Correcting ARBITRATOR ERROR: The Limited Scope of Judicial Review

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Court-imposed sanctions for the failure of an arbitrator to disclose in full any past or present relationships with the parties, their witnesses, or their attorneys before the hearing are considered in this article. The author also looks at the courts' disqualification and self-disqualification of arbitrators prior to the hearing and award. Postaward review raises the doctrine of "manifest disregard of law," propounded by the Supreme Court to set a standard for review of awards in cases with unrestricted submissions. Specific forms of misconduct are examined, such as the failure to grant adjournments or to hear relevant testimony and the conduct of unfair hearings. Note is taken of the courts' attitude toward appeals of arbitrators' procedural rulings before the issuance of awards. The article concludes with a review of the development of judicial tort immunity for the arbitrator and arbitration agencies.

The courts have consistently imposed upon the neutral arbitrator a duty to disclose to the parties "any fact which might disqualify himself from serving in a particular case."[1] Invariably, actions brought to vacate arbitration awards for bias are based upon statutory language containing that requirement. This is true for actions begun under the United States Arbitration Act and in New York, New

[1] Martin Domke, *The Law and Practice of Commercial Arbitration* (Mundelein: Callaghan & Co., 1968), §21.03, p. 208.

Jersey, California, and in the numerous states that have adopted the Uniform Arbitration Act.[2] In some instances, where statutes are silent on the issue, the courts have read into them the need to vacate an award where arbitrators have failed to disclose relationships.

Under the established procedures of the American Arbitration Association (AAA), when arbitrators are called on the telephone to obtain their services in a particular case, they are told the names of the parties involved, their principals (if known), and attorneys (if any), and are requested to advise the AAA at that time if they have any past, present, or pending relationships, business or personal, with any of those mentioned. If the appointment is accepted, the parties are so advised, and are provided with the name of the firm and any professional associations with which the arbitrator is affiliated. The parties are also told about past business relationships, if they are known to the Association.

To ensure full prehearing disclosure, written oaths of office are sent to arbitrators immediately upon their acceptance of appointment. In part, the oath advises:

> It is most important that the parties have complete confidence in the arbitrator's impartiality. Therefore, please disclose any past or present relationship with the parties or their counsel, direct or indirect, whether financial, professional, social or other kind. *Any doubt should be resolved in favor of disclosure.* If you are aware of such relationship, please describe it on the back of this form. The AAA will call the facts to the attention of the parties' counsel (emphasis added).

At the same time, in the Association's letter announcing the appointment of the arbitrators, the following request is made of each party:

> Since the arbitrators appointed in this case are active in the industry, their organizations may have past, present or future business relationships with the parties which may be substantial. Counsel should discuss these matters with their clients to forestall any subsequent claim of potential bias based upon such facts. Any factual objections to the continued services of the designated arbitrators should contain detailed specific information, and should be filed in writing no later than [10–14 days].
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> In addition, the Association strongly urges that counsel for the respective parties *advise their clients, witnesses, and experts,* if any, of the names of the arbitrators appointed (as well as the name of the company with which each of the arbitrators is affiliated) *for the purpose of promptly ascertaining whether a relationship exists and immediately advising the Association of any disclosures* (emphasis added).

Arbitrators are also provided with copies of the rules of the tribunal in which they are serving, supportive material, and a code of ethics, all of which stress the importance of maximum self-disclosure.[3]

Nonetheless, there have been instances wherein, for various reasons, disclosure has not been forthcoming before the issuance of an award. In such cases, the courts have held that the failure to disclose necessitates the vacatur of the award. The mere failure to disclose properly a relationship to the parties results in the award's vacation, even though the nature of the relationship would not have been sufficient to warrant the arbitrator's removal *had it been disclosed.*

NEW YORK STATE

In the state most favorable to arbitration, New York, (the recent Court of Appeals case of *Marlene Industries Corp.* v. *Carnac Textiles, Inc.,* 45 N.Y. 2d 327 [1978], notwithstanding), one of the earliest cases to deal with this issue raised under modern arbitration statutes held that "the existence of any facts which may operate to affect the impartiality of arbitrators will render such arbitrators incompetent to make a valid award, provided such facts were unknown to the complaining party. . . ."[4] This same principle was upheld in later years,[5] culminating in the landmark Court of Appeals' decision in *J. P. Stevens & Co., Inc.* v. *Rytex Corp.* in 1974. In that case, the court placed on the arbitrator the burden of ascertaining disclosable information, rather than on the parties to the arbitration proceeding:

> We . . . hold that the failure of an arbitrator to disclose facts which reasonably may support an inference of bias is grounds to vacate the award under CPLR 7511.
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> . . . we conclude that a rule requiring maximum prehearing disclosure must in the long run be productive of arbitral stability.
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> While such responsibility to ascertain potentially disqualifying facts does rest upon the parties, the major burden of disclosure rests properly upon the arbitrator.
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> Furthermore, the very nature of the arbitrator's quasi-judicial function, particularly since it is subject to only limited judicial review, demands no less duty to disclose than would be expected of a judge.
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> . . . [but] we do not hold that any kind of a business relationship would disqualify a prospective arbitrator.[6]

In a strongly worded dissent, Judge Sol Wachtler suggested that the courts should not sanction a "sour grapes" appeal from an adverse party, which itself made little or no effort to ascertain the existence of any disclosable relationships. This is especially well taken for the industry involved in the *Stevens* case was the textile industry, where *some* type of relationship between one or more of the parties and the firm with which one of the arbitrators is affiliated is commonplace:

