

Under a Contract Containing a Broad Arbitration Clause and a Provision Specifically Authorizing Either Party to Seek Injunctive Relief Without Waiving Other Remedies, the Procurement of a Court Ordered Preliminary Injunction Does Not Waive the Right to Arbitrate Issues on Which the Injunctive Relief Is Based

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eral recent decisions affecting New York practice. In *Assael v. Assael*, the Appellate Division, First Department, determined that a plaintiff did not waive the right to compel arbitration of a corporation's dissolution by seeking a preliminary injunction when the contract that provided for the arbitration also specifically allowed each party to seek injunctive relief without waiving other remedies.

In *Baker v. Board of Education*, a unanimous Court of Appeals held the applicable statute of limitations for a cause of action for breach of the duty of fair representation against a public union was six years. In applying the six-year catch-all provision of CPLR 213(1), the Court of Appeals rejected the lower court's determination that the action was governed by the six-month federal statute of limitations period that had previously been applied in similar actions against *private* unions.

Finally, in *In re Stein*, the Appellate Division, Second Department, delineated the circumstances in which the proceeds of an insurance policy may properly be received by a trustee-beneficiary. Payment is proper, held the court, only if the trust agreement predated the designation of the beneficiary under the insurance policy and that trust agreement was identified in the beneficiary designation.

The members of Volume 62 hope that the New York bench and bar find the cases analyzed in *The Survey* to be of interest and value.

DEVELOPMENTS IN THE LAW

Under a contract containing a broad arbitration clause and a provision specifically authorizing either party to seek injunctive relief without waiving other remedies, the procurement of a court ordered preliminary injunction does not waive the right to arbitrate issues on which the injunctive relief is based

Arbitration is a system for the resolution of contractual disputes in which the parties create the forum and appoint impartial

General Obligations Law (McKinney)	GOL
D. Siegel, <i>New York Practice</i> (1978 & Supp. 1987)	SIEGEL
Weinstein, Korn & Miller, <i>New York Civil Practice</i> (1982)	WK&M
<i>The Survey of New York Practice</i>	<i>The Survey</i>

monitors.¹ The right to seek arbitration of a dispute may be expressly or impliedly waived by either party to the agreement.²

¹ See M. DOMKE, *DOMKE ON COMMERCIAL ARBITRATION* § 1.01, at 1 (rev. ed. 1984). Arbitration is defined as:

[A] contractual proceeding, whereby the parties to any controversy or dispute, in order to obtain an inexpensive and speedy final disposition of the matter involved, select judges of their own choice and by consent submit their controversy to such judges for determination, in the place of the tribunals provided by the ordinary processes of law.

Id. (citing *Gates v. Arizona Brewing Co.*, 54 Ariz. 266, 269, 95 P.2d 49, 50 (1939)).

Arbitration is an efficient alternative to the judicial process but does not completely preempt the area. *Id.* § 1.01, at 2. Instead, arbitration coexists with the courts as a viable alternative forum in which to resolve disputes. *Id.* Unlike judges, arbitrators need not accompany their decisions with written opinions and their decisions generally are not subject to appeal. *Id.*

Prior to 1920, an agreement to arbitrate was held void as against public policy because it was deemed an attempt to oust the courts of their jurisdiction. See *Meacham v. Jamestown, F. & C. R.R.*, 211 N.Y. 346, 351-52, 105 N.E. 653, 655 (1914). However, in 1920, New York law was amended to recognize and enforce agreements to arbitrate disputes, present or future. See *Arbitration Law*, ch. 275, § 2, [1920] N.Y. Laws 803, 804. The *Arbitration Law* was then upheld by the Court of Appeals in *Berkovitz v. Arbib & Houlberg, Inc.*, 230 N.Y. 261, 130 N.E. 288 (1921). Today, courts rarely interfere with an agreement to arbitrate. In fact, they often stay their own proceedings if initiated in violation of the agreement and thereby "compel" arbitration. See *SEGEL* § 586, at 827 (1978). But see *Maye v. Bluestein*, 40 N.Y.2d 113, 118, 351 N.E.2d 717, 720, 386 N.Y.S.2d 69, 72 (1976) (arbitration should be used sparingly if potential conflict exists between arbitration and existing litigation).

