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## Judicial Arbitration in New York

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## NOTES

### JUDICIAL ARBITRATION IN NEW YORK

Effective September 1, 1961, the New York Simplified Procedure for Court Determination of Disputes became available for potential litigants. In order to implement the new legislation, Rule 118 of the Rules of Civil Practice was rescinded, and Title 39, consisting of new Rules 304, 305 and 306, was adopted effective October 16, 1961.<sup>1</sup> The Judicial Conference of the State of New York, in proposing the new procedure, indicated that it wished to provide the commercial community with "a simplified method of litigation, which combines the chief advantages of arbitration—speed, ease, expertise and informality—with the chief advantages of traditional common law trials—the adherence to recognized principles of substantive law, the right to trial by jury if desired, and the right to appeal. . . ."<sup>2</sup> It is the purpose of this note to attempt to ascertain the relative merits of the Simplified Procedure as opposed to arbitration, and to determine whether the new legislation will have any significant impact in the drafting of contracts which provide for the disposal of future disputes.

Section 218-a of the Civil Practice Act, enacted in 1956, provided for the commencement of a civil action without the service of a summons, or the continuation of an action after service of summons, without additional pleadings, by filing a statement acknowledged by the parties, specifying the claims, defenses and relief requested.<sup>3</sup> The Judicial Conference, in its Second Annual Report, stated that "this new procedure is designed to provide the simple start and prompt hearing of cases which the business community has found advantageous in arbitration."<sup>4</sup> The trial of a case under this new procedure was to be con-

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<sup>1</sup> See Tripp, *Simplified Procedure for Court Determination of Contract Disputes: Judicial "Arbitration" in New York*, 146 N.Y.L.J., Oct. 25, 1961, p. 4, cols. 1-4.

<sup>2</sup> 1960 LEG. DOC. NO. 98, N.Y. JUDICIAL CONFERENCE FIFTH ANNUAL REPORT AND STUDIES 96, 103 [hereinafter cited as 1960 LEG. DOC. NO. 98].

<sup>3</sup> N.Y. CIV. PRAC. ACT § 218-a. See *Hammerstein v. Woodlawn Cemetery*, 21 Misc. 2d 42, 194 N.Y.S.2d 385 (Sup. Ct. 1960).

<sup>4</sup> 1957 LEG. DOC. NO. 88, N.Y. JUDICIAL CONFERENCE SECOND ANNUAL REPORT AND STUDIES 18.

ducted in accordance with legal rules, before a jury or not, as the parties might choose, and with the right of appellate review.<sup>5</sup> It soon became apparent, however, that the streamlined procedure made available by section 218-a was not being used by the parties to commercial disputes, while the trend toward settlement of these controversies before an arbitration tribunal continued unchecked.<sup>6</sup> A reason suggested for the indifference of the business community to section 218-a was that attorneys, in drafting contracts for their clients, could provide that any future disputes arising out of the agreement should be submitted to arbitration, while section 218-a could be applied to existing disputes only.<sup>7</sup> As early as 1948, it had been reported that about three out of four disputes before the American Arbitration Association were brought pursuant to clauses in pre-existing contracts, the remainder being submitted after the controversy had arisen.<sup>8</sup> In order to remedy its deficiency in this area, section 218-a has been amended,<sup>9</sup> and sections 218-b and 218-c have been enacted, the three sections together to constitute the New York Simplified Procedure for Court Settlement of Disputes.<sup>10</sup>

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<sup>5</sup> *Ibid.*

<sup>6</sup> See 1960 LEG. DOC. No. 98, at 97.

<sup>7</sup> *Id.* at 97-98.

<sup>8</sup> Note, 61 HARV. L. REV. 1022, 1023 n.11 (1948).

<sup>9</sup> The 1961 amendment added to section 218-a the following: "The procedure in any action commenced under this section shall be as prescribed by section two hundred eighteen-c of this article and rules adopted pursuant thereto. Sections two hundred eighteen-a, two hundred eighteen-b and two hundred eighteen-c of this article shall together constitute 'the New York Simplified Procedure for Court Determination of Disputes' and it shall be sufficient so to identify the procedure in any contract or other document referring to it. A submission of a controversy under this procedure shall constitute a waiver by the parties of the right to trial by jury." N.Y. CIV. PRAC. ACT § 218-a.

<sup>10</sup> N.Y. CIV. PRAC. ACT § 218-b provides: "1. Any written contract, otherwise valid under the substantive law, to submit any existing or future controversy to the court pursuant to section two hundred eighteen-a of this article is valid and enforceable and shall be construed as an implied consent of the parties to the jurisdiction of the supreme court of this state to enforce it pursuant to the procedures of section two hundred eighteen-c of this article, and to enter judgment thereon, and shall constitute a waiver by the parties of the right to trial by jury.

"2. If the parties to a dispute arising under a contract to submit a controversy to the court under section two hundred eighteen-a of this article are unable to agree on a statement of claims and defenses and relief sought pursuant to that section, the court on motion shall settle the terms of the statement. In deciding the motion the court shall consider and determine any questions as to the existence of the contract or its validity or the failure of any party to perform it. If a substantial issue of fact be raised as to the making of the contract or submission or the failure to comply therewith, the court or judge shall proceed to trial of such issue without a jury, unless either party should demand a jury trial.

The Judicial Conference, in proposing the Simplified Procedure, made no attempt to conceal its distress regarding the "ever increasing proportion of commercial disputes of the type once settled pursuant to the principles of law as applied by our courts [which] are now being settled by extra-judicial arbitration bodies."<sup>11</sup> Nor is the Judicial Conference alone in its anxiety.<sup>12</sup> One of the more emotional critics of arbitration tribunals has charged them with having "disregarded well-recognized principles of law, scoffed surreptitiously at them . . . displayed the attitude of judicial demigods who stood above the law of the community, were not bound by it, and . . . could create and invoke their own law. . . ."<sup>13</sup>

There seems to be little doubt that many businessmen prefer arbitration to litigation as a means of settling their controversies,<sup>14</sup>

The procedure in any motion under this paragraph shall be as prescribed by the rules of civil practice."

