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CPLR 7503(b): Clearly Implied Condition Precedent to Arbitration Insufficient to Invoke Threshold Judicial Resolution

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right to a jury trial,[114] CPLR 4544 places guidelines on how this may be done.[115] In light of the considerable bargaining advantage enjoyed by landlords in obtaining lease terms favorable to them, it seems particularly appropriate to require that the print in leases be both legible and of sufficient size.[116] In the future, it is hoped that the courts will follow the lead of *Koslowski* and interpret CPLR 4544 in a manner that will serve its intended purpose.

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ARTICLE 75—ARBITRATION

CPLR 7503(b): Clearly implied condition precedent to arbitration insufficient to invoke threshold judicial resolution

Upon an application to stay arbitration under CPLR 7503(b),[117] courts are empowered to determine whether the parties have com-

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[114] *See* note 102 *supra.*

[115] In other contexts, jury trial waiver clauses are proscribed by statute. For example, waiver clauses in leases are void in actions for personal injury or property damage. N.Y. REAL PROP. LAW § 259-c (McKinney 1968); *see* Fay's Drug Co. v. P & C Property Coop., Inc., 51 App. Div. 2d 887, 380 N.Y.S.2d 398 (4th Dep't 1976); Avenue Assocs. v. Buxbaum, 83 Misc. 2d 719, 373 N.Y.S.2d 814 (Sup. Ct. App. T. 1st Dep't 1975) (per curiam). Jury trial waivers are also prohibited in retail instalment contracts and credit agreements. N.Y. PERS. PROP. LAW §§ 403 (2)(h), 413 (10)(f) (McKinney 1976). The *Koslowski* court's reading of CPLR 4544 to give effect to the legislative intent finds support in the recent interpretation of a similar provision in the Vehicle and Traffic Code which requires that notices of cancellation of automobile insurance be printed in 12-point type. *See* N.Y. VEH. & TRAF. LAW § 313(1)(a) (McKinney Supp. 1978-1979). In Nassau Ins. Co. v. Hernandez, 65 App. Div.2d 551, 408 N.Y.S.2d 956 (2d Dep't 1978), since the notice failed to meet the type-size requirements of the statute, the insured was not deemed to have actual knowledge of its contents, despite the insured having "read, and understood the notice." *Id.* at 553, 408 N.Y.S.2d at 957; *see* Reliance Ins. Co. v. Rabinowitz, 65 App. Div. 2d 619, 409 N.Y.S.2d 539 (2d Dep't 1978); Lion Ins. Co. v. Reilly, 61 App. Div. 2d 1047, 403 N.Y.S.2d 117 (2d Dep't 1978).

[116] In Sorbonne Apartments Co. v. Kranz, 96 Misc. 2d 396, 409 N.Y.S.2d 83 (N.Y.C. Civ. Ct. Kings County 1978), the court observed that the lease in question was a form prepared by the Real Estate Board which was widely used in New York City. *Id.* at 397, 409 N.Y.S.2d at 84. The court stated that "such leases heavily favor landlords and are onerous . . . to tenants who are . . . in a virtually impossible bargaining position." *Id.* In fact, the *Sorbonne Apartments* court contemplated declaring such leases void as against public policy. *Id; see* 1625 Emmons Ave. Owners, Inc. v. Abbamonte. N.Y.L.J., March 20, 1978, at 14, col. 6 (Sup. Ct. Kings County).

[117] CPLR 7503(b) provides in part:

> [A] party who has not participated in the arbitration and who has not made or been served with an application to compel arbitration, may apply to stay arbitration on the ground that a valid agreement was not made or has not been complied with or that the claim sought to be arbitrated is barred by limitation under subdivision (b) of section 7502.

CPLR 7503(b) (Supp. Pam. 1964-1978).

plied with the agreement to arbitrate.[118] This provision has generally been interpreted to apply only in instances where it is clear that a

[118] *Id.* An arbitration agreement customarily requires that an aggrieved party initially serve a notice of intention to arbitrate on the opposing party. Usually, this notice is also filed with a designated arbitrator or an arbitration association for a determination of the parties' rights and liabilities. *See generally* F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS 165 (3d ed. 1976); G. GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION §§ 2.01 - .02 (1977). Since arbitration is a "creature of contract," Astoria Medical Group v. Health Ins. Plan, 11 N.Y.2d 128, 132-33, 182 N.E.2d 85, 87, 227 N.Y.S.2d 401, 403-04 (1962); *see* County of Sullivan v. Edward L. Nezelek, Inc., 42 N.Y. 2d 123, 128, 366 N.E.2d 72, 75, 397 N.Y.S.2d 371, 374 (1977), it is subject to the fundamental rules of contract law. Zimmerman v. Cohen, 236 N.Y. 15, 19, 139 N.E. 764, 765 (1923). CPLR 7501 allows the court to enforce a written agreement to arbitrate as it would any other enforceable agreement. *Advisory Committee Notes,* 14 N.Y. STANDARD CIVIL PRACTICE SERVICES 432 (1964).

