

## Arbitration Proceedings Under Article 84 of the Civil Practice Act

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constitutional provision which forbids a limitation on wrongful death recoveries. This is so, because by its nature as a treaty, the Warsaw Convention ranks with the Federal Constitution as the supreme law of the land and transcends all conflicting state laws. It has been held that the treaty is self-executing and that it is constitutional and in derogation of no power of Congress and no personal right.<sup>117</sup> No right of action for wrongful death is found in the Convention so the beneficiaries of the action and the substantive law of damages would have to be ascertained by the death statute of the place of the accident.<sup>118</sup> Thus, the New York law discussed above, would control only when the accident occurs in this jurisdiction. However, by Article XXVIII of the Convention, the plaintiff has the option of bringing the action in the courts of: (1) the carrier's domicile, (2) the carrier's principal place of business, (3) the place of business through which the contract of carriage was made, or (4) the place of destination. Since by the same Article, all questions of procedure are to be governed by the law of the court to which the case is submitted, the adjective law of New York may be applicable when, in any of the above instances, the action is brought here.

JUSTIN L. VIGDOR,  
JAMES P. KEHOE.

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#### ARBITRATION PROCEEDINGS UNDER ARTICLE 84 OF THE CIVIL PRACTICE ACT

The word arbitration is ordinarily applied to an extrajudicial hearing and determination of a matter or matters of difference between contending parties by arbiters either chosen by the parties involved, or appointed by the court.<sup>1</sup> The decision rendered is called an award. This procedure may embrace either international, labor, or commercial controversies. The discussion herein will be limited to the last mentioned type of dispute.

The inception of this special type of proceeding occurred early in man's history. The Greeks and Romans were familiar with its process, and from the charters that were issued to the English guilds,

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<sup>117</sup> *Indemnity Ins. Co. v. Pan American Airways*, 58 F. Supp. 338, 1945 U. S. Av. R. 52 (S. D. N. Y. 1944).

<sup>118</sup> *Choy v. Pan American Airways, Inc.*, 1941 U. S. Av. R. 10, 1942 U. S. Av. R. 93.

<sup>1</sup> 6 WILLISTON, *CONTRACTS* § 1918 (rev. ed. 1938); see invaluable symposium on arbitration in 83 U. of PA. L. Rev. 119 (1934).

it is certain that these traders appreciated the utility of some extra-judicial method; and from some of the earlier books on the law merchant, it is unquestionable that the merchant preferred justice according to the law merchant rather than that of the common law.<sup>2</sup>

Arbitration clauses in contracts directed to disputes which might arise in the future from such contracts have been held valid at common law from an early date, as have agreements to arbitrate existing controversies, that is, submission agreements.<sup>3</sup> But even though such contracts were valid, either party could sue and recover a final judgment in direct repudiation of his agreement to arbitrate. The other party's remedy was for breach of contract, generally valueless, as he could not prove any damages.<sup>4</sup> The reasoning behind this common law principle was that executory arbitration agreements could be revoked. This crystallized rule found its genesis in *dictum* by Lord Coke in *Vynior's Case*.<sup>5</sup> The basic reason for this *dictum* and the cause of its general acceptance, appears to have been that executory arbitration agreements, while not absolutely illegal, were opposed to public policy because they tended to oust the courts of jurisdiction.<sup>6</sup>

Equity would not compel specific performance of these executory agreements, nor would it appoint an arbitrator or compel an arbitrator to act. Because of the common law revocable character of these agreements, it felt such a decree would be vain, as either party could revoke up to the time of the award, and thus, substantially nullify the decree.<sup>7</sup> However, once an award had been made pursuant to an arbitration contract, equity would enforce it specifically, if a contract between the parties in the same terms was entitled to equitable relief.<sup>8</sup> An action at law would also be sustained on an award for a sum certain in money.<sup>9</sup>

<sup>2</sup> BRITTON, *BILLS & NOTES* § 2 (1943); Wolaver, *The Historical Background of Commercial Arbitration*, 83 U. OF PA. L. REV. 132 (1934); Sayre, *Development of Commercial Arbitration Law*, 37 YALE L. J. 595 (1928).