N.Y. CIV. PRAC. ACT §218-c provides: "1. The procedure in any action under the New York simplified procedure for court determination of disputes authorized by sections two hundred eighteen-a and two hundred eighteen-b of this article shall be as provided in this section and in the rules of civil practice adopted to implement the provisions hereof. The rules shall be designed to promote the speedy hearing of such actions and to provide for such actions a procedure that is as simple and informal as circumstances will permit. Rules adopted pursuant to this section may provide among other things, for service of additional or amended statements of fact, impartial expert testimony by witnesses appointed by the court, and the pre-trial disposition of questions of law which might be conclusive in the action and avoid a trial.

"2. The technical rules of evidence shall be dispensed with to the extent specified in such rules of civil practice.

"3. The practice under this procedure relating to motions to stay or to transfer pending actions, and relating to venue, assessment of costs, entry of judgment, judgment by default, and the continuance of the action in case of death or incompetency of parties shall be as prescribed in the rules of civil practice adopted pursuant hereto.

"4. An appeal may be taken only from a judgment, or an order determining the making of the contract or submission or the failure to comply therewith. There shall be no appeal [*sic*] from an intermediate order of the court or of a judge in an action under the simplified procedure provisions, except with the permission of the trial or appellate court, but such order or orders may be reviewed on the appeal from a judgment entered under these provisions. A decision of the trial judge on the facts shall be final if there is any substantial evidence to support it."

<sup>11</sup> 1960 LEG. DOC. No. 98, at 99.

<sup>12</sup> Herzog, *Judicial Review of Arbitration Proceedings—A Present Need*, 5 DE PAUL L. REV. 14, 25 (1955); Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519, 556 (1960); Marks, *Shaky Foundation of Arbitration*, 13 N.Y. COUNTY LAW. A.B. BULL. 206, 209 (1956).

<sup>13</sup> Herzog, *supra* note 12, at 25.

<sup>14</sup> See Rosenthal, *A Businessman Looks at Arbitration*, 2 ARB. J. (n.s.) 138, 139 (1947); Tausch, *Extrajudicial Settlement of Controversies: The*

and it has been reported that the number of commercial disputes filed with the American Arbitration Association has reached an average of 700 per year over the past five years.<sup>15</sup> The Judicial Conference regards this trend from law to arbitration as undesirable since those who reject the courts for the arbitrator do so, in their estimation, "for the sake of brevity and ease and not for the sake of greater justice."<sup>16</sup> The Conference further contends that the commercial community would look most favorably upon a procedure for settling their disputes which would combine the most desirable characteristics of traditional litigation and arbitration;<sup>17</sup> hence the Simplified Procedure. On the other hand, there is comment to the effect that the new legislation is merely "another example of the attempt [by the courts] to woo back business from the arbitrators . . . [which] will have practically no effect."<sup>18</sup> Which of these conflicting opinions is correct will depend upon whether the new procedure can provide or improve upon the advantages which commercial people seem to have found in arbitration. Those advantages may be classified as (1) a tailor-made decision "which comports with the subtle expectations of the trade rather than with the necessarily grosser rules of substantive law";<sup>19</sup> (2) speed and informality; (3) expertise of the decider; and (4) privacy and economy. Under the Simplified Procedure, the court would adhere to the rules of substantive law and there would be a right of appeal from any judgment entered under such procedure to an extent considerably less broad than the appeal allowed in ordinary litigation.<sup>20</sup>

### *Substantive Law v. Ad Hoc Justice*

Proponents of the Simplified Procedure maintain that one of the primary incentives for businessmen to use the new procedure rather than arbitration is that "their problems will be solved in accordance with the great principles of substantive law which have

*Business Man's Opinion: Trial at Law v. Nonjudicial Settlement*, 83 U. PA. L. REV. 147-48 (1934); Note, 61 HARV. L. REV. 1022 (1948).

<sup>15</sup> Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 858 n.25 (1961).

<sup>16</sup> 1960 LEG. DOC. No. 98, at 100.

<sup>17</sup> *Ibid.*

<sup>18</sup> Weinstein, *Notes on Proposed Revision of the New York Arbitration Law*, 16 ARB. J. (n.s.) 61, 65 (1961).

<sup>19</sup> *Ibid.*

<sup>20</sup> See N.Y. CIV. PRAC. ACT § 218-c(4). The scope of the appeal is limited by the inability to appeal from intermediate orders, except where permission is granted, and by the application of the "substantial evidence rule" to decisions on the facts.

been developed in the English-speaking world over a period of many centuries."<sup>21</sup> In sharp contrast is the well-settled rule that errors by an arbitrator in the determination of questions of law or fact are not grounds for vacating an award nor are they bases for review by the courts.<sup>22</sup> The comment has been made that "anything can happen" before an arbitrator,<sup>23</sup> and to a limited extent, such is the case. The use of precedent, so familiar to the law court, has no place in commercial arbitration, with the exception of the self-contained trade associations where decisions rendered do have precedential value.<sup>24</sup> The casual system of arbitration in use at the American Arbitration Association is designed to discourage the consideration of precedent, and great pressure is put upon its arbitrators to refrain from writing opinions, and merely to state their award in dollar amounts.<sup>25</sup> Of 180 arbitrators selected from the Association panel who were questioned in regard to the manner in which they reached their decisions, eighty per cent replied that they believed they should reach their decisions within the context of the principles of substantive law—but almost ninety per cent stated that they considered themselves free to ignore those rules when, in their judgment, more just decisions would result from so doing.<sup>26</sup> For instance, there is no hard or fast doctrine of damages observed in arbitration, as is illustrated by the awarding of loss of profit to a buyer in one case,<sup>27</sup> but only out-of-pocket losses in another.<sup>28</sup> An arbitrator will not hesitate to order specific performance of a contract of sale where the buyer has cancelled the order prior to delivery in breach of his agreement.<sup>29</sup> Arbitrators have gone

<sup>21</sup> 1960 LEG. DOC. No. 98, at 100.