> I believe this court should lay down a rule that an arbitration proceeding may be vacated for alleged bias only if the information brought to light after the proceeding could not have been discovered with due diligence before the proceeding.[7]

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[2] The United States Arbitration Act, 9 U.S.C.A. §§10(a), 10(b) (West, 1970); N.Y. Civ. Prac. Law §7511(b)(1)(ii) (McKinney Supp., 1977); N.J. Stat. Ann. §2A:24-8(b) (West, 1956); 9 Cal. Civ. Proc. Code §1286.2(b) (West, 1961); and Uniform Arbitration Act, §12(a)(2) (1956). See, for example, Del. Code Ann., title 10, §5701 *et seq.* (1973); Ill. Rev. Stats., c.10, §101 *et seq.* (1962); Tex. Civ. Stat. Ann., title 10, art. 224 *et seq.* (1965); No. Car. Gen. Stats., §1-567.1 *et seq.* (1973); and Wyo. Stats., c. 37, §1-1025 *et seq.* (1959).

[3] See, for example, American Arbitration Association, *Commercial Arbitration Rules,* §18: "A person appointed as neutral Arbitrator shall disclose to the AAA any circumstances likely to affect his impartiality, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their counsel." See, also, American Arbitration Association, *Arbitration Rules of the General Arbitration Council of the Textile Industry,* §13; *A Manual for Commercial Arbitrators,* p. 5; and, with the American Bar Association, *Code of Ethics for Arbitrators in Commercial Disputes,* Canon II, §§A(1), (2)(B).

[4] Matter of Knickerbocker Textile Corp. (Sheila Lynn, Inc.), 172 Misc. 1015, 16 N.Y.S.2d 435, 442 (1939), *affd.* 259 App. Div. 992, 20 N.Y.S.2d 985 (1940). See, also, Matter of Shirley Silk Co. (American Silk Mills), 275 App. Div. 375, 13 N.Y.S.2d 309 (1939).

[5] Matter of Milliken Woolens (Weber Knit Sportswear), 9 N.Y.2d 878, 216 N.Y.S.2d 696, 175 N.E.2d 826 (1961), *affg.* 11 App.Div. 2d 166, 202 N.Y.S.2d 431 (1960).

[6] 34 N.Y.2d 123, 356 N.Y.S.2d 278, 279–283, 312 N.E.2d 466 (Ct. App., 1974. Robert L. Douglas, "*J. P. Stevens & Co.* v. *Rytex Corp.*: Disclosure by Arbitrators," *Hofstra Law Review* 3(1975):155.

[7] 356 N.Y.S.2d at 284.

The same idea had previously been expressed in another Appellate Division case,[8] and was recently reaffirmed by the Supreme Court of New York in *In re Santee Print Works (Imptex International Corp.)*, where it was stated that "the burden imposed by the Court of Appeals upon an arbitrator must, by the reasoning expressed in Matter of Stevens, apply with equal vigor to the Parties themselves."[9]

The Supreme Court set the same stringent guidelines for disclosure as the New York courts in the case of *Commonwealth Coatings Corp.* v. *Continental Casualty Corp.* The Court stated that arbitrators must avoid

> . . . such action as may reasonably tend to awaken suspicion that his social or business relationship constitutes an element in influencing his judicial conduct . . . [since Congress' intent in enacting the Federal Arbitration Act was] to provide not merely for any arbitration but for an impartial one.[10]

INFORMATION TO BE DISCLOSED

These cases involve instances in which one or more of the parties was not aware or apprised of a relationship with one of the arbitrators. What standard, however, is to be applied where the parties *are* informed of a relationship before the issuance of the award? What is sufficient to warrant removal of the arbitrator? Various tests have been devised over the years by the courts to answer this question. At least one court has held that a party which fails to raise an objection to a known relationship between an arbitrator and one of the parties has, in effect, waived the right to object to that relationship after the rendering of an award: "Appellant cannot remain silent, raising no objection during the course of the arbitration proceeding, and when an award adverse to him has been handed down complain of a situation of which he had knowledge from the first."[11] Similarly, in the *Matter of Knickerbocker Textile Corp. (Donath)*, it was pointed out that "the counsel for respondent made no effort to ascertain the extent of business which had been done by the third arbitrator with the petitioner, as he could have done, and chose to accept the third arbitrator without further investigation."[12]

The general disclosure rule set down by the New York courts is that "nothing should be permitted to throw suspicion even upon the entire impartiality of the arbitrators."[13] This was refined in an Illinois decision (*Giddens* v. *Board of Education*) that has been adopted as a guideline in most states. The decision spoke to the sufficiency of a disqualifying relationship: ". . . an interest or bias to disqualify [an arbitrator] may be small, but must be *direct, definite,* and *capable of demonstration,* rather than remote, uncertain, or speculative."[14] This rule is essentially followed by the American Arbitration Association in making its determination as to whether a relationship is disqualifying.

