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Arbitration--Confirmation of Penal Awards for Breach of Contract (Matter of East India Trading Co. (Halari), 280 App. Div. 420 (1st Dep't 1952); Matter of Publishers' Association (Newspaper Union), 280 App. Div. 500 (1st Dep't 1952))

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through the natural parent, may take.[23] In view of these two illustrations, the author is of the opinion that the reasoning of the court is open to sharp criticism.

The court's determination is clearly an encroachment upon the jurisdiction of the legislature. While the court's action was unwarranted, the primary fault lies with the legislature. Section 115 of the Domestic Relations Law should be amended so as to remove all ambiguity in reference to the effect of this statute upon Section 83(14) of the Decedent Estate Law.[24]

ARBITRATION—CONFIRMATION OF PENAL AWARDS FOR BREACH OF CONTRACT.—On July 1, 1952, the Appellate Division in the First Department decided two cases of first impression, both of which dealt with the confirmation of an arbitrator's award.[1] In the first of these, *Matter of East India Trading Co. (Halari)*,[2] the Court *held* that the award of "penal damages" pursuant to an express provision therefor in the arbitration contract was enforceable, and consequently judgment for plaintiff was modified to include the penalty. The second case, *Matter of Publishers' Association (Newspaper Union)*,[3] *held* that an award of penal damages, likewise expressly authorized in the arbitration agreement, was unenforceable; and judgment for plaintiff was modified by reversing so much of the award as granted penal damages.

Article 84 of the New York Civil Practice Act provides for the judicial enforcement of contracts of arbitration, and supplements the inadequate common-law remedies which heretofore existed.[4] The article comprehends both the submission of an existing dispute and a contract to arbitrate future controversies, including those involving labor organizations and employers, or employer associations.[5] In

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[23] *Accord,* Matter of Peters' Estate, 104 N. Y. S. 2d 647 (Surr. Ct. 1951).

[24] The following sentence is suggested: "The provisions of this section shall have no effect upon the existing right of inheritance between the adopted child and his blood relatives."

[1] N. Y. CIV. PRAC. ACT § 1461 (motion to confirm award). Of the seven judges who sat on these cases, only Callahan and Cohn, JJ., participated in both.

[2] 280 App. Div. 420, 114 N. Y. S. 2d 93 (1st Dep't 1952) (3 to 1 decision). Although a notice of appeal had been filed, the appeal was never perfected since the issue would become moot upon the expiration of the collective bargaining agreement.

[3] 280 App. Div. 500, 114 N. Y. S. 2d 401 (1st Dep't 1952) (3 to 2 decision).

[4] *See* Sandford Laundry, Inc. v. Simon, 285 N. Y. 488, 493, 35 N. E. 2d 182, 185 (1941); see Note, 24 ST. JOHN'S L. REV. 254, 267 (1950).

[5] N. Y. CIV. PRAC. ACT § 1448.

order to avail oneself of the statutory remedy, the contract must be in writing,[6] and provision is made for the court to appoint arbitrators should one of the parties refuse to do so.[7] Whether a dispute is arbitrable depends upon whether it is an existing or a future controversy at the time of the execution of the arbitration contract.[8] Where the dispute is then in existence, it is termed a "submission," and must be of a justiciable nature.[9] Where, however, the dispute is submitted pursuant to a contract to arbitrate all future controversies which may arise, it need not be one which may be the subject of an action.[10]

The *Halari* case involved a simple breach of contract of sale. The arbitration was carried out pursuant to a written agreement between the parties, specifying that all controversies arising under the contract should be submitted to and settled by arbitration under the rules of the American Spice Trade Association, which provided that in case of default, the arbitrators should assess both actual damages and a penalty.[11] A "penalty" of two per cent, amounting to $436.80, was imposed by the award, but it was disallowed at Special Term. In reinstating this item, the Appellate Division concluded that the penalty provision was "justified and inoffensive," and that judicial notice could be taken of the expense of litigation and the inadequacy of ordinary costs.[12] It would appear, however, that this "penalty" was not a penalty in the common-law connotation of the term, but rather it was a provision for a special or liquidated sum reflecting the full measure of damages.

In its true sense, a penalty is a monetary sanction, independent of any measure of actual damages, and is imposed for the dual purpose of deterring the contracting parties from breaching the contract or, in the event of breach, to penalize the defaulting party for failure to perform.[13] In the *Halari* case, however, the court, though referring to it as a penalty, declared that its validity should not be deter-