<sup>22</sup> *Dembitzer v. Gutchen*, 3 App. Div. 2d 211, 159 N.Y.S.2d 327 (1st Dep't), *aff'd mem.*, 3 N.Y.2d 851, 144 N.E.2d 728, 166 N.Y.S.2d 85 (1957); *Pine St. Realty Co. v. Coutroulos*, 233 App. Div. 404, 253 N.Y. Supp. 174 (1st Dep't 1931); *A.D. Juilliard & Co. v. Baitch & Castaldi, Inc.*, 2 Misc. 2d 753, 152 N.Y.S.2d 394 (Sup. Ct. 1956).

<sup>23</sup> Note, 61 HARV. L. REV. 1022, 1023 (1948).

<sup>24</sup> Grossman, *Arbitration and the Lawyer*, 17 N.Y.U.L.Q. 511, 514 (1940); Marks, *Shaky Foundation of Arbitration*, 13 N.Y. COUNTY LAW. A.B. BULL. 206, 208 (1956); Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 857 (1961); Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 606 (1934).

<sup>25</sup> See Mentschikoff, *supra* note 24.

<sup>26</sup> *Id.* at 861.

<sup>27</sup> See Note, 61 HARV. L. REV. 1022, 1026 n.32 (1948), which discusses A.A.A. No. 4406 (July 16, 1947) (non-delivery of 1000 dozen nylon hose; loss of \$1,750 awarded).

<sup>28</sup> *Id.* at 1026 n.33, which discusses A.A.A. No. 4367 (June 4, 1947) (buyer allowed only the \$613 lost on resale of defective goods below contract price where claim for profits was excessive).

<sup>29</sup> *Id.* at 1026 n.38, citing A.A.A. No. 4311 (April 3, 1947); A.A.A. No. 4238 (Jan. 16, 1947).

so far in their disregard for the rules of substantive law as to order the specific performance of a contract for personal services, a remedy not available in the courts.<sup>30</sup> Arbitrators have been castigated for practicing "some sort of folksy jurisprudence . . . by making expediency the basic idea to be followed in the determination of controversies."<sup>31</sup> It is alleged that compromise has become the desired result, rather than a decision for one party or the other, as justice may demand.<sup>32</sup>

Assuming it to be true that arbitrators have at times intentionally disregarded the rules of substantive law, the question remains whether use of this procedure does result in frequent startling departures from those rules, and whether the alleged "compromise approach"<sup>33</sup> is really present. There is a considerable body of opinion to the effect that the answer is no. In practice, it has been found that the awards of arbitrators demonstrate a close adherence to the rules of substantive law insofar as it is possible to isolate law from fact or procedure, and where the ethical notions underlying the legal rules are pertinent in a particular business context.<sup>34</sup> The American Arbitration Association expressly encourages its arbitrators "to adopt a judicial attitude that will lead to decisions on the merits rather than to a compromise award."<sup>35</sup> Should an arbitrator attempt to mediate or conciliate between the parties, the hearing is immediately halted by the tribunal clerk, who explains to the parties that the function of the arbitrator is to come to a decision on the merits and not to seek a settlement.<sup>36</sup> There is a growing fear among those who are experienced in labor arbitration that the entire process is growing too legalistic, and is surrendering by this legalism its

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<sup>30</sup> *Staklinski v. Pyramid Elec. Co.*, 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959) (corporation ordered to retain in their employ officer whom they considered disabled); see Note, 61 HARV. L. REV. 1022, 1028 & n.52 (1948), which discusses A.A.A. No. 4247 (March 3, 1947) (company ordered to lay new carpeting in defendant's home in order to entitle itself to the contract price). The *Staklinski* case has been discussed in 48 CALIF. L. REV. 140 (1960); 45 CORNELL L.Q. 580 (1960); 73 HARV. L. REV. 776 (1960); 34 ST. JOHN'S L. REV. 293 (1960); 7 U.C.L.A.L. REV. 507 (1960).

<sup>31</sup> Herzog, *Judicial Review of Arbitration Proceedings—A Present Need*, 5 DE PAUL L. REV. 14, 27 (1955).

<sup>32</sup> *Id.* at 28.

<sup>33</sup> See Mitchell, *Arbitration and Industrial Peace*, 9 ARB. J. (n.s.) 26, 30 (1954).

<sup>34</sup> See Note, 61 HARV. L. REV. 1022, 1024 (1948). This conclusion was drawn by the author of the note cited from a study of approximately 300 cases arbitrated under American Arbitration Association rules from October 1946 through December 1947.

<sup>35</sup> Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 860 (1961).

<sup>36</sup> *Id.* at 865.

advantages over litigation.<sup>37</sup> In short, it has been asserted that arbitrators have been acting like judges, following the decisions of the courts and citing cases as authority.<sup>38</sup> That decisions on the merits are being rendered would seem to be clear from the fact that a study of 396 cases conducted at the American Arbitration Association disclosed that in fifty per cent of these cases, one of the parties received the award in full,<sup>39</sup> a result apparently inconsistent with a widespread compromise approach.