The development of a workable rule continued with the case of *Matter of Atlantic Rayon Corp. (Goldsmith)*, where the court held that past business dealings within the industry of the parties was not, *per se*, a relationship serious enough to warrant the removal of the arbitrator.[15] Arbitrators were also distinguished from judges in that "unlike judges under Section 14 of the Judiciary Law, arbitrators are not disqualified on account of being interested in the result, if that circumstance is disclosed to the adversary."[16] In 1956, a reasonableness requirement was added to the developing law in the case of *DeNicola* v. *Polcini*, where the potential arbitrator was admonished to "inveigh against any conduct indicative of friendship or favor for one side, or which reasonably may tend to awaken suspicion of such a leaning."[17]

Cross Properties v. *Gimbel Bros.* echoed this portion of the disclosure rule:

> The type of relationship which would appear to disqualify is one from which it may not be reasonable to infer an absence of impartiality, the presence of bias or the existence of some interest on the part of the arbitrator in the welfare of one of the parties.[18]

In summary, the arbitrator is under an affirmative duty to disclose to the parties any dealings, past or present, with any of the parties or persons involved in the arbitration, which may *reasonably* tend to evoke suspicion of his or her ability to judge impartially the issues in dispute. Dealings "not in the ordinary course of . . . business . . ."[19] should also be disclosed. The parties, too, have a burden to search their records for the existence of a relationship, inasmuch as it is entirely possible for an arbitrator's firm to do a large amount of business with one of the parties to the arbitration, without the arbitrator being aware of it.

In dealing with disclosures, the courts will apply a rule of reason when considering whether the relationship could have caused bias.

REMOVAL OF ARBITRATORS FOR POTENTIAL BIAS

Under Section 18 of the American Arbitration Association's *Commercial Arbitration Rules,* factual objections to

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[8] Matter of Atlantic Rayon Corp. (Goldsmith), 277 App.Div. 554, 556, 100 N.Y.S.2d 850, 851 (1st Dep't., 1950).

[9] *New York Law Journal,* November 24, 1976, p. 11, col. 1 (Sup. Ct., N.Y. Cty.).

[10] 393 U.S. 145, 149, 21 L.Ed.2d 305, 89 S.Ct. 337 (1968), *reh. den.* 393 U.S. 1112, 21 L.Ed.2d 812, 89 S.Ct. 848 (1969). See George Goldberg, *A Lawyer's Guide to Commercial Arbitration* (Philadelphia: American Law Institute-American Bar Association, 1977), §3.02, pp. 38–41.

[11] Cook Industries v. C. Itoh & Co. (America) Inc., 449 F.2d 106, 107 (2d Cir. 1971).

[12] 22 Misc.2d 1056, 1057, 205 N.Y.S.2d 408, 409 (1953).

[13] In re Friedman, 215 App.Div. 130, 136, 213 N.Y.S. 369 (1926).

[14] Giddens v. Board of Education, 398 Ill. 157, 162, 75 N.E.2d 286, 291 (1947) (emphasis added).

[15] 277 App.Div. 554, 555, 100 N.Y.S.2d 849, 850 (1st Dep't, 1950).

[16] Amtorg Trading Corp. v. Camden Fibre Mills, 277 App.Div. 531, 532–533, 100 N.Y.S.2d 747 (1950), *aff'd.* 304 N.Y. 519, 109 N.E.2d 606 (1951).

[17] 2 Misc.2d 665, 151 N.Y.S.2d 870, 873 (1956), *rev'd on other grounds,* 2 App.Div.2d 675, 152 N.Y.S.2d 995 (1956).

[18] 15 App.Div.2d 913, 225 N.Y.S.2d 1014, 1016 (1st Dep't., 1962).

[19] Garfield & Co. v. Wiest, 432 F.2d 849 (2d Cir., 1970), *cert.den.*, 401 U.S. 940 (1971).

the continued services of an appointed neutral arbitrator must be made to the Association, which then passes upon the matter. When the arbitrator is the source of a disclosure, both parties are invited to file written comments concerning the designated arbitrator's continued service. Where the parties agree to the retention or removal of the arbitrator, their wishes are usually respected. Where the parties disagree, the Association must exercise its discretion. The parameters set forth in *Giddens* are adhered to in making this determination.

The power of the Association to determine the challenged arbitrator's ability to continue is a fairly recent development. Before 1973, the *Commercial Arbitration Rules* did not clearly grant the Association that authority. The decision was left to the arbitrator, with sometimes awkward results in instances where arbitrators refused to recuse themselves.[20]

Parties not satisfied with the determination of the Association find little support in the courts for any interlocutory appeals of the agency's ruling. With the exception of an early case not involving the AAA,[21] most courts have opted to review charges of bias after the issuance of the award. In *San Carlo Opera Co. v. Conley,* the Second Circuit found

> The application to the court for removal of the arbitrators is not one of the remedies set forth in the United States Arbitration Act, 9 U.S.C.A. 1 et seq. . . .
> . . . where the dispute has proceeded to arbitration, the court does not have the power to order a substitution of arbitrators.[22]

Essentially, the courts recognize that one of the prime reasons parties submit to arbitration is for expedition of their disputes. Clearly, this purpose would not be served by piecemeal applications to the court for relief from a perceived potential bias in an arbitrator. In *Copen Associates, Inc. v. Dan River, Inc.* in 1976, a respondent objected to a panel comprised of textile industry arbitrators selected in accordance with the rules of the General Arbitration Council of the Textile Industry, a division of the AAA, on the grounds that the Council was "controlled by large organizations in the textile field, including [claimant]."[23] The court, however, held that