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[6] *Id.* § 1449.
[7] *Id.* § 1452.
[8] *Id.* § 1448; see 46 COL. L. REV. 841 (1946).
[9] Matter of Stern, 285 N. Y. 239, 33 N. E. 2d 689 (1941).
[10] Matter of Select Operating Corp. (Rodgers), 183 Misc. 666, 50 N. Y. S. 2d 16 (Sup. Ct. 1944) (distinguishing Matter of Stern, *supra* note 9); Matter of Robinson, 186 Misc. 974, 61 N. Y. S. 2d 859 (Sup. Ct. 1945), *rev'd*, 271 App. Div. 98, 62 N. Y. S. 2d 785 (1st Dep't 1946), *rev'd mem.*, 296 N. Y. 778, 71 N. E. 2d 214 (1947) (Special Term's decision reinstated). Thus, the court in the *Newspaper* case erred when it stated [280 App. Div. 500, 507, 114 N. Y. S. 2d 401, 407 (1st Dep't 1952)] that ". . . the test for statutory arbitration is a controversy which 'may be the subject of an action . . . ,'" since the controversy before it was a "future" controversy and not a "submission."
[11] "The defaulting party shall pay a penalty, as determined by arbitration, of not less than 2% and not more than 10% of the market value established as of the day of default." 280 App. Div. 420, 422, 114 N. Y. S. 2d 93, 95 (emphasis omitted).
[12] *Id.* at 421, 114 N. Y. S. 2d at 94.
[13] See 3 WILLISTON, CONTRACTS §§ 770, 776 (3d rev. ed. 1936).

mined on the basis of nomenclature, but rather on its true nature.[14] In denying the validity of penal damages, the *Newspaper* case distinguished the *Halari* decision by stating that no penalty as such was imposed in the latter.[15] Upon an analysis of its facts and language, it is submitted that such a distinction is sound, and that the *Halari* case cannot be cited for the proposition that penal damages awarded in an arbitration proceeding are enforceable.[16]

The decision in the *Newspaper* case, on the other hand, is clear and unambiguous in its holding that penalty awards will not be confirmed. The case involves more than mere breach of contract; it presents a very close problem of public policy. The arbitration award was made pursuant to a two-year collective bargaining agreement between an association of metropolitan newspaper publishers and a newspaper employees' union.[17] This agreement provided that no party thereto would order a strike or lockout except as expressly authorized. In the event of a breach by either party, an Adjustment Board was to have power to make all appropriate findings and decisions, and to impose damages, and monetary or other penalties.[18] The breach giving rise to the present action was a strike called by the union against the *New York Times,* for which the Adjustment Board awarded $2,000 actual damages plus penal damages of $5,000, to become due and payable in the event that the union again violated the agreement during the life of the contract.

The penalty imposed by the arbitrators in this case was clearly within the common-law connotation of penal damages, since it had no

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[14] 280 App. Div. at 421, 114 N. Y. S. 2d at 94; see 3 WILLISTON, CONTRACTS § 778 (3d rev. ed. 1936).

[15] 280 App. Div. at 507, 114 N. Y. S. 2d at 408. This writer has been informed that the *Halari* decision will be appealed; but it is doubtful whether the Court of Appeals will consider the narrow question of the validity of punitive damages, or will avoid that difficulty by affirming the determination that no penalty in fact existed.

[16] In Matter of Mencher (Geller & Sons), 276 App. Div. 556, 96 N. Y. S. 2d 13 (1st Dep't 1950), the contract provided: "The following shall be liquidated damages and disciplinary measures to be imposed for violation of the provisions of this agreement: . . . 1. First offense—maximum $150.00." In addition, it was provided "[t]hat an employer found guilty of substantial violation of the contracting provision shall pay the labor cost of the work done on the garment." *Id.* at 559, 96 N. Y. S. 2d at 15. Special Term dismissed the contention that the award was a penalty and this determination was affirmed in the Appellate Division. Due to its brief treatment in the opinion, it is doubtful whether the issue was seriously presented or considered and hence is weak authority for either side of the question.

[17] See Agreement Between Publishers' Association of New York City and Newspaper and Mail Deliverers' Union of New York and Vicinity, November 1, 1950 to October 31, 1952. [Record, pp. 16, 17].

[18] The new collective bargaining agreement between these parties, effective November 1, 1952 to October 31, 1954, omits this controversial provision and authorizes the Adjustment Board ". . . to impose damages either in the form of liquidated damages or *in any other legally permissible form* . . . ." (emphasis added).

relation to the actual damages suffered by the plaintiffs, and its avowed purpose was to act *in terrorem.*[19] Though holding that the award would not be enforced, since it was not final and definite as required by the statute,[20] the appellate court nevertheless indicated that its ". . . decision is based on the broader ground that the allowance of punitive damages is not enforcible [sic] with the aid of the judicial power, rather than on the finality under the form of the award." [21] Since the public policy of the state with reference to the validity of penal damages is determined by case law rather than statute, one must examine the decisions and discover whether the peculiar facts of this case should not admit of a different rule than that applicable to ordinary breach of commercial contract cases.