The right to freely enter into arbitration agreements without state interference is based upon the United States Constitution, which provides that "[n]o state shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts." See U.S. CONST. art. 1, § 10, cl. 1. Chief Judge Cardozo succinctly noted that "[p]arties to a contract may agree, . . . that any and all controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will give effect to their intention." *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 298, 169 N.E. 386, 391 (1929), *appeal dismissed*, 282 U.S. 808 (1930); see also *Walter A. Stanley & Sons, Inc. v. Trustees of Hackley School*, 42 N.Y.2d 436, 439, 366 N.E.2d 1339, 1341, 397 N.Y.S.2d 985, 986 (1977) (parties' intention to arbitrate should be judicially respected).

The right to compel arbitration is purely contractual. See *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). Parties to a commercial contract "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." *Id.*; see also *Calvin Klein Co. v. Minnetonka, Inc.*, 88 App. Div. 2d 503, 504, 449 N.Y.S.2d 729, 731 (1st Dep't 1982) (petitioners could not compel arbitration as they were not signatories to agreement containing arbitration clause).

² See *Zimmerman v. Cohen*, 236 N.Y. 15, 19, 139 N.E. 764, 765 (1923); see also *Sherrill v. Grayco Builders, Inc.*, 64 N.Y.2d 261, 272, 475 N.E.2d 772, 775, 486 N.Y.S.2d 159, 162 (1985) (right to arbitrate may be modified, waived, or abandoned); *Nagy v. Arcas Brass & Iron Co.*, 242 N.Y. 97, 98, 150 N.E. 614, 614 (1926) (party to arbitration agreement can waive rights thereunder).

"There is no set rule as to what constitutes a waiver or abandonment of the right to arbitrate." *In re American News Co.*, 130 N.Y.S.2d 554, 557 (Sup. Ct. N.Y. County 1954). Rather, the court must determine on a case-by-case basis whether the parties actually in-

Generally, the right to compel arbitration is waived by a party's failure to proceed for an unreasonable period of time after an order directing arbitration has been made,³ or by a party's refusal to submit to arbitration proceedings.⁴ Similarly, litigation of a disputed claim relinquishes the plaintiff's right to compel arbitration,⁵ ex-

tended to relinquish a known right. See *id.* at 557-58. Waiver is defined as "an intentional abandonment or relinquishment of a known right." *Id.* at 558 (quoting *Newburger v. Lubell*, 259 N.Y. 383, 386, 178 N.E. 669, 670 (1931)). There can be no waiver of the right to arbitration when the party allegedly waiving his rights was unaware of a dispute. See *Country-Wide Ins. Co. v. Frolich*, 119 Misc. 2d 1089, 1092, 465 N.Y.S.2d 446, 448 (N.Y.C. Civ. Ct. Kings County 1983).

"Waiver of the right to arbitrate may bar a party from obtaining an order compelling arbitration or staying an action pending arbitration . . ." 8 WK&M § 7503.14, at 75-90 (1987). See generally Comment, *Waiver of the Right to Compel Arbitration—A Directional Analysis*, 16 CAL. W.L. REV. 375, 375-78 (1980) (general overview of waiver of arbitration with specific reference to California).