> . . . one purpose of arbitration is expedition, and the litigation ought not to be protracted . . . [citations omitted]. As an initial matter, GACTI being a division of the American Arbitration Association, the arbitration should go forward. If bias or control should be developed, there is a regular procedure set forth in CPLR §7511 for raising that question after the determination.[24]

REVIEW OF AWARDS

The grounds for review of awards of arbitrators are extremely limited. The United States Arbitration Act describes four occasions when an award would be overturned:

(a) Where the award was procured by corruption, fraud, or undue means.
(b) Where there was evident partiality or corruption of the arbitrators, or either of them.
(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award on the subject matter was not made.[25]

The New York Civil Practice Law and Rules lists similar grounds for vacatur:

(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 . . . exceeded his power or so imperfectly executed [the award] 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.[26]

The Uniform Arbitration Act, and the arbitration statutes of numerous states mirror these approaches.[27] The actual application of the ideas set forth in these laws are examined in the sections below.

MANIFEST DISREGARD OF LAW IN UNRESTRICTED SUBMISSIONS

Even before the advent of modern arbitration statutes, the Supreme Court firmly upheld the belief that an award, in an unrestricted submission, cannot be vacated by a showing of mere errors of law. This decision was based primarily upon the notion that the parties, once they agree to the arbitral forum, must accept the determination that results from it. The Court stated that "if the award is within the submission, and contains the honest decision of the arbitrators, after a full and fair hearing of the parties, a court of equity will not set it aside for error, either in law or fact."[28]

The New York courts also affirmed this belief, ruling that "mere departure from formal technicalities without resulting injury is not sufficient cause to nullify an award."[29]

Ultimately, in 1953 in *Wilko v. Swan,* the Supreme Court allowed arbitrators the discretion to interpret the law as long as they did not exhibit "manifest disregard" of it.[30] The precise definition of such disregard was left to the lower courts to decide. In a series of cases be-

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[20] Rosenblum v. Rubenstein, *New York Law Journal* October 26, 1972, p. 2, col. 1 (Sup. Ct., N.Y. Cty.). See also, Rubenstein v. Otterbourg, 78 Misc.2d 376, 357 N.Y.S.2d 62 (Sup. Ct., N.Y. Cty., 1973). Compare present *Commercial Arbitration Rules of the American Arbitration Association* §18: ". . . the AAA shall determine whether the Arbitrator should be disqualified and shall inform the parties of its decision, which shall be conclusive."

[21] Greenspan v. Greenspan, 129 N.Y.S.2d 258, 262 (Sup. Ct., 1954).

[22] 72 F. Supp. 825, 832–833 (S.D.N.Y., 1946), *affd.* 163 F.2d 310 (2d Cir., 1947).

[23] 53 App. Div.2d 834, 385 N.Y.S.2d 557 (1st Dep't., 1976).

[24] *Ibid.*

[25] 9 U.S.C.A. §10 (West, 1970).

[26] §7511(b)(1) (McKinney Supp., 1977).

[27] Uniform Arbitration Act, §12(a). See, for example, N.J. Stat. Ann. §2A:24-8, 9 Cal. Civ. Proc. Code §1286.2.

[28] Burchell v. Marsch, 58 U.S. (17 How.) 344, 349 (1854).

[29] Matter of Gerli & Co. (Heineman Corp.), 258 N.Y. 484, 488, 180 N.E. 243 (1932).

[30] 346 U.S. 427, 436–437, 98 L.Ed. 168, 74 S.Ct. 182 (1953). See also, Bernhardt v. Polygraphic Co. of Amer., 350 U.S. 198 (1956).

ginning in the early 1960s, the federal courts attempted to add some substance to the barebones assertion of the Court:

> A manifest disregard of the law . . . might be present when the arbitrators understand and correctly state the law, but proceed to disregard same.[31]
>
> . . . as long as arbitrators remain within the jurisdiction and do not reach an irrational result, they may fashion the law to fit the facts before them and their award will not be set aside because they erred in the determination or application of the law.[32]
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> The scope of review given the courts in overseeing arbitration proceedings under the Federal Arbitration Act is limited. It does not include reviewing questions of law.[33]
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> . . . it is a truism that an arbitration award will not be vacated for a mistaken interpretation of law. . . . But if the arbitrators simply ignore the applicable law, the literal application of a manifest disregard standard should presumably compel vacation of the award.[34]
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> . . . the court's function . . . in vacating an arbitration award is severely limited . . . being confined to determining whether or not one of the grounds specified by 9 U.S.C. §10 for vacating an award exists. An award will not be set aside because of an error on the part of the arbitrators in their interpretation of the law.[35]
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> . . . an error on the part of an arbitrator in his determination of law is not a ground for setting aside an award. . . . in order to have an award vacated on this ground, the complaining party must establish that the arbitrator understood and correctly stated the law, but proceeded to ignore it.[36]

In a 1974 case, the Second Circuit went so far as to permit the arbitrators to base their award on a "clearly erroneous" interpretation of the contract, in that:

> We see no basis, however, to reverse the award even though it is based upon a clearly erroneous interpretation of the contract. Whatever arbitrators' mistakes of law may be corrected, simple misinterpretations of contracts do not appear to be one of them.[37]

FAIRNESS

A fairness doctrine has also been developed on the federal and state court levels, whereby the courts will not disturb an award as long as the procedures followed by the arbitrators were fundamentally fair to all parties concerned. The reason for this position is the quasi-judicial function of the arbitrator, and of the nature of arbitration itself. "An arbitrator acts in a quasi-judicial capacity and should possess the judicial qualifications of fairness to both parties, so that he may render a faithful, honest, and disinterested opinion."[38] The Third Circuit reaffirmed this rule in *Newark Stereotypers Union No. 18* v. *Newark Morning Star Ledger Co.*, holding that "an award will not be vacated because of an erroneous ruling by arbitrators which does not affect the fairness of the proceedings as a whole."[39] Thus, added to the requirement that an award not be in manifest disregard of the law is the need for the hearings to be fair to the parties.

