Missouri Law Review

Volume 13
Issue 2 *April 1948*

Article 5

1948

Law and Practice of Arbitration in New York, The

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THE LAW AND PRACTICE OF ARBITRTION IN NEW YORK

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HISTORICAL SKETCH OF ARBITRATION LAW IN NEW YORK

Before 1920, there was no effectual way of enforcing arbitration agreements in New York. For many years prior to that date the statutory law of the state contained provisions regulating arbitration (Code of Civil Procedure, §§ 2365 *et seq.*, derived from Revised Statutes, Part III, Chapter 8, Title 14). These provisions, while rather elaborate, never gave arbitration a fair chance to develop. In the jurisprudence of the state (and, indeed, of the nation) there was too firmly embedded the rule of *Vynior's* case,[1] viz., that an agreement to arbitrate could be revoked by any party before the final submission of the case to the arbitrators for their decisions, without any consequence except an ineffectual action at law for damages caused by the revocation.[2] Furthermore, only *existing* controversies could be submitted to arbitration. Clauses in agreements submitting to arbitration all disputes which might thereafter arise were held invalid as against public policy.[3]

In 1920, as a result of the efforts of a joint committee of the New York State Bar Association and the Chamber of Commerce of the State of New York, in the work of which Messrs. Charles A. Boston, Julius Henry Cohen and Daniel S. Remsen, all eminent members of the New York Bar, took a leading part, there was adopted the pioneer Arbitration Law. This, the first modern arbitration law in the country, abolished the doctrine of *Vyinor's* case, and for the first time made contracts to arbitrate both existing and future contracts effectually enforceable.

The new provisions enacted in 1920 were not consolidated with the previously existing provisions theretofore contained in the Code of Civil Procedure and later embodied in Article 84 of the New York Civil Practice Act, but were instead placed in a separate new Arbitration Law forming new

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1. 8 Coke 81b.
2. People *ex rel* Union Insurance Company of Philadelphia v. Nash, 711 N.Y. 310, 18 N.E. 630 (1888).
3. Meacham v. Jamestown F. & C. R.R., 211 N.Y. 346, 105 N.E. 653 (1914).

Chapter 72 of the Consolidated Laws of the State of New York. The salient provisions of this Law, which later was used as the model for the United States Arbitration Act enacted in 1925,[4] were as follows:

A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission of an existing controversy to arbitration pursuant to the provisions of the Code of Civil Procedure or Civil Practice Act, was declared to be valid, enforceable and irrevocable (§ 2). In the event of a refusal to proceed to arbitration by a party to such agreement, a remedy was granted by petition to the supreme court (§ 3). If a party to an arbitration agreement brought suit in court in violation of such agreement, the adverse party could stay the arbitration proceedings by motion in the supreme court (§ 5).

It will be noted that in the case of an agreement to submit future controversies to arbitration only "a written contract" was required. It was held in *Japan Cotton Trading Co. v. Farber*,[5] that this did not necessarily require the contract to be signed, providing that facts showed that the parties adopted an unsigned writing as an embodiment of their contract. The provision as to submission of existing controversies, however, dating back as it did to much earlier days, was far stricter, requiring not only that such a submission should be signed by the parties, but also that it should be acknowledged.

During the interval of seventeen years between the enactment of the Arbitration Law in 1920 and the general revision and consolidation in 1937 of the New York statutes relating to arbitration, only two substantial amendments of the statutory provisions relating to arbitration were made.

The first of these was the enactment in 1923 of a new § 6a of the Arbitration Law, providing that all arbitrations were to be deemed special proceedings. Long before this, it had been held[6] that an arbitration of an existing controversy under an acknowledged submission made pursuant to the provisions of the Code of Civil Procedure (Civil Practice Act) was a special proceeding; but in *Matter of Inter-Ocean Mercantile Corporation*,[7] decided by the Appellate Division in January, 1923, it was held that an arbitration under an unacknowledged agreement to arbitrate future con-

4. 43 Stat. 833 (1925), 9 U.S.C §§ 1-15 (1940).
5. 233 App. Div. 354, 253 N.Y. Supp. 290 (1st Dep't 1931).
6. Webb v. Parker, 130 App. Div. 92, 114 N.Y. Supp. 489 (1st Dep't 1909).
7. 204 App. Div. 284, 197 N.Y. Supp. 706 (1st Dep't 1923), *aff'd* 236 N.Y. 587 (1923).