Where the parties to a contract promise to submit any future dispute arising out of or relating to their agreement to arbitration, courts generally require the arbitrator to resolve any controversy. Long Island Lumber Co. v. Martin, 15 N.Y.2d 380, 384-85, 207 N.E.2d 190, 192-93, 259 N.Y.S.2d 142, 146 (1965); *see* Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 334, 174 N.E.2d 463, 464, 214 N.Y.S.2d 353, 355 (1961); Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 298, 169 N.E. 386, 391 (1929) (Cardozo, C.J.). In *Exercycle,* the Court of Appeals noted that several exceptions exist to the policy of directing arbitration where there is a broad arbitration clause. Such exceptions exist

> (1) where fraud or duress . . . renders the agreement voidable . . . ; (2) . . . where the asserted claim is frivolous . . . ; (3) where the performance which is the subject of the demand for arbitration is prohibited by statute . . . ; or (4) where a condition precedent to arbitration under the contract or an applicable statute has not been fulfilled . . . .

Id. at 334-35, 174 N.E.2d at 465, 214 N.Y.S.2d at 356 (citations omitted); *see* Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers' Ass'n, 46 App. Div. 2d 104, 107, 361 N.Y.S.2d 416, 419 (3d Dep't 1974). Today, however, two of these exceptions are no longer viable. In Weinrott v. Carp, 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973), *discussed in The Survey,* 48 ST. JOHN'S L. REV. 611, 639 (1974), the Court held that an arbitration clause is separable from the remainder of the contract, so that "the agreement to arbitrate would be 'valid' even if the substantive portions of the contract were induced by fraud." 32 N.Y.2d at 198, 298 N.E.2d at 47, 344 N.Y.S.2d at 855; *see* Information Sciences, Inc. v. Mohawk Data Science Corp., 43 N.Y.2d 918, 374 N.E.2d 624, 403 N.Y.S.2d 730 (1978). Whether or not a dispute is frivolous is also no longer a matter for the court to determine. This rule, known as the *Cutler-Hammer* doctrine, *see* International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S.2d 317 (1st Dep't) (per curiam), *aff'd mem.,* 297 N.Y. 519, 74 N.E.2d 464 (1947), has been discarded under CPLR 7501, which prohibits the court from considering the merits of any controversy. Jeffrey Howard & Assocs. v. Shelter Programs, Inc., 57 App. Div. 2d 886, 394 N.Y.S.2d 441 (2d Dep't 1977); Jade Press, Inc. v. Packard, 91 Misc. 2d 820, 398 N.Y.S.2d 785 (N.Y.C. Civ. Ct. N.Y. County 1977). *See generally* D. SIEGEL, NEW YORK PRACTICE § 589 (1978).

CPLR 7502(b) provides that "[i]f at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred" by the statute of limitations applicable to the underlying claim, "a party may assert the limitation as a bar to the arbitration." CPLR 7502(b) (1963); *see* Memorandum of Senator Joseph F. Periconi, *reprinted in* [1959] N.Y. LEGIS. ANN. 12, 27; *see, e.g.,* Steiner v. Wenning, 53 App. Div. 2d 437, 442, 386 N.Y.S.2d 429, 433 (2d Dep't 1976); Schlaifer v. Kaiser, 84 Misc. 2d 817, 822, 377 N.Y.S.2d 356, 361 (Sup. Ct. N.Y. County 1975); Plastic Molded Arts Corp. v. A & H Doll Mfg. Corp., 23 Misc. 2d 839, 841, 200 N.Y.S.2d 858, 860 (Sup. Ct. N.Y. County), *aff'd mem.,* 11 App. Div. 2d 668, 204 N.Y.S.2d 78 (1st Dep't 1960). *See*

condition precedent to arbitration exists.[119] Recently, in *United Nations Development Corp. v. Norkin Plumbing Co.*,[120] the Court of Appeals further narrowed the authority of courts to resolve threshold questions under CPLR 7503(b). Confronted with a broad arbitration clause in a commercial contract, the *Norkin* Court held that

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generally 8 WK&M ¶ 7502.14. Accordingly, in arbitration controversies, "it is for the court to determine whether the claim, and therefore the arbitration, is barred by the Statute of Limitations . . . ." Paver & Wildfoerster v. Catholic High School Ass'n, 38 N.Y.2d 669, 674, 345 N.E.2d 565, 567, 382 N.Y.S.2d 22, 24 (1976) (citations omitted); *see* Andresen & Co. v. Shepard, 45 App. Div. 2d 578, 579, 360 N.Y.S.2d 36, 37 (1st Dep't 1974).