In addition to the prospect of a decision in accord with rules of substantive law, there is another incentive for attorneys to employ the Simplified Procedure rather than a general arbitration clause in attempting to provide a means of settling commercial disputes which may arise from the contract. That incentive is the ability to predict the outcome of disputes, since they would be settled in conformity with the rules of substantive law. Where there is an existing conflict and the client's case is clearly in his favor under the rules of substantive law, the attorney has good reason to avoid an arbitration which might determine that the equities require a result other than that which the legal precedents would demand.<sup>40</sup> Where a future dispute is involved, however, it would appear that an element of uncertainty renders both procedures unpredictable. Since the arbitrator is not bound by the rules of substantive law, what his decision might be in any future dispute is relatively unascertainable. Since the attorney, at the time of drafting the contract, cannot foresee the legal nature of the dispute which may arise in the future, he cannot know whether the rules of substantive law which would be applicable to this potential controversy would be favorable to his client's cause or not. But the Simplified Procedure presents a desirable feature, in that the knowledge that rules of substantive law will be applied can serve as a valuable guide to conduct where alternative courses of action present themselves, and issue, though not yet joined, can be perceived.

On the whole it is questionable whether the Simplified Procedure, with its promise of decisions based on substantive law, is any real innovation, since "in all states, if the parties provide in the arbitration agreement that the arbitrator must decide according to law, courts will hold the arbitrator to that agree-

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<sup>37</sup> Editorial, *Creeping Legalism in Labor Arbitration*, 13 *ARB. J.* (n.s.) 129 (1958); Warns, *Arbitration and the Law*, 32 *TEMP. L.Q.* 386, 390 (1959).

<sup>38</sup> *Ibid.*

<sup>39</sup> Mentschikoff, *supra* note 35, at 861; Smith, *Commercial Arbitration at the American Arbitration Association*, 11 *ARB. J.* (n.s.) 3, 13 (1956).

<sup>40</sup> See Grossman, *Arbitration and the Lawyer*, 17 *N.Y.U.L.Q.* 511, 515 (1940). See also MAYERS, *THE AMERICAN LEGAL SYSTEM* 555 n.12 (1955).

ment and will review the law on appeal.”<sup>41</sup> The powers of an arbitrator are only those which the parties have chosen to confer upon him, and their desire to have rules of substantive law applied to a dispute is binding upon him, so long as it is clearly expressed in the agreement.<sup>42</sup> Since the opportunity to have controversies settled according to law has been possible without the new legislation, it would appear that this characteristic of the Simplified Procedure, considered alone, will not prove to be a great attraction to those drafting contracts and including a provision for the settlement of future disputes.

### *Speed and Informality*

The speed and informal atmosphere of the arbitration hearing have always been advanced as among its most attractive features.<sup>43</sup> It has been reported that in over half of the cases arbitrated under American Arbitration Association Rules during a forty month period from July 1947 through October 1950, the total elapsed time from initiation to award was under ninety days.<sup>44</sup> In the usual case, the hearing takes but a few hours.<sup>45</sup> This speed of settlement is highly important from the businessman's point of view because a lengthy proceeding can be ruinous where a substantial amount of working capital is tied up by the dispute.<sup>46</sup> In addition, arbitration awards are rarely challenged in the courts, and if challenged, are almost always upheld,<sup>47</sup> since the statutory grounds available in New York for vacating the award are extremely narrow.<sup>48</sup>

The informality of the hearing seems to have a salutary effect not only upon the parties, but also upon witnesses, by making them feel at ease and enabling them to relate a clearer story than in the courtroom, where they often become nervous

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<sup>41</sup> Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 603 (1934); cf. *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 299, 169 N.E. 386, 390 (1929) (dictum by Cardozo, J.).

<sup>42</sup> Phillips, *supra* note 41, at 603-04.

<sup>43</sup> See Grossman, *supra* note 40, at 512; Rosenthal, *A Businessman Looks at Arbitration*, 2 ARB. J. (n.s.) 138, 140 (1947); Smith, *supra* note 39, at 17; Tausch, *Extrajudicial Settlement of Controversies: The Businessman's Opinion: Trial at Law v. Nonjudicial Settlement*, 83 U. Pa. L. REV. 147, 150 (1934); Weinstein, *Notes on Proposed Revision of the New York Arbitration Law*, 16 ARB. J. (n.s.) 61, 65 (1961).

<sup>44</sup> Smith, *supra* note 39, at 3, 17.

<sup>45</sup> Note, 61 HARV. L. REV. 1022 n.1 (1948).

<sup>46</sup> See Rosenthal, *supra* note 43, at 139.

<sup>47</sup> Note, 63 HARV. L. REV. 681, 682 (1950). *But see* Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 609 (1934).

<sup>48</sup> See N.Y. CIV. PRAC. ACT § 1462.

and confused.<sup>49</sup> Some observers have expressed the belief that at these informal hearings, where the rules of evidence are not applied, hearsay evidence is given too much credence, that irrelevant testimony obscures the issues in contention, and that failure to control the witnesses encourages perjury.<sup>50</sup> Defenders of arbitration reply, however, that the technical rules of evidence are invoked for the benefit of the lay jury to prevent them from being misled, rather than for the guidance of the experienced judge.<sup>51</sup> They further contend that it is far more in the interests of justice to allow a witness to express himself fully in order to assure him that he has been granted a complete hearing.<sup>52</sup> Attorneys report that in complicated cases, such as those involving mechanics' liens, they have been able to accomplish in a few hours what would have taken a few weeks of trial in a court action.<sup>53</sup> It is interesting to note the effect which the presence of attorneys has apparently had on the speed with which an arbitration proceeding is finally settled. In almost all self-contained trade associations and exchanges, participation by attorneys in the arbitration proceedings is either expressly forbidden or strongly discouraged.<sup>54</sup> The reasons given for this attitude are: "(1) lawyers did not understand the business usages and practices that were typically involved in adjudicating the dispute and were therefore not helpful; and (2) lawyers made the proceedings unduly technical and tended to create unnecessary delays."<sup>55</sup> Statistics gathered from the records of the American Arbitration Association would seem to uphold the second assertion. It was found that when both parties to the hearing were represented by attorneys, only 43 per cent of the cases were decided in less than ninety days, and only 21 per cent in less than sixty days.<sup>56</sup> On the

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<sup>49</sup> Note, 61 HARV. L. REV. 1022 n.3 (1948).