troversies, made pursuant to the provisions of the Arbitration Law, was not a special proceeding and that hence a commission could not issue to take depositions in such a case. The new section was enacted primarily to meet this decision; and in November of the same year the same court held that as a result of this amendment a commission to take testimony outside the state would issue in any arbitration proceeding.[8]

The remaining amendment in the period referred to was the addition to the Arbitration Law in 1927 of a new § 4a, providing for the institution of arbitration proceedings without a court order. As the subject to which this section relates was one of the most important and difficult arising under the New York Arbitration Law, and as the section has several times since been further amended, we shall discuss its history hereafter.

Revision and Consolidation of 1937

The 1937 revision was the work of the Special Committee on Arbitration of the Association of the Bar of the City of New York. The actual draft was prepared by a subcommittee headed by Osmond K. Fraenkel, with the benefit of suggestions and criticisms by representatives of the American Arbitration Association, the Chamber of Commerce of the State of New York, the National Federation of Textiles, Cotton Textile Institute and Professor Wesley A. Sturges, of the Yale Law School. After the revised draft had been approved by the Association at a meeting of its members in December, 1936, it was submitted to the Judicial Council. A careful and helpful study of its provisions was made by Leonard S. Saxe, Executive Secretary of the Judicial Council, and by a staff of the Council, who made a number of suggestions for revision of the proposed statute. The Judicial Council, however, took no official action with regard to the bill.

The bill was introduced in the legislature by Senator Livingston (now Justice of the Supreme Court in Brooklyn) and was enacted into law as Chapter 341 of the Laws of 1937. It repealed the Arbitration Law and consolidated into a single article of the Civil Practice Act all of the statutory provisions relating to arbitration.

The principal changes of substance in the law as revised, with the exception of that relating to commencement of arbitration proceedings without a court order, were as follows:

8. Matter of Inter-Ocean Mercantile Corp. v. Bull, 207 App. Div. 164, 201 N.Y. Supp. 753 (1st Dep't 1923).

1. Section 1448, subdivision 1, of the the Civil Practice Act was amended to provide that guardian of an infant or committee of an incompetent may make a valid submission to arbitration with the approval of the court. Theretofore an infant or incompetent might not make a valid submission to arbitration (Civil Practice Act, former § 1448, subdivision 1).

2. Section 1449 of the Civil Practice Act was amended to provide that a submission of an existing controversy is valid if signed, even though not acknowledged. This did away with the archaic former requirement of acknowledgement, above referred to, which has been productive of much technical litigation.[9]

3. Section 1450 was amended to authorize the commencement of proceedings to compel arbitration by substituted service. Formerly personal service has been required (Arbitration Law, § 3). There seems to have been no good reason why arbitration proceedings might not be brought against a resident of the state in the same manner in which an action can be started.

4. In a number of instances, it was expressly provided that proceeding without objection waives technical defects (§§ 1454, subd. 1; 1455) and the practice was otherwise liberalized (§§ 1460; 1461; 1462, next to the last paragraph; 1458) and clarified (§§ 1462, introductory provision; 1462-a, introductory provision; 1467).

5. Express provision was made (§ 1454, subd. 2) that "the court shall have power to direct the arbitrators to proceed promptly with the hearing and determination of the controversy." Complaint had been made that in certain cases arbitration proceedings had been unduly prolonged, and it was a matter of some doubt whether under the formerly existing law the court had any power to control the action of the arbitrators in this respect.

Commencement of Arbitration Proceedings Without a Court Order

Since the enactment by the New York Legislature in 1920 of the first modern arbitration statute, the most vexing problems of arbitration practice have been those involved in the commencement of arbitration proceedings without a court order. Of course, where both parties cooperate, these problems cause no difficulty. But in the situation (which unfortunately sometimes arises in private, as it does in international affairs) where two

9. *See* Matter of Buckley v. Lippmann, 223 N.Y. 539, 119 N.E. 1033 (1918); Bender v. Bloom, 223 App. Div. 644, 229 N.Y. Supp. 155 (1st Dep't 1928); Matter of Colwell Worsted Mills v. Glass, 228 App. Div. 150, 239 N.Y. Supp. 281 (1st Dep't 1930).

parties agree in advance to submit their differences to arbitration but one of them changes his mind when a dispute actually arises, they must be met.