[119] D. SIEGEL, NEW YORK PRACTICE § 589, at 839-40 (1978); *see* Pearl St. Dev. Corp. v. Conduit & Foundation Corp., 41 N.Y.2d 167, 170, 359 N.E.2d 693, 694-95, 391 N.Y.S.2d 98, 100 (1976). A condition precedent is evidenced by the parties' assent, 5 S. WILLISTON, CONTRACTS § 668 (3d ed. W. Jaeger 1961), and may be interpreted as "express" without any required form. RESTATEMENT OF CONTRACTS § 258 (1932). A common contractual condition precedent is a limitation on the time within which a notice of claim may be made. If such a provision is not satisfied, the conditional duty to arbitrate is discharged. AFSCO Specialties, Inc. v. Maryland Cas. Co., 37 Misc. 2d 641, 645, 235 N.Y.S.2d 147, 150 (Sup. Ct. Monroe County 1962); *see* Mascioni v. I.B. Miller, Inc., 261 N.Y. 1, 4, 184 N.E. 473, 473 (1933); Hershey v. Carter, 137 N.Y.S.2d 207, 208 (Sup. Ct. N.Y. County 1954); S. WILLISTON, *supra*, at § 666A. *See generally* Childres, *Conditions in the Law of Contracts*, 45 N.Y.U.L. REV. 33 (1970).

Some courts have distinguished between conditions precedent to the effectiveness of the contract and conditions precedent to the effectiveness of the arbitration clause. Board of Educ. v. Heckler Elec. Co., 7 N.Y.2d 476, 485, 166 N.E.2d 666, 671, 199 N.Y.S.2d 649, 655 (1960) (Froessel, J., dissenting); Uraga Dock Co. v. Mediterranean & Oriental S.S. Corp., 6 App. Div. 2d 443, 446, 179 N.Y.S.2d 474, 476 (1st Dep't 1958), *aff'd*, 6 N.Y.2d 773, 159 N.E.2d 212, 186 N.Y.S.2d 669 (1959). This is a valid distinction since a court may "not compel arbitration if an issue exists as to whether the contract ever came into existence." Terminal Auxiliar Maritima v. Winkler Credit Corp., 6 N.Y.2d 294, 298, 160 N.E.2d 526, 529, 189 N.Y.S.2d 655, 658 (1959). If conditions precedent to the making of a contract are unsatisfied, there is no agreement between the parties and therefore no promise to arbitrate.

In Board of Educ. v. Heckler Elec. Co., 7 N.Y.2d 476, 166 N.E.2d 666, 199 N.Y.S.2d 649 (1960), the Court of Appeals held that the court was the proper tribunal for determining compliance with the time limitations of N.Y. EDUC. LAW § 3813 (McKinney 1970), a condition precedent to beginning an action or special proceeding against a school district. Citing *Heckler* as support, the Court in Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 174 N.E.2d 463, 214 N.Y.S.2d 353 (1961), expanded this rule to include conditions precedent under a contract. *Id.* at 335, 174 N.E.2d at 465, 214 N.Y.S.2d at 356 (dictum). Thus, when a statute imposes a condition precedent, the determination of compliance is generally a question for the court. *See, e.g.*, Board of Educ. v. Wager Constr. Corp., 37 N.Y.2d 283, 290, 333 N.E.2d 353, 357, 372 N.Y.S.2d 45, 50 (1975); Town of Islip v. Stoye, 29 N.Y.2d 524, 525, 272 N.E.2d 573, 573, 324 N.Y.S.2d 79, 80 (1971), *rev'g mem.* 35 App. Div. 2d 834, 317 N.Y.S.2d 230 (2d Dep't 1970). Although these cases were decided under the Civil Practice Act, they are still viable under the CPLR since Article 75 is primarily a codification and clarification of the previous statutes. SECOND REP. at 130; *see* CPLR 7502. *See generally* 8 WK&M ¶ 7502.04. Once the dispute is submitted to arbitration, all issues concerning the contract are resolved in that forum. CPLR 7503, commentary at 283 (Supp. Pam. 1964-1978); *see* Pearl St. Dev. Corp. v. Conduit & Foundation Corp., 41 N.Y.2d 167, 171, 359 N.E.2d 693, 693, 391 N.Y.S.2d 98, 100 (1976).