³ See *Finkelstein v. Harris*, 17 App. Div. 2d 137, 138-39, 233 N.Y.S.2d 174, 176 (1st Dep't 1962). Although the courts are not involved in the arbitration process itself, they are often called upon to decide threshold questions such as "whether the dispute is arbitrable and whether the arbitration has been sought within the applicable period of limitations." See SIEGEL § 591, at 842. Section 7503 of New York's CPLR provides the procedure whereby an aggrieved party may seek an order to compel or stay arbitration. See CPLR 7503(a), (b) (*McKinney* 1980); see also *Plateis v. Flax*, 54 App. Div. 2d 813, 814, 388 N.Y.S.2d 245, 246 (3d Dep't 1976) (unreasonable delay in asserting right to arbitrate may constitute waiver); *Heldman v. Douglas*, 47 App. Div. 2d 838, 839, 365 N.Y.S.2d 561, 563 (2d Dep't 1975) (five year delay in asserting right to arbitrate constituted waiver).

⁴ See *Nagy*, 242 N.Y. at 98, 150 N.E. at 614.

⁵ See, e.g., *De Sapio v. Kohlmeyer*, 35 N.Y.2d 402, 405-06, 321 N.E.2d 770, 772, 362 N.Y.S.2d 843, 846-47 (1974) (affirmative use of judicial forum, even cross claim, inconsistent with later attempt to force arbitration); *United Paper Mach. Corp. v. DiCarlo*, 14 N.Y.2d 814, 815, 200 N.E.2d 453, 453, 251 N.Y.S.2d 469, 469 (1964) (right to arbitrate waived if action commenced three days after demand for arbitration); *Zimmerman v. Cohen*, 236 N.Y. 15, 19, 139 N.E. 764, 765 (1923) (right to arbitrate waived when plaintiff instituted action and defendant counterclaimed).

The assumption that the commencement of an action constitutes an implied waiver of the right to arbitrate may extend to the defendant, depending on the degree of participation in the action. See *De Sapio*, 35 N.Y.2d at 405, 321 N.E.2d at 772, 362 N.Y.S.2d at 846. The court in *De Sapio* noted:

In the absence of unreasonable delay, so long as the defendant's actions are consistent with an assertion of the right to arbitrate, there is no waiver. However, where the defendant's participation in the lawsuit manifests an affirmative acceptance of the judicial forum . . . his actions are then inconsistent with a later claim that only the arbitral forum is satisfactory.

Id.; see also *Clurman v. Clurman*, 52 N.Y.2d 1036, 1038, 420 N.E.2d 385, 386, 438 N.Y.S.2d 504, 505 (1981) (defendant waived right to arbitrate by defending motion for summary judgment); *Gabor v. Spicyn*, 99 App. Div. 2d 1000, 1001, 473 N.Y.S.2d 457, 458-59 (1st Dep't 1984) (accepting court as proper forum precluded defendants' request for arbitration eight months later); *Esquire Indus., Inc. v. East Bay Textiles, Inc.*, 68 App. Div. 2d 845, 846, 414 N.Y.S.2d 336, 337 (1st Dep't 1979) (defendant's application to stay arbitration constituted a waiver by defendants of the right to arbitrate). *But see* *Hosiery Mfg. Corp. v. Goldston*, 238

cept when the plaintiff seeks to arbitrate a claim which is separate and distinct from the issue before the court.⁶ Recently, in *Assael v. Assael*,⁷ the Appellate Division, First Department, reaffirmed this exception by holding that the commencement of an action to resolve one claim does not constitute an implied waiver of the contractual right to compel arbitration of a separate issue arising from the same agreement.⁸

In *Assael*, the plaintiffs and defendants each owned fifty percent of Daisy Sportswear Inc. ("DSI") and, following irreconcilable disputes, drafted corporate agreements that divided DSI's business into two separate corporations providing, however, that DSI remain in existence until the two corporations became independently viable.⁹ Both agreements contained broad arbitration clauses as well as injunctive remedies for specific breaches of the contracts.¹⁰ Soon after the agreements were signed, the plaintiffs alleged spe-

N.Y. 22, 27, 143 N.E. 779, 780 (1924) (defendant does not waive arbitration right by answering and asserting counterclaims); *Chapman-Krueger Corp. v. Jaffe*, 239 App. Div. 795, 796, 263 N.Y.S. 737, 738 (2d Dep't 1933) (defendant's assertion of counterclaim in answer not a waiver).