Under the original provisions of the Arbitration Law of 1920, the court of appeals solved this problem by holding that where one party refused to proceed with the arbitration, no arbitration could validly be held without first obtaining a court order directing that the arbitration proceed.[10]

This resulted in certain practical difficulties. For example, in the case just cited one of the arbitrators withdrew after the commencement of the arbitration; and it was held that the arbitration could not validly proceed without a court order. To avoid this and other difficulties, the Arbitration Law was amended 1927 by the addition of a new Section 4-a, which provided in effect that where arbitration proceedings were conducted in accordance with a valid arbitration agreement or submission, even without a previous court order directing that arbitration proceed, the resulting award should have full validity.

This provision, however, raised new questions. The regularly constituted tribunals for the adjudication of disputes are the courts; and a party cannot be compelled to submit to arbitration unless he has at some time agreed to do so. Consequently, a party who claims that he has never agreed to arbitrate has an absolute right to litigate that issue at some stage of the proceedings.

This difficulty the draftsman of § 4-a endeavored to meet by the following provisions:

> ". . . At any time before a final judgment shall have been given in proceedings to enforce any such award whether in the courts of the state of New York, or elsewhere, any party to the arbitration who has not participated therein may apply to the supreme court, or a judge thereof, to have all or any of the issues hereinafter mentioned determined, and if, upon any such application the court, or a judge thereof, or a jury, if one be demanded, shall determine that no written contract providing for arbitration was made, or submission entered into, as the case may be, or that such party was not in default by failing to comply with the terms thereof, or that the arbitrator, arbitrators, and, or umpire was, or were not appointed or did not act, pursuant to the written contract, then and in any such case, the award shall thereupon become invalid and unenforceable. Where any such application is made any party may demand a jury trial of all or any of such issues, and if

10. Matter of Bullard v. Grace Co., 240 N.Y. 388, 148 N.E. 559 (1925).

such a demand be made, the court or a judge thereof shall make an order referring the issue or issues to a jury in the manner provided by law for referring to a jury issues in an equity action."

The apparent effect of these provisions was well stated by the majority of the Appellate Division in *Matter of Finsilver, Still & Moss, Inc. v. Goldberg Maas & Co. Inc.*[11] as follows:

"Under this statute a party who disputes the existence of a contract providing for arbitration must make an election at his peril. He may appear before the arbitrators and be heard, but if he does, he is finally estopped from questioning the jurisdiction of the arbitrators and from asserting that he never agreed to be bound by their determination. He may question their jurisdiction to make the award, but only if he foregoes the opportunity to present his side of the controversy to the arbitrators. . ."

The appellate division held in the case cited that the necessity of making this choice rendered the provision unconstitutional.

The court of appeals, in reversing the decision of the appellate division just referred to,[12] did not rule on the question whether the section, if construed in accordance with its literal provisions, as the appellate division had construed it, would have been constitutional. Instead, the court of appeals held that by implication (though not by the express terms of the section), a party claiming that he had never made an agreement to arbitrate had the right, after seasonable protest, to participate in the arbitration, thereby saving both his right to contest the case on the merits and his right later to claim that there had never been a valid agreement to arbitrate. As so construed, the statute was held to be clearly constitutional.

This decision had the advantage of sustaining the constitutionality of the act, but in its turn it raised new difficulties. An unwilling party having knowledge of this decision could save his right to question the existence of an arbitration agreement and then go in and defend on the merits. If he won on the merits, this was the end of the case. If he lost on the merits, he could still litigate the existence of an arbitration agreement. Essentially, his position was "Heads I win, tails you lose."

To avoid what seemed to it the injustice of this result, the Special Committee on Arbitration of the Asociation of the Bar of the City of New York, in preparing the general revision and consolidation of the

11. 227 App. Div. 90, 92, 237 N.Y. Supp. 110 (1st Dep't 1929).
12. 253 N.Y. 382, 171 N.E. 579 (1930).