[120] 45 N.Y.2d 358, 380 N.E.2d 253, 408 N.Y.S.2d 424 (1978), *aff'g* 59 App. Div. 2d 830, 399 N.Y.S.2d 159 (1st Dep't 1977), *aff'g mem.* No. 1677/76 (Sup. Ct. N.Y. County Feb, 4, 1977).

the issue of compliance with a contractual condition precedent involving the time within which to make a demand for arbitration should be determined by the arbitrator in the absence of an *express* declaration that the time provision was a condition precedent to arbitration.[121]

Norkin Plumbing Co. (Norkin) successfully bid on a subcontract with United Nations Development Corp. (UNDC) for the plumbing work required in the construction of a 39-story building.[122] The parties' agreement was embodied in a standard form contract devised by the American Institute of Architects.[123] This contract contained a broad arbitration clause and was modified to provide that a "demand for arbitration shall be made within 60 days after [a] claim . . . has arisen."[124] When Norkin was faced with increased costs due to delays in construction, it served a demand for arbitration.[125] UNDC thereupon brought a proceeding to stay arbitration on the ground that the demand was not made within the requisite 60-day period.[126] The Supreme Court, New York County, dismissed UNDC's petition, reasoning that, since the condition pre-

[121] 45 N.Y.2d at 362, 380 N.E.2d at 254, 408 N.Y.S.2d at 426.

[122] *Id.* UNDC is a nonprofit public benefit corporation which contracted to build offices, hotels and other facilities for the United Nations community. *Id.*

[123] *Id.*

[124] *Id.*, 380 N.E.2d at 254, 408 N.Y.S.2d at 426. The subcontract incorporated by reference the terms of the general contract. Agreement between United Nations Development Corporation and Norkin Plumbing Co., Inc., Art. I-A at 41. The standard form contract contained a provision requiring that a notice of demand for arbitration be made "within a reasonable time." General Conditions of the Contract for Construction, Record, at 93. This was altered to provide:

> Notice of the demand for arbitration shall be filed in writing with the other party to the Contract and with the American Arbitration Association, and a copy shall be filed with the Architect. The demand for arbitration shall be made within 60 days after the claim, dispute or other matter in question has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

Id.

[125] Demand for Arbitration, Record on Appeal, at 9. Norkin attributed the delays in construction to UNDC and sought to recover the resulting damages through arbitration. Brief for Respondent, Record on Appeal at 10.

[126] 45 N.Y.2d at 361, 380 N.E.2d at 254, 408 N.Y.S.2d at 426. Norkin served a demand for arbitration less than 60 days following the completion of its work on the project. *Id.; see* Demand for Arbitration, Record on Appeal at 9. In its motion to stay arbitration under CPLR 7503(b), UNDC contended that the demand was not timely made since it was served more than 6 months after Norkin notified UNDC that there had been a substantial delay in the installation of the plumbing. Appellant's Verified Petition, Record on Appeal at 16. Thus, the dispute focused on the interpretation of the contract language "after the claim . . . has arisen." Norkin thereafter made a cross motion to compel arbitration. Respondent's Notice of Cross-Motion to Compel Arbitration, Record on Appeal at 30.

cedent to arbitration was ambiguous, it was for the arbitrator to determine whether there was timely compliance with the agreement.[127] The Appellate Division, First Department, affirmed without opinion.[128]

The Court of Appeals affirmed the denial of the stay on appeal.[129] Writing for a unanimous Court, Judge Jasen stated that the issue turned on whether the condition precedent was express or implied, not on the clarity of its terms.[130] Noting that CPLR 7503(b) outlines the limited scope of "judicial inquiry permissible upon an application to stay arbitration,"[131] the Court stated that where an agreement contains a broad arbitration clause, compliance with a contractual condition precedent is to be determined by the arbitrator.[132] Despite the presence of a broad arbitration clause, however,

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[127] Record on Appeal, United Nations Development Corp. v. Norkin Plumbing Co., No. 1677/76 (Sup. Ct. N.Y. County Feb. 4, 1977) at 120, 123-24; *see* note 130 *infra*. Since the controversy centered on the meaning of "arisen," *see* note 126 *supra*, it would appear that the phrase was susceptible to more than one interpretation. In finding that it was ambiguous, however, the lower court relied on a somewhat different rationale: "The clause referred to, section 7.10.2 is ambiguous. While directing that arbitration be commenced within 60 days after the claim has 'arisen,' it provides no consequence for delay. On the other hand, it *bars* any arbitration where the claim is barred by a statute of limitations." United Nations Development Corp. v. Norkin Plumbing Co., No. 1677/76 (Sup. Ct. N.Y. County Feb. 4, 1977) (emphasis in original), Record on Appeal at 123. There was apparently a question as to whether the remedy was barred by the statute of limitations or whether the underlying right was barred by noncompliance with the condition precedent. *See* Paver & Wildfoerster v. Catholic High School Ass'n, 38 N.Y.2d 669, 676, 345 N.E.2d 565, 569, 382 N.Y.S.2d 22, 25 (1976); Sharrow v. Inland Lines, Ltd., 214 N.Y. 101, 108 N.E. 217 (1915). When the ambiguity of such a condition is at issue, resolution is properly within the authority of the arbitrators. Pearl St. Dev. Corp. v. Conduit & Foundation Corp., 41 N.Y.2d 167, 170, 359 N.E.2d 693, 695, 391 N.Y.S.2d 98, 100 (1976).