⁶ See *Denihan v. Denihan*, 34 N.Y.2d 307, 310, 313 N.E.2d 759, 760, 357 N.Y.S.2d 454, 456 (1974). Generally, New York courts have held there is no relinquishment of the right to arbitrate issues other than the one raised in the court action, even if they arise from the same contract. See, e.g., *Clurman*, 52 N.Y.2d at 1036-37, 420 N.E.2d at 386, 438 N.Y.S.2d at 505 (although defendant waived right to arbitrate under one paragraph of separation agreement, he retained right to arbitrate under other paragraphs); *Mendelsohn v. A&D Catering Corp.*, 100 App. Div. 2d 209, 216, 473 N.Y.S.2d 481, 486 (2d Dep't 1984) (resorting to judicial forum for protective relief did not waive right to arbitrate distinct and separate claims); see also Comment, *Contract Law—Waiver of Arbitration Rights by Litigating One Issue is not a Waiver of the Same Rights as to Other Issues*, 12 U. BALT. L. REV. 585, 587-88 (1983) (distinguishing cases with separate and distinct issues from single issue cases).

⁷ 132 App. Div. 2d 4, 521 N.Y.S.2d 226 (1st Dep't 1987).

⁸ *Id.* at 8, 521 N.Y.S.2d at 228.

⁹ *Id.* at 5-6, 521 N.Y.S.2d at 226-27. The parties drafted two agreements, a Tri-Corporate Agreement and a Shareholders Agreement. *Id.* at 5, 521 N.Y.S.2d at 226. The Tri-Corporate Agreement provided for a "start up" period so the two new corporations could establish their own credit and business relationships before the dissolution of DSI. *Id.* at 6, 521 N.Y.S.2d at 227. It also prohibited the parties from conducting any activity that would hinder DSI's credit, and provided that such conduct would be a material breach. *Id.* The parties also agreed not to disclose the other's trade secrets or customer lists, or to solicit the other's customers. *Id.* The agreements provided that DSI was to be dissolved on December 31, 1988 or upon earlier termination of the Tri-Corporate Agreement. *Id.*

¹⁰ *Id.* The arbitration clauses in essence provided that "any dispute or controversy regarding the terms of [the Agreements] or the rights and obligations of any of the parties to [the Agreements]" is subject to arbitration. *Id.* In addition, the parties agreed that breaches which threatened the underlying purpose of their agreement could be enjoined without waiving the right to seek other remedies. *Id.* at 9, 521 N.Y.S.2d at 229.

cific contractual violations that impacted on the viability of DSI.¹¹ To enjoin further violations the plaintiffs chose to commence an action in court, rather than rely on arbitration. The defendants opposed the injunction and cross moved for dissolution of the corporation, claiming similar breaches on the part of the plaintiffs.¹² In response, the plaintiffs moved to compel arbitration of the dissolution issue.¹³ The Supreme Court, New York County, denied the plaintiffs' motion, holding that the motion to enjoin violations of the agreement involved the same issues as the arbitration proceeding.¹⁴ Thus, the court concluded, the plaintiffs' election to seek an injunction constituted a waiver of their right to arbitrate the corporation's dissolution.¹⁵

The Appellate Division, First Department, reversed, holding "that there is a critical, and important, distinction between an action to enjoin, and seek damages for, violations of an agreement, and a proceeding intended to terminate the agreement."¹⁶ Noting that plaintiffs' motion for a preliminary injunction was separate from the dissolution issue and specifically authorized under the contract, the majority reinstated the plaintiffs' right to arbitrate the dissolution of the corporation.¹⁷

In contrast, the dissent, citing *Sherrill v. Grayco Builders, Inc.*,¹⁸ stated that unless the claims involved in both the litigation and the requested arbitration are "entirely separate," the right to arbitrate one will be lost by an election to litigate the other.¹⁹ Noting that the same factual issues were raised in both proceedings,

¹¹ *Id.* at 7, 521 N.Y.S.2d at 227.