New York statutes relating to arbitration which was enacted into law as Chap. 341 of the Laws of 1937, sought to deal with this difficulty by including a provision (Civil Practice Act, § 1458, subd. 2), following the general scheme of § 4-a, but providing that a party served personally with a notice of intention to proceed with an arbitration must move within ten days after such personal service to stay the arbitration or be thereafter barred from questioning the noticing party's right to arbitrate.

It was hoped that this provision would put at rest the long controversy which had raged about this particular feature of arbitration procedure. Unfortunately, however, the provision raised still a new difficulty.

In *Schafran & Finkel v. Lowenstein*,[13] the complaint alleged that the plaintiff, who (it was alleged) had never made any agreement whatever to arbitrate, was served by the defendant with a notice of intention to conduct an arbitration; that the defendant had proceeded to conduct an *ex parte* arbitration resulting in an award in its favor and had brought a proceeding to confirm the award; and that the plaintiff was thus being deprived of property without due process of law. The complaint prayed a declaratory judgment and an injunction against proceedings on the award.

The majority of the appellate division, although recognizing the possibility of injustice in such a situation, held the action barred by § 1458, subd. 2, of the Civil Practice Act. Mr. Justice Dore, writing for the majority of the appellate division, suggested[14] that the statute might well require the notice to state that the consequence of ignoring it for ten days was thereafter to bar the party served from questioning the noticing party's right to an arbitration. He held, nevertheless, that the statute was constitutional without such a requirement and that the complaint therefore did not state a cause of action.

The court of appeals, however, speaking unanimously through Chief Judge Crane[15] held that if the meaning of the statute was that a party could be forever barred from questioning the right to arbitrate as consequence of ignoring it, the statute was unconstitutional. As the notice in the *Schafran & Finkel* case contained no such statement, the court of appeals held that the party served with the notice was not barred from questioning

13. 254 App. Div. 218, 4 N.Y.S. 2d 693 (1st Dep't 1938), *reversed* 280 N.Y 164, 19 N.E. 2d 1005 (1939).
14. *Id*, at p. 221.
15. 280 N.Y. 164, 19 N.E. 2d 1005 (1939).

the right to arbitrate, and the decision of the appellate division was accordingly reversed.

In *Matter of Hesslein & Co. v. Greenfield*,[16] a case similar on its facts to the *Schafran & Finkel* case, the court of appeals, speaking again through Chief Judge Crane, reached the same conclusion, saying:

> ". . . The validity of the ten days' limitation depends upon the sufficiency of the notice . . ."[17]

In order to meet these decisions, and in accordance with Justice Dore's suggestion, § 1458, subd. 2, was again amended in 1939 so as to provide that a notice served pursuant to the section must expressly state that unless, within ten days after its service, the party served therewith shall serve a notice of motion to stay arbitration, he shall thereafter be barred from putting in issue the making of the contract or submission or the failure to comply therewith. This amendment seems to meet squarely the constitutional objection to the original section as sustained in the *Schafran & Finkel* and *Hesslein* cases; and in the only reported case on the subject since the amendment, it has been held valid.[18]

Other Amendments of the Statute Since 1937

It had been held in *Matter of Fletcher*,[19] and *Matter of Buffalo & Erie Railroad Company*,[20] that inasmuch as only disputes which might be the subject of an action are arbitrable, arbitration proceedings could not be compelled where there was a clause for an incidental appraisal or where,

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16. 281 N.Y. 26, 22 N.E. 149 (1939).
17. 281 N.Y. at 31.
18. MacNamara v. Doubleday, 270 App. Div. 645, 62 N.Y.S. 2d 369 (3rd Dep't 1946).

This case also holds that a motion for a stay under § 1458, subd. 2, can be made only as an incident to a plenary action for an injunction. This part of the decision is contrary to the established practice in arbitration proceedings and to the express provision of the second paragraph of § 1459 of the Civil Practice Act, which provides:

> "Any application to the court, or a judge thereof, hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."

It is rested on two decisions (Matter of Julius Restaurant, Inc. v. Lombardi, 257 App. Div. 370, 13 N.Y.S. 2d 490 (1st Dep't 1939), and Huntington v. Cortland Home Tel. Co., 62 App. Div. 517, 71 N.Y. Supp. 84 (3rd Dep't 1901)), the first of which was reversed by the Court of Appeals (282 N.Y. 126, 25 N.E. 874 (1940) and the second of which is plainly not in point. This part of the decision, therefore, is clearly incorrect. So far, however, as the case holds the present provisions of § 1458, subd. 2, valid, however, the decision is sound.