[128] 59 App. Div. 2d 830, 399 N.Y.S.2d 159 (1st Dep't 1977).

[129] 45 N.Y.2d at 365, 380 N.E.2d at 257, 408 N.Y.S.2d at 428.

[130] *Id.* at 362, 380 N.E.2d at 255, 408 N.Y.S.2d at 426-27. Neither party contended that there was no contractual prerequisite to arbitration; rather, the arguments concentrated on the ambiguity of the notice provision and whether or not its conditions had been met. *Id.* Judge Jasen, however, stated that the parties had "misperceived the issue" by litigating whether the condition precedent was clear or ambiguous and "overlooked a far more primary question": whether the admitted condition precedent was express or implied. *Id.*

[131] *Id.* at 363, 380 N.E.2d at 255, 408 N.Y.S.2d at 427.

[132] *Id.* at 364, 380 N.E.2d at 256, 408 N.Y.S.2d at 428. The Court noted that compliance with the applicable statute of limitations, *see* CPLR 7502(b); note 118 *supra*, and statutory conditions precedent, *see* note 119 *supra*, is properly reserved for judicial determination. 45 N.Y.2d at 363, 380 N.E.2d at 255, 408 N.Y.S.2d at 427. Contractual conditions precedent, however, present a more difficult situation. Judge Jasen stated that only where there is a narrow arbitration clause limiting the issues that may be submitted to arbitration, have courts considered whether there has been compliance with contractual time and notice provisions. *Id.* at 364, 380 N.E.2d at 255-56, 408 N.Y.S.2d at 427; *see* Perkins & Will Partnership v. Syska and Hennessy, 41 N.Y.2d 1045, 364 N.E.2d 832, 396 N.Y.S.2d 167 (1977); American Plan Corp. v. Jarchin, 53 App. Div. 2d 622, 384 N.Y.S.2d 198 (2d Dep't 1976) (mem.). On the other hand, where there is a broad arbitration clause, courts tend to give full effect to

Judge Jasen observed that where the parties to the agreement have included an express condition precedent to arbitration, the issue of compliance is one for threshold judicial determination.[133] Since the agreement between the parties in *Norkin* did not include an express condition precedent and contained a broad arbitration clause, the Court concluded that resolution of the question of compliance

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the parties' intent and submit all issues to the arbitrators. 45 N.Y.2d at 363-64, 380 N.E.2d at 255-56, 408 N.Y.S.2d at 427-28; *see* R.H. Macy & Co. v. National Sleep Prods., Inc., 39 N.Y.2d 268, 271, 347 N.E.2d 887, 888, 383 N.Y.S.2d 562, 563 (1976); Lipman v. Haeuser Shellac Co., 289 N.Y. 76, 80, 43 N.E.2d 817, 819 (1942); Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284, 298, 169 N.E. 386, 391 (1929). *See also* Nationwide Gen. Ins. Co. v. Investors Ins. Co., 37 N.Y.2d 91, 95, 332 N.E.2d 333, 335, 371 N.Y.S.2d 463, 466-67 (1975).

[133] 45 N.Y.2d at 364, 380 N.E.2d at 256, 408 N.Y.S.2d at 427-28. The Court relied on its earlier decisions in Raisler Corp. v. New York City Hous. Auth., 32 N.Y.2d 274, 298 N.E.2d 91, 344 N.Y.S.2d 917 (1973), and Wilaka Constr. Co. v. New York City Hous. Auth., 17 N.Y.2d 195, 216 N.E.2d 696, 269 N.Y.S.2d 697 (1966), citing both cases as support for the proposition that there exists an exception to "the rule providing for resolution by the arbitrator of questions of compliance with conditions precedent." 45 N.Y.2d at 364, 380 N.E.2d at 256, 408 N.Y.S.2d at 427-28.

Raisler involved a cross-motion to vacate an arbitration award on the grounds that the arbitrator failed to consider the issue of compliance with an express condition precedent. The Court of Appeals confirmed the award, reasoning that even had the arbitrator erred as a matter of law, the error would be unreviewable. 32 N.Y.2d at 285, 298 N.E.2d at 99, 344 N.Y.S.2d at 925. The *Norkin* Court placed its reliance on dictum in *Raisler* that the presence of an express condition precedent in an arbitration clause would make compliance initially a question for the court. The *Raisler* Court observed, however, that "usually, the limitations of time, and related requirements, are not made conditions precedent to arbitration," and therefore compliance is for arbitral decision. *Id.* at 282, 298 N.E.2d at 96, 344 N.Y.S.2d at 922. The *Raisler* statement, however, could be interpreted to depend on whether there is a condition precedent at all, not whether the condition is express or implied.

