S.2d 399, 399 (1967).

judicial proceedings.[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.[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

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90. Sherrill v. Grayco Builders, Inc., 64 N.Y.2d 261, 475 N.E.2d 772, 486 N.Y.S.2d 159 (1985) (aggressive participation in judicial litigation held inconsistent with assertion of right to arbitrate); Preiss/Breismeister Architects v. Westin Hotel Co.-Plaza Hotel Div., 56 N.Y.2d 787, 437 N.E.2d 1154, 452 N.Y.S.2d 397 (1982) (application to courts for protective relief to maintain status quo—to restrain use or disclosure of certain projected plans—held not to constitute waiver); Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers' Ass'n, 53 N.Y.2d 917, 423 N.E.2d 817, 441 N.Y.S.2d 59 (1981) (appeal by teacher to Commissioner of Education under Educ. Law § 310 held not a waiver); Clurman v. Clurman, 52 N.Y.2d 1036, 420 N.E.2d 385, 438 N.Y.S.2d 504 (1981) (participation in judicial proceedings to determine arrears in support payments for years 1973-1976 held not a waiver of right to arbitrate support issues for years 1977-1978); Susquehanna Valley Teachers' Ass'n v. Board of Educ., 52 N.Y.2d 1034, 420 N.E.2d 400, 438 N.Y.S.2d 519 (1981) (institution of CPLR art. 75 proceeding by teacher held not to constitute a waiver of the union's right to arbitrate); International Modular Hous., Inc. v. Atlanta Shipping Corp., 46 N.Y.2d 1016, 389 N.E.2d 1105, 416 N.Y.S.2d 585 (1979) (assertion in judicial proceeding of counterclaims with respect to non-arbitrable causes of action held not to constitute waiver); Allied Bldg. Inspectors Int'l. Union of Operating Eng'rs v. Office of Labor Relations, 45 N.Y.2d 735, 380 N.E.2d 303, 408 N.Y.S.2d 476 (1978) (no waiver where only function of judicial proceeding was to test subject matter jurisdiction); Yonkers v. Cassidy, 44 N.Y.2d 784, 377 N.E.2d 475, 406 N.Y.S.2d 32 (1978) (litigation of dispute in declaratory judgment action held to constitute waiver of right to arbitrate); Rosenblum v. Steiner, 43 N.Y.2d 896, 374 N.E.2d 610, 403 N.Y.S.2d 716 (1978) (no waiver in consequence of failure to demand arbitration until service of supplemental affidavit in opposition to opposing party's motion where delay explained by illness and absence from State); City School Dist. v. Poughkeepsie Pub. School Teachers Ass'n, 35 N.Y.2d 599, 324 N.E.2d 144, 364 N.Y.S.2d 492 (1974) (teacher's prosecution of appeal to Commissioner of Education under Educ. Law § 310 held to constitute no waiver of union's right to arbitrate); De Sapio v. Kohlmeyer, 35 N.Y.2d 402, 321 N.E.2d 770, 362 N.Y.S.2d 843 (1974) (interposing a cross-claim demanding apportionment of liability and procuring the plaintiff's deposition in judicial proceeding each held to constitute a waiver of the right to arbitrate); Denihan v. Denihan, 34 N.Y.2d 307, 313 N.E.2d 759, 357 N.Y.S.2d 454 (1974) (litigation with respect to shareholders' agreement held not to constitute a waiver of right to arbitrate as to different issues under the same agreement); Modular Technics Corp. v. Graverne Contracting Corp., 32 N.Y.2d 673, 296 N.E.2d 255, 343 N.Y.S.2d 358 (1973) (under Lien Law § 35, filing of notice of mechanic's lien held not to constitute a waiver of right to arbitrate).

91. Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers' Ass'n, 53 N.Y.2d 917, 423 N.E.2d 817, 441 N.Y.S.2d 59 (1981); Port Auth. of N.Y. & N.J. v. Port Auth. Police Benevolent Ass'n, 49 N.Y.2d 781, 403 N.E.2d 448, 426 N.Y.S.2d 725 (1980); City School Dist. v. Poughkeepsie Pub. School Teachers Ass'n, 35 N.Y.2d 599, 324 N.E.2d 144, 364 N.Y.S.2d 492 (1974).