19. 237 N.Y. 440, 143 N.E. 248 (1924).
20. 250 N.Y. 275, 165 N.E. 291 (1929).

in effect, the arbitrators were asked to make a contract for the parties. The latter objection covered the ordinary collective bargaining arbitration. In order to overcome the effect of these decisions, § 1448 was amended (laws of 1940 and 1941) by the addition of the following provisions:

> "... A provision in a written contract between a labor organization, as defined in subdivision five of section seven hundred one of the labor law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment, or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.
>
> "Such submission or contract may include questions arising out of valuations, appraisals or other controversies which may be collateral, incidental, precedent or subsequent to any issue between the parties."

The amendment relating to labor disputes appears to have been effectual and has frequently been applied in practice; but the effect of the other amendment is doubtful.[21]

The Present New York Law of Arbitration Procedure

The present law may be summarized as follows:

Agreements may be validly made—and enforced under the provisions of the New York law—to arbitrate any controversies which might be the subject of an action, any ordinary labor disputes and perhaps questions of valuations, appraisals, or other incidental or collateral controversies (Civil Practice Act, § 1448). However, controversies respecting claims to real property are excluded, and agreements by an infant or incompetent to arbitrate must be approved by the appropriate court in order to be valid.

A contract to arbitrate future controversies must be in writing, but need not be signed. A submission to arbitration of an existing controversy must be signed by the party to be charged therewith, but need not be acknowledged (§ 1449).

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21. *See* Matter of Kallus v. Ideal Novelty & Toy Company, 292 N.Y. 459, 55 N.E. 737 (1944).

A person aggrieved by failure of the other party to proceed with arbitration as agreed has a choice of two remedies. He may proceed under § 1450 of the Civil Practice Act with a proceeding to compel arbitration. In this case notice may be served as provided in the contract or submission; or, if there is no such provision, personally within or without the state, or by substituted service, or as the court may otherwise provide. If a substantial issue is raised as to the making of the contract or submission or the failure to comply therewith, either party is entitled to a jury trial. Or the party aggrieved may simply serve a notice of his intention to proceed with the arbitration as agreed (§ 1458). In that case, the adverse party must prove within ten days to stay the arbitration, or he is bound by a conclusive presumption that he has agreed to arbitrate. The notice must, in substance, call attention to the provisions of § 1458, and must be personally served.

On a motion to stay arbitration, the court must determine whether there has been a valid agreement to arbitrate and a failure to comply therewith. The party proposing arbitration has a right to a jury trial, but under the provisions of the section as it stands at present, the party seeking arbitration has no such right.[22]

The arbitration must be adjourned pending the determination of the motion for a stay.

Where court action is brought in violation of an arbitration agreement, the defendant in the action may move in the supreme court for a stay of the action (§ 1451). In the event of failure to name an arbitrator, the court has power to name the arbitrator (§§ 1452, 1453).

Hearings must be had on notice (§ 1454(1)). The court has the power to direct the arbitrators to proceed promptly (§ 1454 (2)).

Before hearing testimony, the arbitrators must take an oath faithfully and fully to hear and examine the matters in controversy and to make a just award to the best of their understanding; but the oath may be waived by the parties or their attorneys or upon written consent or by proceeding with the arbitration without objecting to the failure of the arbitrators to take the oath (§ 1455).

The arbitrators have power to issue subpoenas. All must take part in the proceedings, but a majority may make an award unless the agreement or submission requires unanimous concurrence (§ 1456).

22. The Committee on Arbitration and Conciliation of the New York County Lawyers Association proposed an amendment of this Section to give the right to demand a jury trial equally to both parties. After this article was written, the amendment was adopted, effective September 1, 1948.

Unless otherwise provided in the submission or contract, an award may require the payment by either party of the arbitrators' fees at the rate provided by law for referees, viz., $25 a day per arbitrator (§§ 1457, 1545). Arbitration is a special proceeding; and all applications to the court are heard as motions (§ 1459).

An award must be acknowledged and either delivered to the clerk of the court or to one of the parties or his attorney (§ 1460). At any time within one year after an award is made, any party may move for its confirmation or notice to the adverse party or his attorney (§ 1461).