<sup>50</sup> *Id.* at 1023 n.15.

<sup>51</sup> Warns, *Arbitration and the Law*, 32 TEMP. L.Q. 386, 396 (1958). See generally Phillips, *A Practical Method for the Determination of Business Fact*, 82 U. PA. L. REV. 230 (1934).

<sup>52</sup> Warns, *supra* note 51, at 396.

<sup>53</sup> Arbuse, *The General Case for Arbitration*, 31 FLA. B.J. 129, 130 (1957). *But see* Phillips, *supra* note 51, at 242, commenting upon the arbitration case which consumed nine days because the arbitrators, all outstanding building experts, were forced to listen to testimony of other building men regarding their opinions on the construction of a building which the arbitrators had previously examined. The arbitrators felt it necessary to hear such testimony in order to protect themselves from the charge of having excluded competent evidence. Had the arbitrators been able to exclude such testimony, the hearing would have taken but a few hours.

<sup>54</sup> Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 859 (1961).

<sup>55</sup> *Ibid.*

<sup>56</sup> Smith, *Commercial Arbitration at the American Arbitration Association*, 11 ARB. J. (n.s.) 3, 18 (1956); Mentschikoff, *supra* note 54, at 859.

other hand, where neither party to the hearing was represented by an attorney, 78 per cent of the cases were settled in less than ninety days and 49 per cent in less than sixty days.<sup>57</sup>

Under the Simplified Procedure, every effort has been made to equal or better the speed and informality of the arbitration tribunal. Rule 306(1) of the Rules of Civil Practice provides that "the rules as to the admissibility of evidence, except as provided by statutes relating to privileged communications, and as to procedure shall be dispensed with unless the court shall otherwise direct, and shall not apply to or exclude, limit, or restrict the taking of any testimony and the adducing of any proof."<sup>58</sup> Rule 306(5)(d) provides that the court may limit or restrict the number of experts to be heard as witnesses, while subdivision (g) provides for the granting of summary judgment in favor of any party.<sup>59</sup> It is difficult at this time to attempt to predict in any concrete manner the length of time which an average action might take. Obviously, much will depend upon the eagerness or lack of it with which the business community embraces the new procedure as a means of settling their conflicts. The Judicial Conference, in its study of the new legislation, indicated that at present, there is no calendar congestion in commercial and other contract cases,<sup>60</sup> and it is anticipated that cases submitted under the Simplified Procedure will meet with no delay.

From the point of view of speed of settlement, the Simplified Procedure profits greatly from the fact that the parties have a right of appeal considerably less broad than is available from an ordinary action.<sup>61</sup> This is a major factor to be considered, since the inability to appeal from intermediate orders, and the application of the "substantial evidence rule"<sup>62</sup> to decisions on the

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<sup>57</sup> *Ibid.*

<sup>58</sup> N.Y.R. CIV. PRAC. 306(1).

<sup>59</sup> N.Y.R. CIV. PRAC. 306(5).

<sup>60</sup> See 1960 LEG. DOC. NO. 98, at 104. *But see* Weinstein, *Notes on the Proposed Revision of the New York Arbitration Law*, 16 *ARB. J.* (n.s.) 61, 64-65 (1961), alleging that this lack of congestion results from (1) preferring commercial cases over negligence cases, (2) the failure to apply calendar classification rules to commercial cases, so that a case which could be tried in a lower court is allowed to remain in the Supreme Court, and (3) the pre-trial of negligence cases only.

<sup>61</sup> N.Y. CIV. PRAC. ACT § 218-c(4) provides that "there shall be no appeal [*sic*] from an intermediate order of the court or of a judge in an action under the simplified procedure provisions, except with the permission of the trial or appellate court . . . [*and*] a decision of the trial judge on the facts shall be final if there is any substantial evidence to support it."

<sup>62</sup> Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. . . . [I]t must be enough to justify, if the trial were to a jury, a refusal to direct a

facts, will undoubtedly keep the number of appeals at a minimum. These deviations from the usual right of appeal indicate the importance with which the Legislature regards the need for a speedy and final settlement. A possibility of delay results from Rule 305(3) of the Rules of Civil Practice which provides that "if the court shall find that a substantial issue of fact has been raised as to the making of the contract or submission, or the failure to comply therewith . . . the court shall proceed expeditiously with the trial thereof without a jury, unless either party . . . shall have demanded in writing a trial by jury. . . ." <sup>63</sup> In short, if the validity of the contract or submission is challenged, and a substantial question of fact arises, the anticipated streamlined proceeding can become the usual type of litigation, complete with jury, if one of the parties so demands.<sup>64</sup> However, the same thing may happen in arbitration if a party makes timely objection under Section 1450 of the Civil Practice Act.<sup>65</sup>

On balance, it would seem that the Simplified Procedure, once in motion, should be as speedy as arbitration, if not more so. Under certain circumstances, however, a jury trial as provided in section 218b(2) <sup>66</sup> will result in an unanticipated delay—but this may also occur in arbitration. The possibility of an appeal leading to delay would seem to be equal for both procedures. However, statistics regarding the effect which the presence of attorneys has apparently had on the speed of the arbitration proceeding would lead one to wonder whether they might not have the same effect on the streamlined Simplified Procedure.<sup>67</sup>

### *Expertise of the Decider*

It has been said that "even if we had private, speedy, cheap jury trials, there would still be a great number who would turn to arbitration because they can obtain thereby an expert business

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verdict when the conclusion sought to be drawn from it is one of fact for the jury." *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939). See generally DAVIS, *ADMINISTRATIVE LAW TEXT* § 29.02 (1959).