<sup>3</sup> *Union Insurance Co. v. Central Trust Co.*, 157 N. Y. 633, 52 N. E. 671 (1899); *Haggart v. Morgan*, 5 N. Y. 422 (1851); see *Matter of Berkovitz v. Arbib & Houlberg*, 230 N. Y. 261, 271, 130 N. E. 288, 290 (1921).

<sup>4</sup> WALSH, *EQUITY* § 64 (1930).

<sup>5</sup> ". . . if I submit myself to an arbitrement . . . yet I may revoke it for my act, or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable." 8 Co. 80a, 81b, 77 Eng. Rep. 595, 597 (K. B. 1609). It seems Lord Coke did not appreciate any system of jurisprudence which tended to reduce the jurisdiction of the common law courts. For his controversy over the jurisdiction of equity see AMES, *LECTURES ON LEGAL HISTORY* (1913); AMES, *CASES IN EQUITY JURISDICTION*, p. 5 (1905).

<sup>6</sup> *Kill v. Hollister*, 1 Wilson 129, 95 Eng. Rep. 539 (K. B. 1746).

<sup>7</sup> RESTATEMENT, *CONTRACTS* § 377 (1932); Pound, *The Progress of the Law—Equity*, 33 HARV. L. REV. 420, 434 (1920).

<sup>8</sup> Simpson, *Specific Enforcement of Arbitration Contracts*, 83 U. OF PA. L. REV. 160 (1934).

<sup>9</sup> See *Howe v. Nickerson*, 14 Allen 400, 409 (Mass. 1867); *Sandford Laundry, Inc. v. Simon*, 285 N. Y. 488, 493, 35 N. E. 2d 182, 185 (1941).

This common law rule of revocability was so solidified that it could be changed only by legislation.<sup>10</sup> Recognizing this, New York in 1920, provided for specific enforcement of arbitration agreements by virtue of the New York Arbitration Law,<sup>11</sup> later incorporated into the New York Civil Practice Act, Article 84, Sections 1448 to 1469. In substance this legislation authorizes direct enforcement of arbitration agreements by an order compelling arbitration; provides for the stay of any action commenced in violation of such an arbitration clause, thereby indirectly compelling arbitration; and furnishes an auxiliary method of enforcement by an order appointing arbitrators empowered with irrevocable authority to proceed with the arbitration.<sup>12</sup>

The constitutionality of this legislation was upheld against particular claims.<sup>13</sup> Common law arbitration was not abrogated by this enactment. It is supplementary rather than exclusive.<sup>14</sup> Where the parties do not manifest their purpose to arbitrate under statute by executing a written agreement according to the legislation, common law rules of arbitration generally control.

Section 1448 states in effect, that parties may submit to arbitration any controversy existing at the time of submission which may be the subject of an action or they may contract to settle by arbitration disputes thereafter arising and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or equity, for the revocation of any contract. In 1941, there was added the further clause that such submission or contract may include questions arising out of valuations or appraisals which are collateral, incidental, precedent or subsequent to any issue between the parties. It is to be noted that there is a difference between appraisal and arbitration.<sup>15</sup> Appraisal had been invariably observed as the reference of a collateral or incidental matter of calculation, the decision of which is conclusive of nothing except the amount due, while arbitration was the submission of all matters that are in controversy between the parties for ultimate legal liability.<sup>16</sup> Appraisal,

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<sup>10</sup> *Finucane Co. v. Board of Education*, 190 N. Y. 76, 82 N. E. 737 (1907); *People ex rel. Union Insurance Co. v. Nash*, 111 N. Y. 310, 18 N. E. 630 (1888).

<sup>11</sup> Arbitration Law, constituting Chapter 72 of Consolidated Laws, repealed by Laws of N. Y. 1937, c. 341.

<sup>12</sup> WILLISTON, *CONTRACTS* § 1920 (rev. ed. 1938).

<sup>13</sup> *Matter of Berkovitz v. Arbib & Houlberg*, 230 N. Y. 261, 130 N. E. 288 (1921) (right of trial by jury, impairment of contract obligations, reserving general jurisdiction of the Supreme Court of New York); *Mohawk Manufacturing Co. v. Cavicchi*, 281 N. Y. 629, 22 N. E. 2d 179 (1939) (patent infringement).