RESTRICTED SUBMISSIONS

Where an arbitration clause specifically limits the arbitrators' powers, the courts are in agreement that awards that go beyond the scope of the contract are violative of statute,[40] and must therefore be vacated. Thus, in the *Application of States Marine Corp. of Delaware* in 1954, the District Court for the Southern District of New York declared that

> It is not the function of the court to agree or disagree with the reasoning of the arbitrators . . . [but] if the arbitrators determined matters not within the terms of the arbitration agreement, or failed to determine matters within the terms of such agreement, they exceeded or imperfectly executed their jurisdiction and their award should be vacated.[41]

The Supreme Court also indicated its accord with this position in *United Steelworkers* v. *Enterprise Wheel & Carriage Corp.* in 1960, where it held that

> . . . [the arbitrator's] award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, the courts have no choice but to refuse enforcement of the award.[42]

Some examples cited by the courts were determining the obligations of a nonparty corporation, determining questions of law where limited to questions of fact, reinstating an employee with full seniority in violation of a contractual provision, awarding a type of damages specifically barred by the arbitration agreement, and permitting an *ex parte* amendment of claim.[43]

A New York court has held that arbitrators may issue awards in direct contravention of contracts if they find that the arbitration agreement, or a portion thereof, is unconscionable,[44] with the proviso that the award contain a specific finding to the effect that unconscionability has been determined:

> There is no doubt that an arbitrator, if he so decides, may indeed refuse to enforce such a damage limitation clause on the ground of unconscionability or other grounds . . . [if] the award indicate[s] that he has in fact delib-

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[31] San Martine Compania De Navigacion, S.A. v. Sangneyay Terminals, Ltd., 293 F.2d 796, 801 (9th Cir., 1961).

[32] Marcy Lee Mfg. Co. v. Cortley Fabrics Co., 354 F.2d 42, (2d Cir., 1965).

[33] Lundgren v. Freeman, 307 F.2d 104, 110 (9th Cir., 1962).

[34] Sobel v. Hertz, Warner & Co., 469 F.2d 1211, 1214 (2d Cir., 1972).

[35] Office of Supply, Govt. of Republic of Korea v. N.Y. Nav. Co., 469 F.2d 377, 379 (2d Cir., 1972).

[36] Bell Aerospace Co. Div. of Textron Inc. v. Int'l Union, 356 F. Supp. 354 (W.D.N.Y., 1973). See, also, Fukaya Trading Company, S.A. v. Eastern Marine Corp., 322 F. Supp. 278, 282 (E.D. La., 1971).

[37] I/S Stavborg v. National Metal Converters, Inc., 500 F.2d 424, 432 (2d. Cir., 1974).

[38] American Eagle Fire Insurance Co. v. New Jersey Insurance Co., 240 N.Y. 398, 148 N.E. 562 (1925).

[39] 397 F.2d 594, 600 (3d Cir., 1968), *cert. den.* 393 U.S. 954, 21 L.Ed.2d 365, 89 S.Ct. 378 (1969). See the *Commercial Arbitration Rules of the American Arbitration Association* §28: "The Arbitrator may in his discretion vary . . . procedure but he shall afford full and equal opportunity to all parties for the presentation of any material or relevant proofs."

[40] See, for example, 9 U.S.C.A. §10(d), Uniform Arbitration Act §12(c), N.Y. Civ. Prac. Act §7511(b)(1)(iii), N.J. Stat. Ann. §2A:24-8(d), 9 Cal. Civ. Proc. Code §1286.2(d).

[41] 127 F.Supp. 943, 944 (S.D.N.Y., 1954).

[42] 363 U.S. 593, 597, 4 L.Ed.2d 1424, 80 S.Ct. 1358 (1960). See, also, Anthony J. Basincki, "Commercial Arbitration under the Federal Act: Expanding the Scope of Judicial Review," *University of Pittsburgh Law Review* 35 (1974):799.

[43] Orion Shipping & Trading Co. v. Eastern States Petroleum Corp., 312 F.2d 299, 300 (2d Cir., 1963); J. P. Greathouse Steel Erectors, Inc. v. Blount Bros. Cons. Co., 374 F.2d 324, 325 (D.C. Cir., 1967), *cert. den.* 389 U.S. 487, 19 L.Ed.2d 116, 88 S.Ct.64 (1968); Amanda Bent Bolt Co. v. United Auto, 415 F.2d 1277, 1280 (6th Cir., 1971); Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 25 N.Y.2d 451, 456, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969); and Goldman Bros. v. Local 32K, Bldg. Serv. Emp., 8 Misc.2d 653, 166 N.Y.S.2d 19 (Sup. Ct., 1957).