The *Wilaka* Court also declared that "the fulfillment of conditions precedent to arbitration is a question for the . . . court." 17 N.Y.2d at 198, 216 N.E.2d at 69, 269 N.Y.S.2d at 698. It seems only happenstance that, as in *Raisler,* the arbitration clause used the term "condition precedent." Neither *Raisler* nor *Wilaka* extended this concept to argue that the only time satisfaction of conditions precedent is determinable by the courts is when they are expressly so designated. In this sense, the *Norkin* decision has created a new rule and clarified a controversial area of the law under Article 75. *See* note 137 *infra.*

The *Norkin* Court distinguished its decision in Pearl St. Dev. Corp. v. Conduit & Foundation Corp., 41 N.Y.2d 167, 359 N.E.2d 693, 391 N.Y.S.2d 98 (1976). *Pearl Street,* which involved the interpretation of two interrelated contracts, implied that the court should retain jurisdiction "in the usual case [where] the existence of a condition precedent has been agreed to by the parties or is otherwise established, and their threshold dispute is as to performance or nonperformance of that condition." *Id.* at 170, 359 N.E.2d at 695, 391 N.Y.S.2d at 100. The primary contract contained a broad arbitration clause and a merger clause, but had no conditions precedent. *Id.* at 169-70, 359 N.E.2d at 694, 391 N.Y.S.2d at 99. The standard form general contract included a broad arbitration clause and a second provision requiring initial submission of any dispute to the architect before arbitration could be sought. *Id.* at 170, 359 N.E.2d at 694, 391 N.Y.S.2d at 99. The facts of *Norkin* were essentially identical, but the Court abandoned the *Pearl Street* rationale that the ambiguity of the situation required arbitral resolution. Instead, despite the manifest intent and clear language of the parties, the *Norkin* Court opted for a new rule that requires explicit language before a judicial determination may be obtained. *See* note 124 *supra.*

should be left to the arbitrator.[134]

The distinction drawn between express and implied conditions precedent by the *Norkin* Court is novel and finds support in neither the language of CPLR 7503(b) nor its statutory history.[135] While there would seem to have been ample support for permitting courts to determine whether there has been compliance with clearly implied conditions precedent,[136] the rule adopted in *Norkin* is advantageous in that it clearly circumscribes the permissible scope of judicial inquiry under CPLR 7503(b). Thus, the *Norkin* holding will serve to resolve the uncertainty that has resulted from inconsistent rationales and decisions rendered by courts interpreting the statute.[137] In the future, in the absence of a condition precedent being so labeled in the contract, the question whether a condition precedent has been complied with, and the broader question whether a condition precedent exists, will be determined by the arbitrator as are other issues of contract interpretation.

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[134] 45 N.Y.2d at 364, 380 N.E.2d at 256, 408 N.Y.S.2d at 428. The Court declared:

> We hold that the contractual limitation upon the time within which a demand for arbitration was required to be filed does not constitute an express condition precedent permitting threshold judicial resolution of the question of compliance, but, rather, constitutes a matter of procedural arbitrability to be determined by the arbitrator.

Id. at 362, 380 N.E.2d at 254, 408 N.Y.S.2d at 426.

[135] *See* SECOND REP. at 136-37; note 117 *supra.*

[136] *See* note 118 *supra.*

[137] Courts have been divided on the issue of who should determine compliance with contractual conditions precedent. Guilderland Cent. School Dist. v. Guilderland Cent. Teachers Ass'n, 45 App. Div. 2d 85, 87, 356 N.Y.S.2d 689, 691-92 (3d Dep't 1974); *accord,* Board of Educ. v. Brentwood Teachers Ass'n, 79 Misc. 2d 758, 761, 361 N.Y.S.2d 570, 574-75 (Sup. Ct. Suffolk County 1974). Notwithstanding the presence of a broad arbitration clause and an implied condition precedent provision, some courts have placed the determination of compliance within the authority of the courts, while others defer to the arbitral forum. *Compare* Opan Realty Corp. v. Pedrone, 36 N.Y.2d 943, 944, 335 N.E.2d 854, 855, 373 N.Y.S.2d 549, 550 (1975) (per curiam) *and* New York Tel. Co. v. Schumacher & Forelle, Inc., 60 App. Div. 2d 151, 154, 400 N.Y.S.2d 332, 334 (1st Dep't 1977) *with* Brown & Guenther v. North Queensview Homes, Inc., 18 App. Div. 2d 327, 328, 239 N.Y.S.2d 482, 485 (1st Dep't 1963) *and* Tuttman v. Kattan, Talamas Export Corp., 274 App. Div. 395, 396, 83 N.Y.S.2d 651, 652 (1st Dep't 1948) (per curiam).