<sup>14</sup> *French v. Petrinovic*, 184 Misc. 406, 54 N. Y. S. 2d 179 (Sup. Ct. 1945); *see Fidelity & Deposit Co. v. Woltz*, 234 App. Div. 823, 253 N. Y. Supp. 583 (4th Dep't 1931).

<sup>15</sup> STURGES, *COMMERCIAL ARBITRATION & AWARD* § 7 (1930).

<sup>16</sup> *Matter of American Ins. Co.*, 208 App. Div. 168, 203 N. Y. Supp. 206 (1st Dep't 1924).

it was considered, allowed a less restrictive inquiry and was not expected to be a method to settle matters in a *quasi* judicial manner, as is the objective of arbitration. It was thought that its manner was ministerial rather than judicial. The fulcrum of this ruling was that such an incidental reference of an amount due merely substituted the judgment of the appraisers for evidence of value on a collateral matter and left the rest of the controversy open for adjudication in the legal form.<sup>17</sup> It was considered that arbitrators can deal only with controversies open to judicial cognizance.<sup>18</sup> For these reasons, it was stated prior to 1941 that appraisals were not within the purview of Article 84 of the New York Civil Practice Act, and thus, not entitled to its benefits.

In June, 1949, however, the Appellate Division<sup>19</sup> had an opportunity to construe the effect of the clause added in 1941, mentioned heretofore. Predicating its decision on the basis that the amendment is remedial<sup>20</sup> in character and thus should be liberally construed, and also, that it was intended to secure some useful purpose, the court held that an appraisal agreement, even though it isn't part and parcel of a primary arbitration clause, is specifically enforceable under this article. Two rules which may be gleaned from this decision are: (1) it is not essential that parties contract to submit the whole subject matter of dispute to arbitration; and, (2) it is not necessary that the award be conclusive upon the parties' ultimate rights. However, these rules may be limited, by a statement of the court to the effect that the case is one in which the entire controversy is encompassed in the appraisal, *i.e.*, a situation where the amount of loss is the only subject of dispute.

It is submitted that the desirability of such a ruling is consistent with the policy of the state in its attitude toward arbitration. It is difficult to question the holding when one considers the advantages which will ensue from its equalizing effect on the status of insurer and insured, since the majority of appraisal clauses are found in insurance policies. As was indicated by the court, if the insured repudiated the standard appraisal clause,<sup>21</sup> he was generally denied the right to sue because it was necessary to prove fulfillment by him of all terms and conditions of the contract. Thus the insurer could indirectly compel an appraisal. On the other hand, repudiation of it by the insurer only subjected him to an action for damages which generally proved to be worthless. This peculiarity may have been inductive to the decision.

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<sup>17</sup> *Garr v. Gomez*, 9 Wend. 649 (N. Y. 1832).

<sup>18</sup> See *Matter of Kallus*, 292 N. Y. 459, 462, 55 N. E. 2d 737, 738 (1944).

<sup>19</sup> *Matter of Fitzgerald*, 275 App. Div. 453, 90 N. Y. S. 2d 430 (3d Dep't), *leave to appeal denied*, 275 App. Div. 1005, 91 N. Y. S. 2d 519 (3d Dep't 1949).

<sup>20</sup> For various connotations placed upon this word by the courts, see 3 SUTHERLAND, STATUTORY CONSTRUCTION, p. 68 (3d ed. Horack 1943).

<sup>21</sup> This clause is required by N. Y. INSURANCE LAW § 168(6).

If it is ever necessary, however, for the court of last resort to consider and pass upon this decision, it seems that approval of this holding may meet the following criticism. The court premised its reasoning on the theory that the legislature must have intended to secure some useful purpose by adding this clause. However, to this one might answer that the instances of the legislature in doing no more than codifying the existing law are legion. One will find in the section under consideration that the legislature says that these arbitration contracts shall be valid. Did the legislature intend any useful purpose by that statement? Of course not. As was expressed heretofore in this article, these contracts were valid even before legislation, thus, this part of the statute did nothing more than reiterate the common law; if the legislature intended to change this well-entrenched attitude toward appraisal agreements, it seems that the clause would have been couched in a more direct language which would clearly evidence that intention. On a reading of the clause, it clearly appears that the legislature intended that these appraisal agreements should rest upon a primary and subsisting arbitration clause or submission agreement. In substance the clause says that such contract, referring to the arbitration agreement and not the overall commercial contract, may *include* appraisal agreements. It is difficult to reconcile this decision to a normal reading of the clause.