[44] U.C.C. §2-302.

erately and intentionally exercised that power so that judicial review can proceed without the need for speculation as to what in fact has occurred in the arbitration tribunal.[45]

REFUSAL TO HEAR EVIDENCE

In their limited review of awards, the courts will vacate upon a showing that the arbitrators refused to hear pertinent and material evidence. This is expressly provided for in most arbitration statutes.[46] New York, which does not specifically list failure to hear evidence as a basis for vacatur in its arbitration statute, has nonetheless taken this position in numerous decisions of its courts. In *Katz* v. *Uvegi* in 1959, the court determined that "the refusal to hear pertinent and material evidence of witnesses constitutes misconduct sufficient to vitiate an award in arbitration proceedings."[47]

The determinating factor is whether the refusal to hear evidence prejudiced the rights of a party. Section 30 of the American Arbitration Association's *Commercial Arbitration Rules* allows arbitrators to vary the hearing procedures as they see fit, on the condition that the results are fair and equitable to all parties. Section 34 of the rules mandates that the arbitrator inquire, at the conclusion of the hearing, if all parties have presented all of their evidence, before the hearings can formally be closed. Although not rigidly bound by these rules, the courts will defer to the discretion of the arbitrator about the materiality of additional testimony. In *Harvey Aluminum* v. *United Steelworkers of America* in 1967, for example, the court said:

> The rules of the American Arbitration Association are not binding upon the arbitrators but do set guidelines as to hearing procedures. . . .
> . . . the refusal to hear and consider the pertinent and material evidence also reflects an unfair hearing in violation of Title 9, United States Code, §10(c).[48]

If evidence or testimony is offered merely to prolong the hearing, however, the courts may defer to the arbitrator's discretion in curtailing direct testimony or cross-examination. Thus, the Southern District in 1968 stated that "arbitrators must be given discretion to determine whether additional evidence is necessary or would simply prolong the hearing."[49]

REFUSAL TO GRANT ADJOURNMENTS

Arbitrators are given wide latitude in deciding whether to grant a request for an adjournment of hearings. The failure to grant a *reasonable* request for an adjournment, however, has been held to constitute misconduct, which requires the vacation of the award,[50] especially where material evidence is foreclosed by the refusal to adjourn. In *Matter of Woodco Mfg. Co. (G.R.&.R. Mfg. Inc.)* in 1976, the original date set for the hearing was October 28. Respondent in the arbitration, a Tennessee concern, successfully obtained an adjournment to November 4. It then requested a further postponement, to obtain the services of counsel in New York (the locale of the hearings), after it had discharged its original home-state attorney. This final request was objected to by the claimant, and denied by the arbitrator. The hearings proceeded *ex parte,* and the resultant award was vacated upon motion to the court pursuant to CPLR §7511(b)(1)(i). The reason advanced by the court for its decision was that "where refusal to grant an adjournment results in the foreclosure of the presentation of pertinent evidence, such refusal constitutes sufficient misconduct to vitiate the award."[51]

Similarly, where the refusal to adjourn is clearly contrary to statute, the award will not stand. In the *Matter of Cormier Fabrics Corp. (Capri Sportswear),* the claimant's principal attorney, a state legislator, requested an adjournment of the hearing pursuant to New York State Judiciary Law, due to the fact that the legislature was in session on the scheduled hearing day. The respondent to the arbitration objected to any delay, and the issue was referred to the arbitrators for a ruling pursuant to §20 of the *Rules of the General Arbitration Council of the Textile Industry.* This request was denied and the hearings proceeded in the absence of the attorney-legislator. In a strongly worded opinion, the court found that

> Given the circumstances that petitioner's principal attorney could not attend the hearing, had given reasonable notice thereof, and had requested a reasonable adjournment . . . the refusal of the arbitrators to grant an adjournment of the hearing to a time at least 10 days after the close of the Legislative Session (Judiciary Law Sec. 469) was such a misconduct as to warrant the vacating of the hearings conducted, the removal of the arbitrators involved, and a de novo arbitration proceeding before new arbitrators.[52]

The court saw fit to remove the arbitrators *prior* to the issuance of the award.

If no prejudice or injury would accrue to the party of which the adjournment request is made, the courts will generally find a failure to grant the postponement a misconduct.[53] In *Allendale Nursing Home, Inc.* v. *Local 1115 Joint Board* in 1974, a federal court devised a "sound discretion" rule for determining whether misconduct had occurred.[54]

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[45] 25 N.Y.2d at 457.

[46] See, for example, 9 U.S.C.A. §10(c), Uniform Arbitration Act §12(a)(4), N.Y. Civ. Prac. Law, §7511(b)(1), N.J. Stat. Ann. §2A:24-8(c).

[47] 18 Misc.2d 576, 187 N.Y.S.2d 511 (Sup. Ct., 1959), *affd.* 11 App.Div.2d 773, 205 N.Y.S.2d 972 (2d Dep't., 1959).

[48] 263 F.Supp. 488, 493 (C.D. Cal., 1967).

[49] Catz American Co. v. Pearl Grange Fruit Exchange, Inc., 292 F.Supp. 549, 553 (S.D.N.Y., 1968). See, also, *Arbitration Rules of the General Arbitration Council of the Textile Industry* §26: "If satisfied that the record is complete, the arbitrator shall declare the hearings closed. . . ."

[50] See, for example, 9 U.S.C.A.§10(c), Uniform Arbitration Act §12(a)(4), and *Commercial Arbitration Rules of the American Arbitration Association* §25, *Arbitration Rules of the General Arbitration Council of the Textile Industry* §20.