<sup>63</sup> N.Y.R. CIV. PRAC. 305(3).

<sup>64</sup> *Ibid.* Rule 305(3) implements N.Y. CIV. PRAC. ACT § 218-b(2).

<sup>65</sup> N.Y. CIV. PRAC. ACT § 1450. *But see* *Exercycle Corp. v. Maratta*, 9 N.Y.2d 329, 174 N.E.2d 463, 214 N.Y.S.2d 353 (1961), holding that, where the contract provided for arbitration of any dispute, whether a contract of employment lacked mutuality was a question for the arbitrators regardless of whether it involved a question of fact or mixed question of fact and law.

<sup>66</sup> N.Y. CIV. PRAC. ACT § 218-b(2).

<sup>67</sup> See text accompanying notes 56 and 57 *supra*.

judgment of the facts involved.”<sup>68</sup> The American Arbitration Association maintains a panel of over 9000 businessmen, bankers and lawyers from which arbitrators can be chosen who are expert in their particular field.<sup>69</sup> The time and expense involved in securing the testimony of expert witnesses is often eliminated because the arbitrators, or one of them, are expert themselves.<sup>70</sup> This is not to say that in every case which comes before an arbitration tribunal there is an expert on the panel who is familiar with the custom and usages of the trade. Whether one can expect to have an expert on the panel often depends on the nature of the contract from which the dispute arose.<sup>71</sup> For instance, a study of 649 cases which involved all types of contracts indicated that in cases involving contracts of sale where the quality of the goods was at issue, an expert was on the panel in 73 per cent of such cases, while in disputes involving employment contracts, an expert in the area was present in only 25 per cent of the cases.<sup>72</sup>

Under the Simplified Procedure, Rule 306(2) of the Rules of Civil Practice provides that if “the court shall be of the opinion that evidence by an impartial expert would be of material aid to the just determination of the action, it may direct that such evidence be obtained.”<sup>73</sup> Section 218-c states that the rules may provide for “impartial expert testimony by witnesses appointed by the court . . . .”<sup>74</sup> It is not quite clear whether the rules require that the court appoint the impartial expert, but that would seem to be the only way to obtain impartial testimony, since experts selected by the parties would probably be chosen on less than an objective basis. Nor is it clear whom the court may direct to obtain such evidence. In addition, there may arise the problem of whether the impartial expert witness appointed by the court is acceptable to each of the parties. It would seem clear that either party should have a right to challenge such a witness for possible hostility about which the court could

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<sup>68</sup> Phillips, *A Practical Method for the Determination of Business Fact*, 82 U. PA. L. REV. 230, 234 (1934).

<sup>69</sup> Smith, *Commercial Arbitration at the American Arbitration Association*, 11 ARB. J. (n.s.) 3, 10 (1956); see Rosenthal, *A Businessman Looks at Arbitration*, 2 ARB. J. (n.s.) 139, 140 (1947).

<sup>70</sup> Grossman, *Arbitration and the Lawyer*, 17 N.Y.U.L.Q. 511, 512 (1940).

<sup>71</sup> See Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 860 (1961); Smith, *supra* note 69, at 10-11. But see Braden, *Sound Rules and Administration in Arbitration*, 83 U. PA. L. REV. 189, 196 (1934), proposing that the parties, more interested in securing advocates than experts, will rarely select the arbitrators on the basis of their technical knowledge.

<sup>72</sup> See Mentschikoff, *supra* note 71; Smith, *supra* note 69.

<sup>73</sup> N.Y.R. CIV. PRAC. 306(2).

<sup>74</sup> N.Y. CIV. PRAC. ACT § 218-c(1).

have no knowledge; or because there had been business dealings between the witness and one of the parties which might suffer because of certain testimony, or for a number of other reasons.

It is difficult to deny that many businessmen have left the courtroom with bitterness, convinced that their defeat was the direct result of the court's failure to understand the intricacies of the issue.<sup>75</sup> The frequency with which the court has to be painstakingly informed regarding matters which, to the litigants, appear elementary does little to deter such ill feeling.<sup>76</sup> It seems likely that the Simplified Procedure will not be able to improve upon the usual litigation in this area of expertise. Expert witnesses have always been available. The court's education in the complex business practices of the litigants is as necessary as it ever was, and unlike arbitration, it is the court and not the expert who decides the result. That judges endowed with extensive knowledge of general commercial practices are available is undoubtedly true, and should the new procedure receive the attention of the business community to the extent anticipated by its proponents, it seems likely that the courts will become ever more adept in handling the subtle facets of commercial dealings,<sup>77</sup> especially in the delicate area of contract construction where an intimate knowledge of trade customs and usages is almost essential. For the present, however, it would appear that commercial arbitration has the clear advantage.

### *Privacy and Economy*

The privacy which the parties enjoy in arbitration has always been considered one of its more attractive features.<sup>78</sup> The public airing of private matters, trade secrets, confidential operating costs and the attendant loss of prestige and good will which often result from the publicity of a court trial are several of the reasons why the commercial community has been abandoning litigation for

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<sup>75</sup> See Tausch, *Extrajudicial Settlement of Controversies: The Business Man's Opinion: Trial at Law v. Nonjudicial Settlement*, 83 U. PA. L. REV. 147, 150 (1934).