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.[92] 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.[93] The court has, nevertheless, resolved issues relating to the standing of the party seeking arbitration.[94] With respect to substantive issues which have arisen in arbitration proceedings, the New York State Court of Appeals has sometimes made the determination.[95] Cases in which judicial relief is sought after the award has been made are to be clearly distinguished from those

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92. Cooper v. Ateliers de la Motobecane, S.A., 57 N.Y.2d 408, 413, 442 N.E.2d 1239, 1241-42, 456 N.Y.S.2d 728, 730-31 (1982) (pre-award attachment not available in aid of international arbitration, but a blind suggestion by way of dictum that pre-award attachment might be available in domestic arbitration in "appropriate circumstances"). *But see* 1985 N.Y. Laws ch. 253, effective January 1, 1986, authorizing issuance of attachment or preliminary injunction in connection with an arbitrable controversy. *See also* State Mut. Auto Ins. Co. v. Mercado, 52 N.Y.2d 840, 418 N.E.2d 663, 437 N.Y.S.2d 70 (1981) (arbitration under uninsured motorist provision must proceed under terms of the arbitration clause rather than rules of the American Arbitration Association); Cowper Co. v. Hires-Turner Glass Co., 51 N.Y.2d 937, 415 N.E.2d 975, 434 N.Y.S.2d 987 (1980) (courts may, in the exercise of discretion, order consolidation of arbitration proceedings); County of Sullivan v. Edward L. Nezelek Inc., 42 N.Y.2d 123, 366 N.E.2d 72, 397 N.Y.S.2d 371 (1977) (same); Fashion Envelopes, Inc. v. Minsky, 51 N.Y.2d 799, 412 N.E.2d 1325, 433 N.Y.S.2d 100 (1980) (demand for arbitration addressed to threats of discharge broad enough to embrace actual discharge as well); Newton v. Booras, 50 N.Y.2d 967, 409 N.E.2d 1001, 431 N.Y.S.2d 528 (1980) (failure to observe a contractual ten-day time limit constituted waiver of right to appoint member of arbitration panel); D.M.C. Constr. Corp. v. Nash Steel Corp., 41 N.Y.2d 855, 362 N.E.2d 260, 393 N.Y.S.2d 709 (1977) (designation of venue by American Arbitration Association pursuant to contract provision upheld).

93. Triborough Bridge & Tunnel Auth. v. District Council 37, Am. Fed'n of State, County & Mun. Employees, 44 N.Y.2d 967, 380 N.E.2d 160, 408 N.Y.S.2d 328 (1978) (compliance with contractual provisions for four-step grievance procedures to be determined by arbitrator).

94. Diaz v. Pilgrim State Psychiatric Center, 62 N.Y.2d 693, 465 N.E.2d 32, 476 N.Y.S.2d 525 (1984) (employee, as well as union, had standing to prosecute arbitration under terms of collective bargaining agreement); County of Westchester v. Mahoney, 56 N.Y.2d 756, 437 N.E.2d 280, 452 N.Y.S.2d 21 (1982) (arbitration clause limited rights to demand arbitration to college and teachers union; did not extend to individual professor).

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.[96]

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;[97] in others, the issue has been raised in the form of a motion to modify or to vacate the award.[98] 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[99] 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.[100] Where public policy is advanced as a ground for vacatur

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 505 (1981) (proceeding to vacate award cannot be used as a vehicle to challenge arbitrability of claim); Central Gen. Hosp. v. Hanover Ins. Co. 49 N.Y.2d 950, 406 N.E.2d 739, 428 N.Y.S.2d 881 (1980) (assertion of newly discovered evidence no ground for vacatur of award); Board of Higher Educ. v. Brown, 49 N.Y.2d 935, 406 N.E.2d 438, 428 N.Y.S.2d 621 (1980) (having proceeded to arbitration, losing party may not seek vacatur of award on ground that claim was not arbitrable); Board of Educ. v. Patchogue-Medford Congress of Teachers, 48 N.Y.2d 812, 399 N.E.2d 1143, 424 N.Y.S.2d 122 (1979) (whether a prior award in arbitration constitutes a bar to the relief sought is an issue for the arbitrator, not the courts); Lange-Finn Constr. Co. v. C.R. Joyce & Sons, Inc., 41 N.Y.2d 814, 361 N.E.2d 1045, 393 N.Y.S.2d 397 (1977) (on motion to confirm an award, court cannot consider contentions beyond issue submitted for arbitration).