[51] 51 App.Div.2d 531, 378 N.Y.S.2d 504, 505 (3rd Dep't., 1976). See also, International Components Corporation v. Klaiber, 59 App.Div.2d 853, 399 N.Y.S.2d 132 (1st Dep't., 1977); award vacated for misconduct where the arbitrator refused to grant an adjournment to co-counsel for respondent, whose wife was scheduled to undergo cancer surgery on the day of the hearing.

[52] *New York Law Journal,* November 17, 1977, p. 5, col. 1 (Sup. Ct., N.Y. Cty). See, also, Franklin Dev. Associates v. Dechtman, *New York Law Journal,* June 16, 1977, p. 6, col. 1 (Sup. Ct., N.Y. Cty.)

[53] Tube & Steel Corp. of America v. Chicago Carbon Steel Products, 319 F.Supp. 1302, 1304 (S.D.N.Y., 1970).

[54] 377 F.Supp. 1208, 1212 (S.D.N.Y., 1974).

On balance, however, the preponderance of decisions indicate that the courts will uphold the broad discretion given arbitrators, provided that that discretion is not abused. Thus, in *Matter of Kool Air Systems, Inc. (Syosset Int'l Builders)* in 1964, the New York Appellate Division of the Supreme Court upheld the denial of an adjournment where the respondent's officers (and only witnesses) requested a delay to attend to other business.[55] This same principle was recently upheld by the Southern District, in a case dealing with remarkably similar circumstances. The court's decision speaks for itself:

> The November 1, 1977 hearing was scheduled in August 1977. Notwithstanding this, Cal-Togs' "Chief witness" made sales commitments just one week prior to the scheduled hearing. No explanation was offered as to why other of Cal-Togs' witnesses could not attend nor why the "Chief witness" could not arrange his schedule so as to allow his attendance. Cal-Togs claims that the presence of this witness in California to "show the line" precluded him from preparing for the hearing; yet the hearing had been scheduled for months prior to the time that his purported commitments in California were made. Refusal to adjourn on this ground cannot be viewed as unreasonable.[56]

Similarly, in a case where no doctor's certificate or other evidence could be produced to substantiate a request for postponement based upon the alleged illness of a key witness, the arbitrator's denial was reaffirmed.[57]

JUDICIAL INTERFERENCE BEFORE THE AWARD

As noted, the courts are reluctant to disturb the arbitral process before the rendering of an award, because of concern that piecemeal judicial challenges would delay the arbitration process.[58] In a case where the respondent moved to have an arbitrator recused prior to the award, for example, the Appellate Division refused to interfere on the ground that "the power of the court to grant relief against misconduct set up in the section on which the motion was based [CPLR §7511] is plainly, by statute, to be exercised by an 'order vacating the award.' "[59]

In another case, the New York State Supreme Court declined to disturb procedural rulings made by a panel of arbitrators before the hearing.[60] In still another, the same court twice refused to disturb a ruling by the arbitrators that directed the respondent to submit an accounting to the claimant before the hearing. Respondent moved the court for a protective order, contending that the arbitrators were ordering discovery without leave of the court, in violation of New York statute.[61] The court declined to interfere before the issuance of an award, since "it would appear that such relief would be premature, being more properly sought under subdivision (b)(1) of CPLR 7511, which statute provides, inter alia, for the setting aside of an arbitrator's award on the grounds of legal misconduct."[62] On reargument before the same judge, the court denied the motion inasmuch as

> . . . no showing is made that the arbitrators acted in excess of law or their powers or other than in accordance with proper arbitration procedure. This determination is without prejudice to any application with respect to the arbitrators' directions, *after* an award has been rendered.[63]

On rare occasions, the court, to avoid wasting time, *will* interfere before an award is issued, where the alleged bias or misconduct, if true, would undoubtedly lead to the vacatur of the eventual award. In two New York decisions, the court read the arbitration statute to allow for the removal of arbitrators prior to the award. The judge in *Cormier* ruled that petitioner "need not wait for judicial intervention until after an Award, since the arbitrators' misconduct necessitates their removal."[64]

Previously, in *Greenspan,* the court held that "if an award after arbitration may be set aside because it be made under circumstances of bias by an arbitrator [citations omitted] . . . it follows that an arbitration should be avoided altogether and an award obviated where bias may be reasonably anticipated."[65]

ARBITRATORS' IMMUNITY FROM CIVIL LIABILITY

> . . . it would seem clear that arbitrators and quasi-arbitrators are exempt from any civil liability for failure to exercise care or skill in the performance of their arbitral functions; however, liability attaches for improper acts when committed in a capacity other than that of arbitrator.[66]

New York State, among others, has strongly upheld the doctrine of arbitrator immunity. In *In re Friedman* in 1926, the Supreme Court found that arbitrators were to be bound by judicial rules, although in fact they were not *eo nomine* judges.[67] The precise extension of judicial immunity from civil actions came about in a 1957 case, *Babylon Milk & Cream Co., Inc.* v. *Horvitz,* in which the court found "no reason to distinguish between a judge and an arbitrator. . . . the same rule of immunity should apply to arbitrators as applies to the judiciary. . . ."[68]

The law in New York State regarding this immunity is so well established that civil suits brought against arbitrators for general or special damages are likely

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[55] 22 App.Div.2d 672 (1st Dep't., 1964).

[56] Dan River, Inc., v. Cal-Togs, Inc., _____ F. Supp. _____ (S.D.N.Y., March 6, 1978).