<sup>76</sup> *Ibid.*

<sup>77</sup> See Callahan, *New Simplified Procedure Act*, 146 N.Y.L.J., Oct. 24, 1961, p. 4, cols. 2-3, indicating that justices of the Appellate Division in the First and Second Departments "have considered favorably the setting up of a special part or parts to hear cases arising under the new law to which will be assigned justices experienced in the disposition of commercial litigation."

<sup>78</sup> See Braden, *supra* note 71, at 195; Grossman, *supra* note 70, at 514; Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration*, 47 HARV. L. REV. 590, 606 (1934); Rosenthal, *supra* note 69, at 140.

arbitration.<sup>79</sup> Awards in arbitration are generally private, and arbitrators are encouraged not to give reasons for their decisions in the award.<sup>80</sup> In addition to this desirable element of privacy, arbitration is usually more economical than the ordinary form of litigation.<sup>81</sup> There is generally no record before a court reviewing an arbitration award, unless the parties have chosen to go to that expense.<sup>82</sup> The American Arbitration Association provides hearing rooms and clerical help, takes care of all notices, and only a nominal fee is charged for each hearing.<sup>83</sup> Arbitrators are not usually paid, either by the Association or the contending parties.<sup>84</sup>

The Judicial Conference proposed, in regard to the rules which could be adopted to implement the Simplified Procedure, that there might be "informal hearings in chambers in appropriate cases. . . ." <sup>85</sup> The rules adopted are silent upon this matter, but section 218-c would seem to imply the power of the court to do so by enabling it "to provide for such actions a procedure that is as simple and informal as circumstances will permit."<sup>86</sup> As regards economy, use of the Simplified Procedure will probably result in comparable costs, unless a lengthy appeal is taken from the trial court's decision. The informal atmosphere of litigation under the new procedure should have the same salutary effect upon the future relations of the parties as has the informality of arbitration.

### *The Right of Appeal*

The Simplified Procedure provides that "an appeal may be taken only from a judgment, or an order determining the making of the contract or submission or the failure to comply therewith. . . . A decision of the trial judge on the facts shall be final if there is any substantial evidence to support it."<sup>87</sup> It should be noted that appellate review of findings of fact is limited "to the same extent that judicial review of such findings by administrative bodies is circumscribed . . . [, that is,] the weight of the evidence is not subject to judicial review . . . [and] the

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<sup>79</sup> See Braden, *supra* note 71, at 195.

<sup>80</sup> See Phillips, *supra* note 78, at 606.

<sup>81</sup> See Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519, 522 (1960).

<sup>82</sup> *Ibid.*

<sup>83</sup> See Arbuse, *The General Case for Arbitration*, 31 FLA. B.J. 129, 130 (1957).

<sup>84</sup> *Ibid.*

<sup>85</sup> 1960 LEG. DOC. No. 98, at 97.

<sup>86</sup> N.Y. CIV. PRAC. ACT § 218-c(1).

<sup>87</sup> N.Y. CIV. PRAC. ACT § 218-c(4).

judicial function is exhausted as to the facts when there is found to be a rational basis for the findings of the [lower court]. . . ."<sup>88</sup> This application of the "substantial evidence rule"<sup>89</sup> will undoubtedly reduce the number of appeals taken from decisions of the trial court on the facts, and will serve to lessen the possibility of the litigants' becoming involved in an extended appellate review.

An arbitration award, on the other hand, may be challenged in one of two ways: (1) by opposing a motion to confirm,<sup>90</sup> or (2) by making a motion to vacate the award.<sup>91</sup> In either case, the following are the grounds for setting aside the award:

(1) Where the award was procured by corruption, fraud or other undue means.<sup>[92]</sup>

(2) Where there was evident partiality or corruption in the arbitrators or either of them.<sup>[93]</sup>

(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 were prejudiced.<sup>[94]</sup>

(4) Where the arbitrators or other persons making the award exceeded their powers, or so imperfectly executed them, that a mutual, final and definite award upon the subject matter submitted was not made.<sup>[95]</sup>

(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.<sup>[96]</sup><sup>97</sup>

The scope of judicial review of arbitration awards, however, is broader than the statute would appear to allow.<sup>98</sup> The New York courts have vacated and set aside arbitration awards which con-

<sup>88</sup> Tripp, *Simplified Procedure for Court Determination of Contract Disputes: Judicial "Arbitration" in New York*, 146 N.Y.L.J., Oct. 25, 1961, p. 4, col. 4.

<sup>89</sup> See generally DAVIS, *ADMINISTRATIVE LAW TEXT* § 29.02 (1959).

<sup>90</sup> N.Y. CIV. PRAC. ACT § 1461.

<sup>91</sup> N.Y. CIV. PRAC. ACT § 1462.

<sup>92</sup> See *Livingston v. Banff, Ltd.*, 13 Misc. 2d 766, 178 N.Y.S.2d 973 (Sup. Ct. 1958).

<sup>93</sup> See *Shirley Silk Co. v. American Silk Mills, Inc.*, 260 App. Div. 572, 23 N.Y.S.2d 254 (1st Dep't 1940).

<sup>94</sup> See *Simons v. New Syndicate, Inc.*, 152 N.Y.S.2d 236 (Sup. Ct. 1956).

<sup>95</sup> See *Kyne v. Molfetas*, 3 App. Div. 2d 384, 160 N.Y.S.2d 605 (1st Dep't 1957) (per curiam).

<sup>96</sup> See *Behrens v. Feurring*, 182 Misc. 979, 49 N.Y.S.2d 753 (Sup. Ct. 1944), *aff'd mem.*, 269 App. Div. 930, 58 N.Y.S.2d 216 (1st Dep't 1945), *aff'd*, 296 N.Y. 172, 71 N.E.2d 454 (1947).

<sup>97</sup> N.Y. CIV. PRAC. ACT § 1462.