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

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101. Candor Cent. School Dist. v. Candor Teachers Ass'n, 42 N.Y.2d 266, 270 n.*, 366 N.E.2d 826, 828 n.*, 397 N.Y.S.2d 737, 738 n.* (1977); *cf.* Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 309, 461 N.E.2d 1261, 1266-67, 473 N.Y.S.2d 774, 779-80 (1984).

102. *See* N.Y. ADMIN. CODE tit. x, § 65.17(i) (Williams 1985). The following are illustrative of rulings with respect to judicial review of no-fault insurance awards. Aleman v. Empire Mut. Ins. Co., 62 N.Y.2d 1017, 468 N.E.2d 676, 479 N.Y.S.2d 494 (1984) (award of master arbitrator vacated where he engaged in factual review and impermissibly weighed the evidence); Smith v. Firemen's Ins. Co., 55 N.Y.2d 224, 433 N.E.2d 509, 448 N.Y.S.2d 444 (1982) (court upheld vacatur of initial award by master arbitrator as grounded in his conclusion that initial award was erroneous as a matter of law); Mott v. State Farm Ins. Co., 55 N.Y.2d 224, 433 N.E.2d 509, 448 N.Y.S.2d 444 (1982) (award of master arbitrator—vacating initial award of benefits—vacated on ground that it was based on master arbitrator's review of procedural and factual matters outside his powers of review); Petrofsky v. Allstate Ins. Co., 54 N.Y.2d 207, 429 N.E.2d 755, 445 N.Y.S.2d 77 (1981) (award of master arbitrator based on factual determinations vacated); Bamond v. Nationwide Mut. Ins. Co., 52 N.Y.2d 957, 419 N.E.2d 872, 437 N.Y.S.2d 969 (1981) (award of master arbitrator affirming initial award of benefits confirmed); McKenna v. County of Nassau Office of County Attorney, 51 N.Y.2d 902, 415 N.E.2d 979, 434 N.Y.S.2d 991 (1980) (award of first-party benefits without deduction of payments to claimant under Gen. Mun. Law § 207-c not so irrational as to warrant vacatur); Cohn v. Royal Globe Ins. Co., 49 N.Y.2d 942, 406 N.E.2d 739, 428 N.Y.S.2d 881 (1980) (arbitrator's interpretation of statute specifying form of notice of cancellation of insurance policy upheld; notice valid); Furstenberg v. Aetna Casualty & Sur. Co., 49 N.Y.2d 757, 403 N.E.2d 170, 426 N.Y.S.2d 465 (1980) (same); Levine v. Zurich Am. Ins. Co., 49 N.Y.2d 907, 405 N.E.2d 675, 428 N.Y.S.2d 193 (1980) (factual determination that jury verdict in third-party action did not incorporate "basic economic loss" sustained as having a "basis in reason"); Fresh Meadows Medical Assocs. v. Liberty Mut. Ins. Co., 49 N.Y.2d

process is compulsory, the standard of judicial review includes determination of " 'whether the award is supported by evidence or other basis in reason.' "[103] 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,[104] 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.[105]

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."[106]

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.[107] These provisions of New

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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).

103. Petrofsky v. Allstate Ins. Co., 54 N.Y.2d 207, 211, 429 N.E.2d 755, 757, 445 N.Y.S.2d 77, 79-80 (1981) (quoting Mount St. Mary's Hosp. v. Catherwood, 26 N.Y.2d 493, 260 N.E.2d 508, 311 N.Y.S.2d 863 (1970)); Smith v. Firemen's Ins. Co., 55 N.Y.2d 224, 231, 433 N.E.2d 509, 511, 448 N.Y.S.2d 444, 446 (1982) (quoting *Petrofsky*).

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

105. Candor Cent. School Dist. v. Candor Teachers Ass'n, 42 N.Y.2d 266, 270 n.8, 366 N.E.2d 826, 828 n.*, 397 N.Y.S.2d 737, 738 n.* (1977).

106. City of Buffalo v. Rinaldo, 41 N.Y.2d 764, 364 N.E.2d 817, 396 N.Y.S.2d 152 (1977).

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.[108] 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

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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.