[57] Matter of A&R Const. Co., Inc. (Gorlin-Okum), 41 App.Div.2d 876, 342 N.Y.S.2d 950 (3rd Dep't., 1973).

[58] Petition of Dover Steamship Co., 143 F.Supp. 738, 742 (S.D.N.Y., 1956); 58 U.S. (17 How.) at 349. See, Jonathan Yarowsky, "Judicial Deference to Arbitral Determinations: Continuing Problems of Power and Finality," *U.C.L.A. Law Review,* 23(1976):936.

[59] Franks v. Penn-Uranium Corp., 4 App.Div.2d 39, 162 N.Y.S.2d 685, *reh. and app. den.,* 5 App.Div.2d 100, 165 N.Y.S.2d 434 (1957).

[60] MSK Overseas Co. v. Mitsubishi Int'l Corp., *New York Law Journal,* May 24, 1974, p. 19 (Sup. Ct., N.Y. Cty.).

[61] N.Y. Civ. Prac. Law §3102(c).

[62] Eisenberg Int'l, Inc. v. Jacques Bellini, No. 21713/77, January 11, 1978 (Sup. Ct., N.Y. Cty.).

[63] *Ibid.,* April 12, 1978 (Sup. Ct., N.Y. Cty.) (Memo) (emphasis added).

[64] *New York Law Journal,* November 17, 1977, p. 5, col. 1.

[65] 129 N.Y.S.2d at 262.

[66] Domke, *op. cit.,* §23.01.

[67] 215 App.Div. 130, 136, 213 N.Y.S. 369, 373 (1926).

[68] 151 N.Y.S.2d 221, 224 (1956), *affd.,* 4 App.Div.2d 777, 165 N.Y.S.2d 717 (1957).

to be dismissed on a motion for summary judgment.

This is precisely what happened in *Rubenstein* v. *Otterbourg* (1973),[69] where the chairman of a three-arbitrator panel refused to disqualify himself after it was learned that the attorneys for the claimant in the arbitration had represented the arbitrator's firm on a number of occasions. The respondent (and loser) in the case brought the action against the arbitrator for $10,000 in special damages after having procured the vacation of the award. The damages were for the arbitrator's conduct in declining to recuse himself. The AAA and the claimant's law firm were also named as co-defendants. The court affirmed the tort immunity of the arbitrator and the AAA, since "judges are clearly immune from civil liability for acts done in the exercise of judicial functions; [citations omitted]. Arbitrators, while not *eo nomine* judges, exercise judicial functions and are likewise protected."[70]

The federal rule is similar to that promulgated by the New York courts, and is perhaps even more vociferous in its defense of arbitrators' immunity. The subject was briefly touched upon in *Cooper* v. *O'Connor* in 1938[71] and was clearly announced in a Second Circuit case 24 years later, where it was presumed that this policy of immunity extended "to persons acting in a quasi-judicial capacity within the jurisdiction established by a private agreement."[72]

Perhaps the most unequivocal assertion of the doctrine was set forth in *Hill* v. *Aro* in 1967:

> If national policy encourages arbitration, and if arbitrators are indispensable agencies in furtherance of that policy, then it follows that the common law rule protecting the arbitrators from suit ought to be affirmed, but if need be, expanded.[73]

Immunity serves many functions. It encourages arbitrators to act freely, without the encumbrances that the threat of a civil lawsuit would surely create. Likewise, arbitration itself is fostered by the resultant incentive to arbitrators to serve repeatedly. In many commercial tribunals (for example, the one for the textile industry), the bulk of the arbitrators are business people serving without compensation, and it is therefore likely that the possibility of a challenge to the arbitrators' authority through a civil action would undoubtedly cripple the availability of a sufficient pool of qualified arbitrators.

In summary, the parties' only legal weapon, to date, against the arbitrator is the motion to vacate his or her award. Civil tort liability is not a viable alternative,[74] as long as judicial immunity itself remains intact.

CONCLUSIONS

Throughout the rulings of the courts runs the "reasonableness doctrine." If an arbitrator acts unreasonably, the award will be vitiated. If a reasonable person would doubt an arbitrator's impartiality, the arbitrator should step down. If a reasonable adjournment request is denied, the award is subject to attack in court.

The courts, and statutes, in their deference to arbitral discretion and in their desire to encourage expedited procedures, have evolved various tests that have the effect of limiting the courts' ability to review awards, except where unreasonable abuses of discretion have taken place. This will become an important factor in the years ahead as arbitration continues to relieve the courts of large numbers of disputes that would otherwise have added to its growing congestion.

[69] 78 Misc.2d 376, 377, 357 N.Y.S.2d 62, 63 (Sup. Ct., N.Y. Cty., 1973).

[70] 78 Misc.2d at 377, 357 N.Y.S.2d at 63.

[71] 99 F.2d 135, 141 (D.C. Cir. 1938).

[72] Lundgren v. Freeman, 307 F.2d at 118 See, also, Cahn v. ILGWU, 311 F.2d 113, 114–115 (3rd. Cir., 1965).

[73] 263 F.Supp. 324, 326 (N.D. Ohio, 1967).

[74] This is not so for criminal liability. See, for example, Leslie Alan Glick, "Bias, Fraud, Misconduct and Partiality of the Arbitrator," *The Arbitration Journal* 22(1967):161, 163–164.