<sup>98</sup> See Gold, *Considerations of Equity in Vacatur of Arbitral Awards*, 15 ARB. J. (n.s.) 70 (1960); Herzog, *Judicial Review of Arbitration Proceedings—A Present Need*, 5 DE PAUL L. REV. 14 (1955); Jalet, *Judicial*

travened or violated a particular statute,<sup>99</sup> which have given custody or visitation rights in pursuance of a separation agreement,<sup>100</sup> where an error of law appears on the face of the award,<sup>101</sup> where the award was found excessive or permitted punitive damages,<sup>102</sup> and where the court determined that there was nothing for the arbitrator to decide.<sup>103</sup> In recent years, however, there seems to have been a relaxation of the courts' attempt to limit the power of the arbitrator. It has been indicated that it is the public policy of New York to encourage arbitration, which may account for the present highly liberal attitude of the Court of Appeals in reviewing awards.<sup>104</sup>

The right of appeal provided for under the new legislation is clearly a desirable element, since it ensures the opportunity of having errors of law and decisions on the facts which are arbitrary and have little or no support in the record, corrected on review. Although the power of the courts to review arbitration awards is considerably more broad than the statutory grounds would apparently allow, the scope of that power is not equal to the review afforded by the new legislation. For those primarily interested in a speedy determination and who possess "that spirit of conciliation which so often conduces to . . . finality in arbitration proceedings,"<sup>105</sup> the right of appeal offered by the Simplified Procedure may not offer any great inducement. For many, however, such right will be a primary motivation for using a "Simplified Procedure clause" to provide a means of settling their future disputes, rather than a general arbitration clause.

### Conclusion

The New York Simplified Procedure for Court Determination of Disputes would seem to be a step in the right direction. It indicates a recognition by the Legislature of the needs of commercial litigants—needs which normal court procedure seems un-

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*Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519 (1960); Mayer, "Judicial Bulls" in the Delicate China Shop of Labor Arbitration, 2 LAB. L.J. 502 (1951); Note, 63 HARV. L. REV. 681 (1950); Note, 21 U. CHI. L. REV. 148 (1953).

<sup>99</sup> See *Western Union Tel. Co. v. American Communications Ass'n*, 299 N.Y. 177, 86 N.E.2d 162 (1949).

<sup>100</sup> See *Hill v. Hill*, 199 Misc. 1035, 104 N.Y.S.2d 755 (Sup. Ct. 1951).

<sup>101</sup> See *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N.Y. 392 (1875).

<sup>102</sup> See *Publishers' Ass'n v. Newspaper Union*, 280 App. Div. 500, 114 N.Y.S.2d 401 (1st Dep't 1952).

<sup>103</sup> See *Alpert v. Admiration Knitwear Co.*, 304 N.Y. 1, 105 N.E.2d 561 (1952).

<sup>104</sup> See *Grayson-Robinson Stores, Inc. v. Iris Constr. Corp.*, 8 N.Y.2d 133, 137, 168 N.E.2d 377, 378-79, 202 N.Y.S.2d 303, 306-07 (1960).

<sup>105</sup> MAYERS, *THE AMERICAN LEGAL SYSTEM* 555 (1955).

able to satisfy. The new procedure appears to be ideal for the settlement of *existing* disputes which the parties desire to be settled according to the rules of substantive law and with the right of appeal. Whether it will be incorporated in contracts as a means for the settlement of *future* disputes is questionable.<sup>106</sup> The obstacle of overcoming human inertia and resistance to change imposes an immediate burden upon the Simplified Procedure. Much remains to be seen. If the procedure receives sufficient publicity and trial by the business community, it may be a reform of great significance. Its success or failure will, in large measure, depend upon the cooperation of judges and attorneys in accomplishing its announced aim, that is, "a simplified method of litigation which combines the chief advantages of arbitration . . . with the chief advantages of traditional common law trials—the adherence to recognized principles of substantive law, the right to trial by jury if desired, and the right to appeal. . . ." <sup>107</sup>



#### THE EFFECT OF ESTOPPEL ON THE RECOGNITION OF SISTER STATE DIVORCE DECREES IN NEW YORK

In general, estoppel may be defined as a prohibition against the knowledgeable assumption of an obviously inconsistent position in relation to previous acts.<sup>1</sup> Within the context of a marital controversy, its immediate effect is to prohibit a party from asserting the invalidity of a decree of divorce.<sup>2</sup> This note will discuss the circumstances under which, and the parties against whom, the estoppel may be generally applied.

In order to properly appraise the law of estoppel in cases where a decree of divorce is attacked on jurisdictional grounds, it is first

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<sup>106</sup> See Weinstein, *Notes on Proposed Revision of the New York Arbitration Law*, 16 *ARB. J.* (n.s.) 61, 65 (1961).

<sup>107</sup> 1960 LEG. DOC. NO. 98, at 103.

<sup>1</sup> See McCLINTOCK, *EQUITY* 79 (2d ed. 1948). For a treatment of the origin of estoppel see 3 POMEROY, *EQUITY JURISPRUDENCE* § 802 (5th ed. 1941).

<sup>2</sup> In *Krause v. Krause*, 282 N.Y. 355, 26 N.E.2d 290 (1940), this judicial impediment was treated as a quasi-estoppel because the court said it was not a true estoppel although its effect was the same. See *Borenstein v. Borenstein*, 151 Misc. 160, 270 N.Y. Supp. 688 (Sup. Ct. 1934), *aff'd*, 242 App. Div. 761, 274 N.Y. Supp. 1011 (1st Dep't), *aff'd*, 272 N.Y. 407, 3 N.E.2d 844 (1936), wherein the court stated that this was not an estoppel and that no one has defined what it is. For convenience it shall be hereinafter referred to as "estoppel."