¹² *Id.* The lower court granted a preliminary injunction, restraining both the plaintiffs and the defendants from violating either of the corporate agreements. *Id.*

¹³ *Id.* The plaintiffs sought to compel arbitration pursuant to CPLR 7503(a) and to stay the dissolution proceeding. *Id.*

¹⁴ *Id.* at 8, 521 N.Y.S.2d at 228.

¹⁵ *Id.*

¹⁶ *Id.* at 10, 521 N.Y.S.2d at 229. The appellate court granted the motion to stay the dissolution proceeding. *Id.* at 8, 521 N.Y.S.2d at 228.

¹⁷ *See id.* at 9-10, 521 N.Y.S.2d at 229. The court noted that the corporate agreements "specifically authorized each side to seek injunctive relief in the event of specified material breaches by the other side, and to do so without waiving any other remedies to which the moving party might be entitled." *Id.* at 9, 521 N.Y.S.2d at 229. Thus, the court distinguished the action for injunctive relief from the dissolution proceeding, seeing them as alternative remedies. *Id.* at 10, 521 N.Y.S.2d at 229.

¹⁸ 64 N.Y.2d 261, 475 N.E.2d 772, 486 N.Y.S.2d 159 (1985).

¹⁹ *Assael*, 132 App. Div. 2d at 15, 521 N.Y.S.2d at 232 (Smith, J., dissenting); *see also Sherrill*, 64 N.Y.2d at 272, 475 N.E.2d at 775-76, 486 N.Y.S.2d at 162-63 (waiver of right to arbitrate because of active participation in litigation over extended period).

the dissent concluded that the plaintiff had waived all rights to arbitrate the dissolution claim.²⁰

While the *Assael* court correctly interpreted the parties' contractual agreements by allowing them to resolve their disputes in different forums, it is suggested that in certain instances such bifurcation is inefficient.²¹ Multiple proceedings involving issues that are not "entirely separate" are counterproductive and undermine the primary reason for arbitration—the efficient and expedient resolution of disputes.²² In such instances, the court should consider its policy of enforcing arbitration agreements in light of the potential costs and burdens of resolving contractual issues in different forums.²³ Consequently, when cost and delay will increase if the

²⁰ *Assael*, 132 App. Div. 2d at 15, 521 N.Y.S.2d at 232 (Smith, J., dissenting). Justice Smith noted that the same issues of harassment, breaches of the corporate agreements, and wrongful solicitation of employees "were raised in both the litigation commenced by the [plaintiffs] and in the dissolution proceeding which the [plaintiffs] . . . seek to have arbitrated." *Id.* (Smith, J., dissenting).

²¹ *See Denihan v. Denihan*, 34 N.Y.2d 307, 311, 313 N.E.2d 759, 761, 357 N.Y.S.2d 454, 456 (1974). The New York Court of Appeals has intimated that it will not honor an arbitration clause that hinders the credibility or operation of the court. *See id.* In *Denihan*, the Court of Appeals noted that "[w]hile there is no legal impediment to arbitration . . . we cannot but remark that by flitting between forums the parties have abused both the arbitration process and the courts." *Id.* Judge Rabin reiterated the court's viewpoint in *De Sapio v. Kohlmeyer*, noting that "[t]he courtroom may not be used as a convenient vestibule to the arbitration hall so as to allow a party to create his own unique structure combining litigation and arbitration." 35 N.Y.2d at 406, 321 N.E.2d at 773, 362 N.Y.S.2d at 847.