Compliance with express conditions precedent has generally been determined in the judicial tribunal. Raisler Corp. v. New York City Hous. Auth., 32 N.Y.2d 274, 298 N.E.2d 91, 344 N.Y.S.2d 917 (1973); Wilaka Constr. Co. v. New York City Hous. Auth., 17 N.Y.2d 195, 216 N.E.2d 696, 269 N.Y.S.2d 697 (1966); Frouge Corp. v. New York City Hous. Auth., 26 App. Div. 2d 269, 273 N.Y.S.2d 657 (1st Dep't 1966) (per curiam).

In Guilderland Cent. School Dist. v. Guilderland Cent. Teachers Ass'n, 45 App. Div. 2d 85, 356 N.Y.S.2d 689 (3d Dep't 1974), Justice Cooke recognized an apparent trend, "at least in the absence of a very narrow arbitration clause or an express provision making compliance with contractual time limitations conditions precedent to arbitration, to treat contractual time limitations . . . as matters of procedural arbitrability for the arbitrators . . . ." *Id.* at 87, 356 N.Y.S.2d at 692 (citations omitted).

The result in *Norkin* is apparently best explained by the favor with which New York views the arbitral process.[138] Since a broad arbitration clause indicates a clear intent by the parties to an agreement to submit any controversy to arbitration, it can be argued that it is proper for the arbitrator to determine the existence of, and compliance with, conditions precedent where they are not made express by the terms of the contract.[139] At the very least, *Norkin* will

[138] *See* Fudickar v. Guardian Mut. Life Ins. Co., 62 N.Y. 392, 399 (1875). Since New York passed its first Arbitration Act, ch. 275, [1920] N.Y. LAWS 803 (repealed 1937) the Court has consistently upheld arbitration as a viable alternative to litigation. *See, e.g.*, Prinze v. Jonas, 38 N.Y.2d 570, 574, 345 N.E.2d 295, 298, 381 N.Y.S.2d 824, 828 (1976); Weinrott v. Carp, 32 N.Y.2d 190, 199, 298 N.E.2d 42, 47, 344 N.Y.S.2d 848, 856 (1973); *In re* Feuer Transp., Inc., 295 N.Y. 87, 91, 65 N.E.2d 178, 180 (1946); Gilbert v. Burnstine, 255 N.Y. 348, 353, 174 N.E. 706, 707 (1931). Although arbitration has the advantage of expediency, informality, finality and the expertise of chosen arbitrators, it is generally not subject to legal principles or judicial review. *See* Aimcee Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d 621, 626, 237 N.E.2d 223, 225, 289 N.Y.S.2d 968, 971 (1968); Bay Iron Works, Inc. v. Eisenstein, 17 App. Div. 2d 804, 804-05, 232 N.Y.S.2d 746, 747 (1st Dep't 1962) (per curiam). Only in specific circumstances will courts review an arbitrator's decision. Siegel v. Lewis, 40 N.Y.2d 687, 358 N.E.2d 484, 389 N.Y.S.2d 800 (1976); Niagara Wheatfield Adm'rs Ass'n v. Niagara Wheatfield Cent. School Dist., 54 App. Div. 2d 498, 389 N.Y.S.2d 667 (4th Dep't 1976); CPLR 7511 (1963). *See generally* THIRD ANN. REP. N.Y. JUD. CONFERENCE 94, 96-101 (1958); H. WACHTELL, NEW YORK PRACTICE UNDER THE CPLR 475-76 (5th ed. 1976); F. WHITNEY, THE LAW OF MODERN COMMERCIAL PRACTICES § 168, at 226-27 (2d ed. 1965). The *Norkin* decision also brings interpretation of New York arbitration law closer to judicial interpretations of the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1976), which strongly favor the arbitral process. *See* Scherk v. Alberto-Culver Co., 417 U.S. 506, 510-11 (1974); Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942). Significantly, federal law reserves all issues in controversy for the arbitrator where the parties have agreed to a broad arbitration clause. Aksen, Prima Paint v. Flood & Conklin — *What Does It Mean?*, 43 ST. JOHN'S L. REV. 1, 5-7 (1968). *See generally* D. SIEGEL, NEW YORK PRACTICE § 607 (1978).