Id.; *see* Civil Serv. Employees Ass'n v. State, 56 N.Y.2d 663, 436 N.E.2d 1333, 451 N.Y.S.2d 731 (1982).

108. *E.g.*, N.Y. CIV. PRAC. LAW § 7511 (McKinney 1980).

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

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109. Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 312, 461 N.E.2d 1261, 1268, 473 N.Y.S.2d 774, 781 (1984) (Kaye, J., dissenting).

110. N.Y. CIV. PRAC. LAW § 7501 (McKinney 1980). *See, e.g.*, Long Island Univ. Faculty Fed'n v. Board of Trustees, 60 N.Y.2d 855, 458 N.E.2d 381, 470 N.Y.S.2d 140 (1983) (general proposition); Spanish Gardens Co. v. Local 32B-32J Serv. Employees Int'l Union, 56 N.Y.2d 826, 438 N.E.2d 104, 452 N.Y.S.2d 571 (1982) (same); I.J.S. Fabrics, Inc. v. Dan River, Inc., 56 N.Y.2d 755, 437 N.E.2d 260, 452 N.Y.S.2d 1 (1982) (whether seller retained and thereafter exercised right to accept sales note at home office a question for the arbitrator); Dunseith v. Travia, 56 N.Y.2d 582, 435 N.E.2d 405, 450 N.Y.S.2d 188 (1982) (arbitrator to decide which version of Code of National Association of Securities Dealers is applicable); MPG Capital Corp. v. Nick, 56 N.Y.2d 515, 434 N.E.2d 1329, 449 N.Y.S.2d 951 (1982) (arbitrators to determine whether 1973 or 1978 edition of Code of National Association of Securities Dealers is applicable); Board of Educ. v. Cattaraugus Teacher's Ass'n, 55 N.Y.2d 951, 434 N.E.2d 262, 449 N.Y.S.2d 193 (1982) (general proposition); Dobbs Ferry Union Free School Dist. v. Dobbs Ferry United Teachers, 53 N.Y.2d 1040, 425 N.E.2d 886, 442 N.Y.S.2d 498 (1981) (arbitrator to determine whether there was compliance with contractual grievance procedures); County of Rockland v. Rockland County Unit of the Civil Serv. Employees Ass'n, 53 N.Y.2d 741, 421 N.E.2d 849, 439 N.Y.S.2d 357 (1981) (arbitrator to determine existence of positions to which grievants were assigned to perform out-of-title work); Board of Educ. v. Barni, 51 N.Y.2d 894, 415 N.E.2d 963, 434 N.Y.S.2d 975 (1980) (arbitrator to decide whether procedures preliminary to filling vacancy were followed); Ryder Truck Lines, Inc. v. Maiorano, 44 N.Y.2d 364, 376 N.E.2d 1311, 405 N.Y.S.2d 666 (1978) (general statement); City of Buffalo v. Rinaldo, 41 N.Y.2d 764, 364 N.E.2d 817, 396 N.Y.S.2d 152 (1977) (arbitrators to determine municipal fiscal priorities); Praetorian Realty Corp. v. Presidential Towers Residence, Inc., 40 N.Y.2d 897, 357 N.E.2d 1006, 389 N.Y.S.2d 351 (1976) (arbitrator to determine whether claims are barred by merger doctrine in real property law); Board of Educ. v. Yonkers Fed'n of Teachers, 40 N.Y.2d 268, 276, 353 N.E.2d 569, 573, 386 N.Y.S.2d 657, 661 (1976) (general statement); Nationwide Gen. Ins. Co. v. Investors Ins. Co., 37 N.Y.2d 91, 95, 332 N.E.2d 333, 335, 371 N.Y.S.2d 463, 466 (1975) (general statement).