An award may be vacated on any one of the following grounds:

1. Where the award was procured by corruption, fraud or other undue means.

2. Where there was evident partiality or corruption in the arbitrators or either of them.

3. 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.

4. Where the arbitrators exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject-matter submitted was not made.

5. If there was no valid submission or contract, and the objection has been raised under the conditions set forth in section fourteen hundred fifty-eight. (§ 1462).

An award may be modified or corrected on any one of the following grounds:

1. Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property referred to in the award.

2. Where the arbitrators have awarded upon a matter not submitted to them, not affecting the merits of the decision upon the matters submitted.

3. Where the award is imperfect in a matter of form not affecting the merits of the controversy, and, if it had been a referee's report, the defect could have been amended or disregarded by the court (§ 1462(a)).

Unless the award is subject to being vacated or modified on one of the grounds specified above, the decision of the arbitrators is conclusive on the

merits; and the court has no power to review that decision either on the facts or the law.[23]

Unless the award is vacated or modified on one of the grounds just stated, a motion to confirm the award results in the entry of judgment upon the award which is enforceable like any other judgment (§§ 1464, 1465, 1466).

Appeals may be taken as in other proceedings (§ 1467).

Provision is made for the continuance of proceedings after death of a party (§ 1468).

Conduct of Arbitration Proceeding

The preceding division of this article indicates the legal proceedings available where there is a dispute between the parties as to whether arbitration shall proceed or not; so that subject will not be discussed here. In this division of the article it will be assumed that either the parties both desire to proceed with arbitration or the necessary court proceedings have been concluded and the question of proceeding with arbitration is no longer open.

Obviously one of the most important matters to be considered in arbitration proceedings is the selection of the arbitrator or arbitrators. The arbitration agreement or submission ordinarily provides for this; where no such provision is made, the arbitrator is (as stated above) selected by the court. (§ 1452).

Until twenty or twenty-five years ago, the customary, if not universal, method of selecting arbitrators was to have each party in the controversy select one arbitrator and the two arbitrators so selected chose a third. This method of selecting arbitrators has the obvious disadvantage of making at least two of the arbitrators, in effect, advocates of the respective parties. It has been disapproved by the New York Court of Appeals in *Matter of American Eagle Fire Ins. Co. v. N. J. Ins. Co.*,[24] in which Judge Pound, writing for the court said:

> ". . . the practice of arbitrators of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitrations and as calculated to bring the system of enforced arbitrations into disrepute. An arbitrator acts in a quasi-judicial capacity, and should possess the judicial qualifications of fairness to both parties so he may render a faithful, honest, and disinterested opinion."

23. Matter of Friedheim v. International Paper Co., 265 App. Div. 601, 40 N.Y.S. 2d 144 (1st Dep't 1943), and cases cited.
24. 240 N.Y. 398, 405, 148 N.E. 562 (1925).

In recent years the practice has grown, particularly in arbitrations conducted under the auspices of the American Arbitration Association, of having all the arbitrators impartial persons selected from panels of persons willing to serve. Panels are usually available of persons possessing special qualifications.

In many cases it is obviously desirable to have arbitrators engaged in the particular business or profession involved in the controversy. In other cases it may be desirable to have accountants or lawyers serve as arbitrators. Sometimes the best group of arbitrators consists of one lawyer and two business or other professional men.

The parties to the arbitrations may be represented by lawyers; except, that the rules of certain organizations (the validity of which, so far as we know, has not been authoritatively determined) prohibit the appearance of lawyers.

Proceedings are conducted in general in the same manner as a trial in court, with the following important differences:

1. A much prompter trial can ordinarily be obtained in arbitration than in a court proceeding.

2. There being no jury present, most of the oratory and byplay common in jury trials is omitted, which, among other things, saves a good deal of time.

3. One of the few grounds on which an award of arbitrators can be set aside is the wrongful exclusion of evidence (§ 1462(3)). There is, however, no restriction on the evidence that they may receive. For this, as well as for practical reasons, arbitrators are usually extremely liberal in the reception of evidence. Although this might seem to make for delay, actually it makes for expedition.