[139] County of Sullivan v. Edward L. Nezelek, Inc., 42 N.Y.2d 123, 128, 366 N.E.2d 72, 75, 397 N.Y.S.2d 371, 374 (1977). Where a broad arbitration clause is adopted, it is the general view that the courts should give effect to the parties' intent. *See* note 132 *supra*. It should be noted, however, that courts traditionally have distinguished commercial arbitration contracts from collective bargaining agreements. G.E. Howard & Co. v. Daley, 27 N.Y.2d 285, 288, 265 N.E.2d 747, 750, 317 N.Y.S.2d 326, 329 (1970); Long Island Lumber Co. v. Martin, 15 N.Y.2d 380, 387, 207 N.E.2d 190, 196, 259 N.Y.S.2d 142, 148 (1965). Although public policy generally favors arbitration, the courts recognize that in a commercial agreement the parties are relinquishing a substantial right by agreeing to arbitrate their differences and, therefore, the contract language must clearly indicate what issues the parties desire the arbitrator to decide. *See, e.g.*, Siegel v. 141 Bowery Corp., 51 App. Div. 2d 209, 212, 380 N.Y.S.2d 232, 235 (1st Dep't 1976) (mem.); Littlejohn & Co. v. J. Berlage Co., 20 App. Div. 697, 247 N.Y.S.2d 56, (1st Dep't) (per curiam), *aff'd mem.*, 15 N.Y.2d 530, 202 N.E.2d 566, 254 N.Y.S.2d 122 (1964). When collective bargaining is involved, however, the "special economic circumstances which surround the institution," Long Island Lumber Co. v. Martin, 15 N.Y.2d 380, 387, 207 N.E.2d 190, 194, 259 N.Y.S.2d 142, 148 (1965), establish a strong "presumption of arbitrability," rebuttable only by specific exclusion of the issue from arbitration. G.E. Howard & Co. v. Daley, 27 N.Y.2d 285, 290-91, 265 N.E.2d 747, 750, 317 N.Y.S.2d 326, 330-31 (1970); *accord*, Susquehanna Valley Cent. School Dist. v. Susquehanna Valley Teachers' Ass'n, 46 App. Div. 2d 104, 361 N.Y.S.2d 416 (3d Dep't 1974); Morris Cent. School Dist. Bd. of Educ. v. Morris

serve to put draftsmen of broad arbitration provisions on notice that if judicial resolution of the issue of compliance with conditions precedent is desired, the conditions must be express. Absent such a clear characterization, the question will be decided by the arbitrator.

Sharon M. Heim

CRIMINAL PROCEDURE LAW

CPL § 310.50(2): Jury's noncompliance with trial court's instructions does not, per se, require resubmission of verdict

Under CPL § 310.50(2), "the court . . . must direct the jury to reconsider" its verdict when the verdict "is not in accordance with the [trial] court's instructions . . . ."[140] Recently, however, in *People v. Robinson*,[141] the Court of Appeals held that unless the jury's intention with respect to individual counts of an indictment is unclear, the failure of a jury to comply with the court's instructions does not, per se, require resubmission of the case.[142]

The defendant in *Robinson* was charged with criminal sale, criminal possession with intent to sell and simple possession of a controlled substance.[143] Before submitting the case to the jury, the judge properly instructed it to consider the lesser included offenses[144] of criminal possession with intent to sell and simple possession

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Educ. Ass'n, 84 Misc. 2d 675, 376 N.Y.S.2d 376 (Sup. Ct. Oswego County 1975). It is submitted that the *Norkin* decision will have the effect of minimizing the difference between commercial arbitration and collective bargaining.

[140] CPL § 310.50(2) provides in pertinent part:

> If the jury renders a verdict which in form is not in accordance with the court's instructions or which is otherwise legally defective, the court must explain the defect or error and must direct the jury to reconsider such verdict, to resume its deliberation for such purpose, and to render a proper verdict.

CPL § 310.50(2) represents a codification of CCP §§ 447-449 (1881) in revised form. *See* CPL § 310.50(2), commentary at 593 (1971).

[141] 45 N.Y.2d 448, 382 N.E.2d 759, 410 N.Y.S.2d 59 (1978).

[142] *Id.* at 452, 382 N.E.2d at 761, 410 N.Y.S.2d at 61.

[143] *Id.* at 451, 382 N.E.2d at 760, 410 N.Y.S.2d at 60. The defendant, Marion Robinson, was indicted for his alleged participation in two separate drug transactions. The six-count indictment charged him with criminal sale of a controlled substance in the second degree, N.Y. PENAL LAW § 220.41(1) (Supp. 1978-1979); criminal sale of a controlled substance in the third degree, *id.* § 220.39(1); two counts of criminal possession of a controlled substance with intent to sell in the third degree, *id.* § 220.16(1); criminal possession of a controlled substance in the fifth degree, *id.* § 220.09(1); criminal possession of a controlled substance in the seventh degree, *id.* § 220.03.

[144] 45 N.Y.2d at 451, 382 N.E.2d at 760, 410 N.Y.S.2d at 60. CPL § 1.20(37) defines lesser included offense as follows: "when it is impossible to commit a particular crime without