111. *See* Allen v. New York State, 53 N.Y.2d 694, 696, 421 N.E.2d 498, 499, 439 N.Y.S.2d 103, 104 (1981); Sprinzen v. Nomberg, 46 N.Y.2d 623, 629, 389 N.E.2d 456, 458, 415 N.Y.S.2d 974, 977 (1979); Binghamton Civil Serv. Forum

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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v. Binghamton, 44 N.Y.2d 23, 28, 374 N.E.2d 380, 383, 403 N.Y.S.2d 482, 485 (1978); American Ins. Co. v. Messinger, 43 N.Y.2d 184, 191, 371 N.E.2d 798, 802, 401 N.Y.S.2d 36, 40 (1977); Candor Cent. School Dist. v. Candor Teachers Ass'n, 42 N.Y.2d 266, 271, 366 N.E.2d 826, 828, 397 N.Y.S.2d 737, 739, (1977); Associated Gen. Contractors, N.Y. State Chapter, Inc. v. Savin Bros., Inc., 36 N.Y.2d 957, 959, 335 N.E.2d 859, 859, 373 N.Y.S.2d 555, 556 (1975); Wolff & Munier, Inc. v. Diesel Constr. Co., 36 N.Y.2d 750, 752, 329 N.E.2d 662, 663, 368 N.Y.S.2d 828, 829 (1975); Raisler Corp. v. New York City Hous. Auth., 32 N.Y.2d 274, 282, 284, 298 N.E.2d 91, 94, 96, 344 N.Y.S.2d 917, 923, 924 (1973). In general, questions of law which arise during the course of the arbitration proceedings are to be determined by the arbitrator. *See* City School Dist. v. Tonawanda Educ. Ass'n, 63 N.Y.2d 846, 472 N.E.2d 34, 482 N.Y.S.2d 258 (1984) (preclusive effect to be accorded prior award in arbitration); Board of Educ. v. Patchogue-Medford Congress of Teachers, 48 N.Y.2d 812, 399 N.E.2d 1143, 424 N.Y.S.2d 122 (1979) (preclusive effect to be accorded prior award in arbitration); Country-Wide Ins. Co. v. Barrios, 48 N.Y.2d 831, 399 N.E.2d 1153, 424 N.Y.S.2d 132 (1979) (entitlement of claimant under statute to attorney's fees on appeal).

112. Albany County Sheriff's Local 775 of Council 82 v. County of Albany, 63 N.Y.2d 654, 656, 468 N.E.2d 695, 696, 479 N.Y.S.2d 513, 514 (1984) ("The applicable principle is that an arbitrator's award 'will not be vacated even though the court concludes that his interpretation of the agreement misconstrues or disregards its plain meaning . . . unless it is violative of a strong public policy, or is totally irrational, or exceeds a specifically enumerated limitation'.") (citation omitted); Nyack Bd. of Educ. v. Nyack Teachers Ass'n, 55 N.Y.2d 959, 434 N.E.2d 264, 449 N.Y.S. 194 (1982) (general proposition); Adelstein v. Ortiz Funeral Home Corp., 52 N.Y.2d 997, 419 N.E.2d 1079, 438 N.Y.S.2d 80 (1981) (general proposition); Board of Educ. v. New York State United Teachers, 51 N.Y.2d 994, 996, 417 N.E.2d 89, 90, 435 N.Y.S.2d 977, 978 (1980) (ambiguities in provisions alleged to have been violated); Board of Educ. v. Deer Park Teachers Ass'n, 50 N.Y.2d 1011, 409 N.E.2d 1356, 431 N.Y.S.2d 682 (1980) (interpretation, meaning, and application of substantive provisions of agreement); Local 1179 Amalgamated Transit Union v. Green Bus Lines, Inc., 50 N.Y.2d 1007, 1009, 409 N.E.2d 1354, 1355, 431 N.Y.S.2d 680, 681 (1980) ("[C]ourts may not overturn an award because they believe the arbitrator has misconstrued the apparent, or even the obvious, meaning of the contract"); 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) ("[C]ourts may not set aside an award because they feel that the arbitrator's interpretation disregards the apparent, or even the plain, meaning of the words . . ."); Associated Gen. Contractors, N.Y. State Chapter, Inc. v. Savin Bros., Inc., 36 N.Y.2d 957, 335 N.E.2d 859, 373 N.Y.S.2d 555 (1975) (whether provision for liquidating damages was a penalty; arbitrator's conclusion that it was not a penalty and thus enforceable upheld); W.M. Girvan, Inc. v. Robilotto, 33 N.Y.2d 425, 309 N.E.2d 422, 353 N.Y.S.2d 958 (1974) (interpretation of provision prohibiting discharge or suspension without "just cause"); Cooper v. Abrams, 32 N.Y.2d 865, 299 N.E.2d 896, 346 N.Y.S.2d 530 (1973) (construction of substantive provisions of the agreement).

which it has found to be completely irrational;[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.[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).