²² *See Mole v. Queen Ins. Co.*, 14 App. Div. 2d 1, 3, 217 N.Y.S.2d 330, 332 (4th Dep't 1961) ("principal purpose of arbitration is to reach a speedy and final result and to avoid protracted litigation"); *see also* *Spring Cotton Mills v. Buster Boy Suit Co.*, 275 App. Div. 196, 200, 88 N.Y.S.2d 295, 298 (1st Dep't), *aff'd*, 300 N.Y. 586, 89 N.E.2d 887 (1949) (arbitration provides means for expeditious and effective settlement of disputes); *Ferber v. Schultz*, 104 Misc. 2d 1009, 1011, 429 N.Y.S.2d 861, 863 (N.Y.C. Civ. Ct. Kings County 1980) (arbitration intended to dispose of disputes in rapid and inexpensive manner, thus avoiding litigation).

In recognizing the potential for overlap between judicial and arbitration proceedings, New York courts frequently stay one proceeding to await a final resolution of the other. *See, e.g., Slepian v. Beanstalk Restaurant, Inc.*, 75 App. Div. 2d 749, 749, 427 N.Y.S.2d 421, 422 (1st Dep't 1980) (court enjoined escrow agent from delivering corporate stock because disposition of stock would nullify pending arbitration); *Armco Steel Corp. v. Renago Constr., Inc.*, 34 App. Div. 2d 887, 888, 312 N.Y.S.2d 161, 162 (4th Dep't 1970) (court proceeding stayed because arbitration may make court action superfluous); *accord* *Midwest Window Sys., Inc. v. Amcor Indus., Inc.*, 630 F.2d 535 (7th Cir. 1980). In *Midwest*, the court consolidated the arbitration and court controversies into one proceeding to be tried before the court, noting that one party cannot bifurcate and complicate the dispute by changing forums and rules. *Id.* at 537. *But see Denihan*, 34 N.Y.2d at 311, 313 N.E.2d at 761, 357 N.Y.S.2d at 456 (dictum) (although proceeding in two forums was unorthodox, it matched the parties intent).

²³ Other courts have adopted this rationale and consider cost and efficiency before giv-

clause is enforced, it is urged that the court, looking beyond the plain meaning of the arbitration provision to the intent of the drafters, deny multiple proceedings.

The *Assael* court reaffirmed the common law rule that participation in a court action does not necessarily constitute a waiver of the right to arbitrate separate issues.²⁴ In so doing, the court has reiterated the importance of distinguishing the issues addressed in the court action from distinct issues that arise from the same agreement.²⁵ As the majority noted, New York follows a "flexible and balanced approach to the issue of waiver."²⁶ Therefore, it seems that a case-by-case determination of what constitutes "separate" issues is necessary in similar cases involving waiver of arbitration rights.

Moreover, the practitioner would be well advised to recognize that the *Assael* holding is limited to its unique factual setting. It is suggested that in the absence of a similar contractual provision, specifically providing for injunctive relief in addition to arbitration, the court should advance the intent of the parties to curtail costs by consolidating proceedings that involve related issues even if it results in the waiver of a remedy.

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CIVIL PRACTICE LAW AND RULES

CPLR 213(1): Six-year "catch-all" statute of limitations provision is applicable to a claim under the Taylor Law alleging the breach of a public union's duty of fair representation

Article 2 of New York's CPLR provides the applicable statute

ing arbitration favorable treatment. *See, e.g., J.F. Inc. v. Vicik*, 99 Ill. App. 3d 815, 820, 426 N.E.2d 257, 261 (1981) (rejecting right to arbitrate issues factually similar to those being litigated because arbitration would increase cost and delay); *Prestressed Concrete, Inc. v. Adolfsen & Peterson, Inc.*, 308 Minn. 20, 24, 240 N.W.2d 551, 553 (1976) (arbitration not favored because it increases cost and delay).

²⁴ *Assael*, 132 App. Div. 2d at 8, 521 N.Y.S.2d at 228.

²⁵ *Id.* at 9, 521 N.Y.S.2d at 229.

²⁶ *Id.* at 8, 521 N.Y.S.2d at 228.