4. Another ground on which an award can be set aside is "misbehavior" (§ 1462(3)). Under this provision awards have sometimes been set aside where the arbitrators, or one of them, without the knowledge and consent of the parties, makes a test or inspection with regard to the subject matter of the controversy.[25] Although in some cases awards have survived attack on this ground,[26] the only safe course is to avoid such tests and inspections

25. Berizzi Co. v. Krausz, 239 N.Y. 315, 146 N.E. 436 (1925); Robins Silk Mfg. Co. v. C. P. Dye Works, 251 N.Y. 87, 167 N.E. 181 (1929).

26. Matter of Gerli & Co. v. Heineman Corp., 258 N.Y. 484, 180 N.E. 243 (1932); Matter of Snaider v. Mano Hoffner Fur. Corp., 269 App. Div. 271, 55 N.Y.S. 2d 285 (1st Dep't 1945); *aff'd* 295 N.Y. 846, 67 N.E. 2d 255 (1946).

excepting on due notice to the parties or their counsel, and with full opportunity for them to be present. It is best and safest to procure their consent; but if this cannot be procured and the test or inspection is deemed essential, notice to the parties and an opportunity to be present is probably sufficient.

5. Except for bias, corruption, misbehavior or mistake, the only other ground on which an award of arbitrators can be questioned is improper refusal to grant an adjournment. Of course, arbitrators may refuse an adjournment where no proper ground for it exists. However, in view of the possible legal consequences of refusing an adjournment,[27] it is obviously the best practice to grant one if there is any serious doubt whether the party applying for an adjournment is not entitled to it. This sometimes causes trouble in the case of an unfair or litigious party; but ordinarily no serious difficulty arises from this cause.

6. As above indicated, the decision of the arbitrators is conclusive on all question of law and fact; and it has long been settled that there is no court review on the merits.[28] The only grounds on which an award may be upset as indicated above, are wrongful exclusion of evidence, wrongful refusal to grant an adjournment, bias, corruption, or misconduct. Accordingly, in a great majority of cases awards are confirmed, or perhaps still more commonly carried out without the necessity of a formal court confirmation.

Where arbitrations are conducted under the auspices of an organization, the matter of compensation of the arbitrators depends on the rules of the organization, and arbitrators are usually not compensated for their work. When arbitrations are conducted under the auspices of the American Arbitration Association, the arbitrators are not compensated excepting where special arrangement for their compensation is made either in labor cases (where such compensation is customary) or in cases involving unusually prolonged and onerous work on the part of the arbitrators. However, the American Arbitration Association receives a fee based on the amount in controversy, which may be substantial.

Where arbitrations are conducted without the intervention of any organization, arbitrators are usually compensated either at the rate fixed by law or at a rate fixed by agreement of the parties. Such an agreement,

27. *See* Matter of Navarro v. Kachurin, 266 App. Div. 181, 41 N.Y.S. 2d 585 (1st Dep't 1943) in which an award was set aside on the ground that a request for an adjournment should have been granted.

28. Matter of Friedheim v. International Paper Co., 265 App. Div. 601, 40 N.Y.S. 2d 144 (1st Dep't 1943), and cases cited.

if properly made, is valid (Civil Practice Act § 1457). Obviously it is improper for the arbitrator to conduct separate negotiations with either party regarding his fees. The only proper manner in which fees larger than the statutory fee may be agreed upon is for both parties jointly to offer the arbitrator an agreement to this effect.

The foregoing discussion indicates the advantages and disadvantages of arbitration. By express provision in the statute (§ 1448(2)), controversies relating to title in fee or life estates in real property cannot be arbitrated; nor can certain controversies where the validity of the agreement itself as a matter of public policy is involved.[29] Obviously, arbitration is not appropriate where decision in accordance with strict principles of law is desired or where it is desired to settle the construction of a constitution or statute or establish a precedent on a question of law. On the other hand, in the case of the ordinary commercial dispute, involving no fundamental question of law or of principle, it furnishes a quick, inexpensive and conclusive method of settling a controversy with a minimum of the heat and bitterness that often accompanies litigation in court. Its important place in settling labor controversies is, of course, well known. With an ancient history behind it, it has, in modern times, established a large sphere of usefulness as one of the recognized and, in some respects, one of the most efficient, methods of composing differences between men and men.

29. Matter of Kramer & Uchitelle, Inc., 288 N.Y. 467, 43 N.E. 2d 493 (1942).