113. Town of Haverstraw v. Rockland County Patrolmen's Benevolent Ass'n, 65 N.Y.2d 677, 481 N.E.2d 248, 491 N.Y.S.2d 616 (1985) (award of overtime compensation as well as regular salary to incapacitated police officer); Diaz v. Pilgrim State Psychiatric Center, 62 N.Y.2d 693, 465 N.E.2d 32, 476 N.Y.S.2d 525 (1984) (arbitrator's conclusion that there had not been compliance with contractual provisions as to time and manner of demand); McKenna v. County of Nassau, 61 N.Y.2d 739, 460 N.E.2d 1348, 472 N.Y.S.2d 913 (1984) (grant of interest on an award against a municipal self-insurer); Central Squares Teachers Ass'n v. Board of Educ., 52 N.Y.2d 918, 919, 419 N.E.2d 341, 341, 437 N.Y.S.2d 663, 663 (1981) (award with reference to assignment of teachers to cafeteria duty. "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).

114. Cady v. Aetna Life & Casualty Co., 61 N.Y.2d 594, 463 N.E.2d 1214, 475 N.Y.S.2d 362 (1984) (Superintendent of Insurance had no authority to reduce ninety-day period specified in CPLR 7511 to fifty-one days for judicial review of awards in no-fault insurance cases); Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 461 N.E.2d 1261, 473 N.Y.S.2d 774 (1984) (unless the entire controversy is non-arbitrable, participation in arbitration not a waiver of the right to seek vacatur of the award as in excess of arbitrator's power); Thermasol, Ltd. v. Dreiske, 52 N.Y.2d 1069, 420 N.E.2d 401, 438 N.Y.S.2d 520, *cert. denied*, 454 U.S. 826 (1981) (vacatur on ground that party never received demand denied where party received adequate notice of arbitration by mail in accordance with the rule of the American Arbitration Association); North Colonie Cent. School Dist. v. North Colonie Teachers' Ass'n, 46 N.Y.2d 965, 389 N.E.2d 142, 415 N.Y.S.2d 829 (1979) (submission to arbitrator of cited authority without advice that it had been modified not ground for vacatur of award); PPX Enterprises, Inc. v. Ducale Edizione Musicali, 42 N.Y.2d 897, 366 N.E.2d 1341, 397 N.Y.S.2d 987 (1977) (vacatur granted on ground of failure to follow procedure under CPLR art. 75 where, because of inartful administration

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.[115] 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.[116]

Generally speaking, the court recognizes that the arbitrator has

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by American Arbitration Association, there was a failure to give notice of hearing as required by CPLR 7506 (b)); Professional Staff Congress/City Univ. of N.Y. v. Board of Higher Educ., 39 N.Y.2d 319, 347 N.E.2d 918, 383 N.Y.S.2d 592 (1976) (no judicial review of arbitrator's determination that personnel records of college were confidential); Friedman v. Weinberger, 31 N.Y.2d 1048, 294 N.E.2d 856, 342 N.Y.S.2d 71 (1973) (court clarified terms of award to give effect to intention of arbitrators).

115. Board of Educ. v. Connetquot Teachers Ass'n, 60 N.Y.2d 840, 458 N.E.2d 373, 470 N.Y.S.2d 132 (1983) (general proposition); Nyack Bd. of Educ. v. Nyack Teachers Ass'n, 55 N.Y.2d 959, 434 N.E.2d 264, 449 N.Y.S.2d 194 (1982) (that arbitrator cannot grant relief requested is not ground for a stay); Board of Educ. v. Three Village Teachers' Ass'n, 52 N.Y.2d 750, 417 N.E.2d 570, 436 N.Y.S.2d 276 (1980) (permissible remedy could be fashioned for a violation of procedural prerequisites to adoption of a reading management system); Board of Educ. v. Barni, 51 N.Y.2d 894, 415 N.E.2d 963, 434 N.Y.S.2d 975 (1980) (that requested remedy may be beyond power of arbitrator is not ground for stay); Board of Educ. of Lakeland Cent. School Dist. v. Barni, 49 N.Y.2d 311, 401 N.E.2d 912, 425 N.Y.S.2d 554 (1980) (that arbitrator might fashion a remedy in excess of his powers under arbitration clause is not grounds for stay).