The purpose of collective bargaining agreements is to preserve industrial peace; and in implementing this purpose, our legislature has sought to encourage the arbitration of labor disputes even where such a dispute is not of a justiciable nature.[22] The whole concept of arbitration is to permit individuals in a commercial society to contract for a particular mode of settling disputes unhampered by the common-law rules which, in some instances, have outlived their usefulness and prevented the achievement of substantial justice.[23] Inasmuch as arbitration proceedings are subject to neither the doctrine of *stare decisis* [24] nor to the technicalities of a judicial action,[25] it would appear that common-law rules should not be strictly applied. Conceding the invalidity of punitive damages for breach of contract actions at law, there would seem to be no insuperable objection to

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[19] "This suspension of the collectibility of the punitive damages should . . . serve both as a warning and an inducement to the Union to fully comply with the Agreement." Opinion of Impartial Chairman, [Record, p. 33]. There can be no doubt that the agreement contemplated the award of penal damages as such, since the union admitted ". . . the contract gives you (the Association) the right to impose punitive damages." [Brief for Respondent, p. 10]. In addition, punitive damages were imposed against the same union under a prior contract containing an identical provision, and no appeal was taken from that award. [Record, p. 38].

[20] N. Y. CIV. PRAC. ACT § 1462(4).

[21] 280 App. Div. at 507, 114 N. Y. S. 2d at 408.

[22] See Laws of N. Y. 1952, c. 757, § 1, amending N. Y. CIV. PRAC. ACT § 1448 so as to read: ". . . without regard to the justiciable character of such controversy or controversies."

[23] See 24 ST. JOHN'S L. REV. 254, 268 (1950).

[24] See Note, 62 HARV. L. REV. 118 (1948).

[25] Many common examples of the liberality of arbitration proceedings may be cited, prime among which are the elimination of the technical rules of evidence [see Singer, *Labor Arbitration: Use of Legal Rules of Evidence,* 2 LABOR L. J. 185 (1951); Abelow, *Standards of Evidence in Arbitration Proceedings,* 4 ARB. J. (N.S.) 252 (1949)], and the principle that errors of law not apparent on the face of the award are not the subject of judicial review [Fudickar v. Guardian Mut. Life Ins. Co., 62 N. Y. 392 (1875); Matter of Pine St. Realty Co. v. Coutroulos, 233 App. Div. 404, 253 N. Y. Supp. 174 (1st Dep't 1931); see PRASHKER, NEW YORK PRACTICE § 538A(2) (2d ed. 1951)].

such an award made by arbitrators pursuant to a collective bargaining agreement.

The opinion of the Adjustment Board that the union ". . . has a particular obligation beyond the normal . . ." to respect its contract obligations [26] suggests a justification for the imposition of punitive damages in this class of contract violations. The preservation of economic stability in employer-employee relationships, and the avoidance of breaches of the peace resulting from labor disputes and their consequent picketing, strikes and lockouts, is paramount. Therefore it is submitted that reasonable penalty provisions designed to prevent industrial strife should command consideration as a potential implementation of public policy.[27]

ARBITRATION—NOT "SUIT" WITHIN MEANING OF INSURANCE POLICY.—Plaintiff company, a subcontractor, agreed to indemnify the general contractor against any loss during construction, to provide liability insurance covering such losses, and to settle any claims by arbitration.[1] Plaintiff then procured a policy wherein defendant-insurer agreed to defend ". . . any suit against the insured alleging such injury . . ." and to pay after the final determination of liability ". . . by judgment against the insured after actual trial . . . ." The general contractor asserted a claim, but the insurer refused to defend in the ensuing arbitration, or be bound by the award. *Held:* arbitration is not a "suit" within the meaning of the policy; and the insurer is not obligated by any award.[2] *Madawick Cont. Co. v. Travelers Ins. Co.*, 281 App. Div. 754 (2d Dep't 1953).

Arbitration has developed into a widely-employed means of settling controversy without the time-consuming and costly litigation inherent in the regular court system.[3] No newcomer in the field,

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[26] Opinion of Impartial Chairman, [Record, p. 30].

[27] See opinion of Botein, J., Matter of Publishers' Association (Newspaper Union), 111 N. Y. S. 2d 725, 732 (Sup. Ct. 1952) (Special Term decision in *Newspaper* case).

[1] This was a standardized contract for agreements between general contractors and subcontractors, prepared by the New York Building Congress.

[2] Two justices dissented on the ground that, although the insurer need not defend in the arbitration, it would be obligated by a judgment on any resulting award.

[3] *Cf.* American Eagle Fire Ins. Co. v. New Jersey Ins. Co., 240 N. Y. 398, 408, 148 N. E. 562, 565 (1925); Matter of Friedman, 215 App. Div. 130, 136, 213 N. Y. Supp. 369, 375 (1st Dep't 1926); Knickerbocker Textile Corp. v. Sheila-Lynn, Inc., 172 Misc. 1015, 1018, 16 N. Y. S. 2d 435, 438 (Sup. Ct. 1939); see Mosk, *Arbitration Versus Litigation*, 7 ARB. J. (N.S.) 218 (1952) (a judge's viewpoint).