116. Northeast Cent. School Dist. v. Webutuck Teachers Ass'n, 52 N.Y.2d 717, 417 N.E.2d 567, 436 N.Y.S.2d 273 (1980) (although tenure may not be granted, reinstatement for further year of probation is proper remedy for violation of procedural requirements preliminary to tenure determination); Vestal Cent. Schools v. Vestal Teachers Ass'n, 46 N.Y.2d 746, 386 N.E.2d 261, 413 N.Y.S.2d 653 (1978) (although arbitrator cannot award tenure, he may grant relief for violation of provisions apart from tenure); Candor Cent. School Dist. v. Candor Teachers Ass'n, 42 N.Y.2d 266, 366 N.E.2d 826, 397 N.Y.S.2d 737 (1977) (arbitrator may grant relief short of tenure for violation of pre-tenure procedures); Fayetteville-Manlius Cent. School Dist. v. Fayetteville-Manlius Teachers Ass'n, 41 N.Y.2d 818, 361 N.E.2d 1045, 393 N.Y.S.2d 397 (1977) (same proposition); Cohoes City School Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 358 N.E.2d 878, 390 N.Y.S.2d 53 (1976) (same proposition); Board of Educ. v. Bellmore-Merrick United Secondary Teachers, Inc., 39 N.Y.2d 167, 347 N.E.2d 603, 383 N.Y.S.2d 242 (1976) (same proposition).

broad discretion to fashion remedies[117] and that this discretion is not limited to the remedies sought by the parties.[118] In a number of non-tenure cases, the remedy awarded by the arbitrator was upheld.[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.[120] The New York State Court of

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).

118. Board of Educ. v. Bellmore-Merrick United Secondary Teachers, 39 N.Y.2d 167, 172, 347 N.E.2d 603, 606, 383 N.Y.S.2d 242, 245 (1976), *cited with approval in* Port Washington Union Free School Dist. v. Port Washington Teachers Ass'n, 45 N.Y.2d 411, 418, 380 N.E.2d 280, 283, 408 N.Y.S.2d 453, 456 (1978).

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 965, 463 N.E.2d 621, 475 N.Y.S.2d 280 (1984) (award of back pay and attorney's fees in defense of criminal charges for impermissible suspension); Tilbury Fabrics, Inc. v. Stillwater, Inc., 56 N.Y.2d 624, 435 N.E.2d 1093, 450 N.Y.S.2d 478 (1982) (mere possibility that award included consequential damages—award of which was expressly prohibited in contract—not sufficient to disturb award); Allen v. New York State, 53 N.Y.2d 694, 421 N.E.2d 498, 439 N.Y.S.2d 103 (1981) (amendment of remedy in disciplinary proceeding over that initially proposed by State); De Paulo v. Albany, 49 N.Y.2d 994, 406 N.E.2d 1064, 429 N.Y.S.2d 171 (1980) (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); Psychoanalytic 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 Syracuse Cent. School Dist. v. North Syracuse Educ. Ass'n, 45 N.Y.2d 195, 379 N.E.2d 1193, 408 N.Y.S.2d 64 (1978) (negative action of voters no bar to reinstatement 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 lease); Ganser v. New York Tel. Co., 34 N.Y.2d 717, 313 N.E.2d 342, 356 N.Y.S.2d 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 N.E.2d 258, 345 N.Y.S.2d 1014 (1973) (direction for promotion of employee).

120. Local 345 of Retail Store Employees Union v. Heinrich Motors, Inc., 63 N.Y.2d 985, 473 N.E.2d 247, 483 N.Y.S.2d 997 (1984).

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.[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.[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,[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.[124] In a few cases, the court has addressed procedural aspects of the awarding of remedies.[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."[126] This has not proven to be a rewarding avenue of attack on awards. In many cases, the contention advanced as

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121. Turner v Booth Memorial Hosp., 63 N.Y.2d 633, 634-35, 468 N.E.2d 690, 691, 479 N.Y.S.2d 508, 509 (1984) (rule applicable to all arbitration); Board of Educ. v. Dover-Wingdale Teachers' Ass'n, 61 N.Y.2d 913, 463 N.E.2d 32, 474 N.Y.S.2d 716 (1984) (labor relations public sector); Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 461 N.E.2d 1261, 473 N.Y.S.2d 774 (1984) (commercial arbitration).

122. Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 310-11, 461 N.E.2d 1261, 1267, 473 N.Y.S.2d 774, 780-81 (1984).

123 *Cf.* HRH Constr. Corp. v. Bethlehem Steel Corp., 45 N.Y.2d 675, 384 N.E.2d 1289, 412 N.Y.S.2d 366 (1978).

124. Silverman v. Benmor Coats, Inc., 61 N.Y.2d 299, 307, 461 N.E.2d 1261, 1265-66, 473 N.Y.S.2d 774, 778-79 (1984).

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.[127] On the other hand, in cases in this category, on occasion, the court has found sufficient grounds for vacatur of the award.[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.[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.

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.[130] In *Allied Building*

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127. Harwyn Luggage, Inc. v. Henry Rosenfeld, Inc., 58 N.Y.2d 1063, 449 N.E.2d 422, 462 N.Y.S.2d 642 (1983) (denial of request for adjournment to change counsel); Feisthamel v. State Dep't of Envtl. Conservation, 57 N.Y.2d 696, 440 N.E.2d 534, 454 N.Y.S.2d 534 (1982) (refusal to hear evidence of good character and past history on issue of propriety in dismissal of employees); Peninsula Nat'l Bank v. Joseph M. Turecamo, Inc., 56 N.Y.2d 794, 437 N.E.2d 1155, 452 N.Y.S.2d 398 (1982) (refusal to grant adjournment to obtain new counsel and refusal to accept certain documentary evidence); Civil Serv. Employees Ass'n v. Soper, 56 N.Y.2d 639, 436 N.E.2d 192, 450 N.Y.S.2d 786 (1982) (receipt of testimony of mental patient conditioned on availability of her file); Sprinzen v. Nomberg, 46 N.Y.2d 623, 389 N.E.2d 456, 415 N.Y.S.2d 974 (1979) (relationship of arbitrator to other party known to applicant and receipt of compensation from the other for services); Siegel v. Lewis, 40 N.Y.2d 687, 358 N.E.2d 484, 389 N.Y.S.2d 800 (1976) (prior relationship of arbitrator to other party known to applicant when arbitration agreement made); Professional Staff Congress/City Univ. of N.Y. v. Board of Higher Educ., 39 N.Y.2d 319, 347 N.E.2d 918, 383 N.Y.S.2d 592 (1976) (exclusion of evidence in conformity with contract terms); Stern v. Lentnek, 34 N.Y.2d 932, 316 N.E.2d 872, 359 N.Y.S.2d 557 (1974) (request by arbitrator for compensation).

128. J.P. Stevens & Co. v. Rytex Corp., 34 N.Y.2d 123, 312 N.E.2d 466, 356 N.Y.S.2d 278 (1974) (relationship of arbitrator to party); *see* Raisler Corp. v. New York City Hous. Auth., 32 N.Y.2d 274, 298 N.E.2d 91, 344 N.Y.S.2d 917 (1973) (refusal to receive relevant evidence).

129. *See* Kornit v. Plainview-Old Bethpage Cent. School Dist., 49 N.Y.2d 842, 404 N.E.2d 1327, 427 N.Y.S.2d 786 (1980).

130. Zupan v. Firestone, 59 N.Y.2d 709, 450 N.E.2d 245, 463 N.Y.S.2d 439 (1983); Velazquez v. Water Taxi, Inc., 49 N.Y.2d 762, 403 N.E.2d 172, 426 N.Y.S.2d

Inspectors International Union of Operating Engineers v. Office of Labor Relations,[131] 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.[132] It does, however, provide the basis for an order compelling arbitration and for a stay of the judicial proceedings pending arbitration.[133]

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.

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467 (1980); American Ins. Co. v. Messinger, 43 N.Y.2d 184, 371 N.E.2d 798, 401 N.Y.S.2d 36 (1977). *Contra* Rembrandt Indus., Inc. v. Hodges Int'l, Inc., 38 N.Y.2d 502, 344 N.E.2d 383, 381 N.Y.S.2d 451 (1976).

131. 45 N.Y.2d 735, 380 N.E.2d 303, 408 N.Y.S.2d 476 (1978).

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").