The word "irrevocable" as used in Section 1448, means the contract to arbitrate cannot be revoked at the will of one party. It can be modified by subsequent agreement based on consideration or abandoned or waived by words or acts of the parties; one waives his right by bringing an action on the contract.<sup>22</sup> A defendant's right will be considered as waived when it is not insisted upon prior to the time of trial.<sup>23</sup> From the decisions on this relative point, one would gather that the mere service of the answer constitutes a waiver. But one does not waive his right by filing an amended answer reserving his right to arbitrate to an amended complaint alleging new causes of action, even though the former answer did not allege this right.<sup>24</sup> Nor does the defendant waive by moving to dismiss the complaint or by moving to have the causes of action separately stated and numbered.<sup>25</sup> It had been held that filing a mechanic's lien indicating

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<sup>22</sup> *Matter of Zimmerman*, 236 N. Y. 15, 139 N. E. 764 (1923); *Oklahoma Publishing Co. v. Parsons & Whillimore*, 255 App. Div. 589, 8 N. Y. S. 2d 432 (1st Dep't 1938). See Note, 117 A. L. R. 304 (1938).

<sup>23</sup> *Nagy v. Arcas Brass & Iron Co.*, 242 N. Y. 97, 150 N. E. 614 (1926); *Bauer Co. v. Anderson Chemical Co.*, 206 App. Div. 423, 201 N. Y. Supp. 438 (1st Dep't 1923); *Samuels v. Samis*, 124 Misc. 35, 207 N. Y. Supp. 249 (N. Y. Munic. Ct. 1924).

<sup>24</sup> *Dandy Dress v. Rae Dress Co.*, 179 Misc. 36, 37 N. Y. S. 2d 449 (Sup. Ct. 1942). See Note, 161 A. L. R. 1427 (1946).

<sup>25</sup> *Haupt v. Rose*, 265 N. Y. 108, 191 N. E. 853 (1934).

an intent to forego rights of arbitration was a waiver,<sup>26</sup> but this rule was later nullified by statute.<sup>27</sup>

There are two types of arbitration clauses—limited and unlimited. The latter makes provision for the arbitration of any and all controversies arising out of the contract, the former provides for specific types of disputes arising from the agreement. The clause must cover the dispute which has arisen. The courts have manifested an intention to construe them strictly as is evidenced from the following language used by the court in *Matter of General Silk Importing Co.*,<sup>28</sup> “. . . since the contract to arbitrate presupposes an agreement to forego the rights to resort to the courts for redress, an alleged contract to arbitrate will be subjected to strict construction in order that the parties may not be deprived of their constitutional rights to seek redress in the court.” And yet it also may be for the reason that these agreements oust the courts of their jurisdiction.<sup>29</sup>

The following clauses were considered not to include the disputes attempted to be arbitrated: a clause which provided for the submission of “all questions that may arise under this contract and in the performance of the work thereunder” was thought not to include a claim for damages arising from acts of the owner which were not done under and in performance of the contract but in violation and repudiation of the building contract;<sup>30</sup> a clause that the sales be governed by raw silk rules adopted by an association is not a contract to arbitrate differences between the parties;<sup>31</sup> a provision that disputes over its terms should be settled by arbitration, does not cover a dispute as to a matter about which the parties had orally agreed to make another contract;<sup>32</sup> under a stipulation that arbitration was to be invoked in the event that the parties disagreed “in relation to any clause in this contract,” disputes concerning delays and hindrances not referable to a particular clause are not arbitrable;<sup>33</sup> a clause in a contract of sale by a foreign seller to a domestic buyer providing that the seller’s agent guarantees an award, if any, may not be construed as an agreement on the agent’s part to arbitrate.<sup>34</sup> A motion to

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<sup>26</sup> *Young v. Crescent Development Co.*, 240 N. Y. 244, 148 N. E. 510 (1925).

<sup>27</sup> N. Y. LIEN LAW § 35.

<sup>28</sup> 200 App. Div. 786, 792, 194 N. Y. Supp. 15, 20 (1st Dep’t), *aff’d without opinion*, 234 N. Y. 513, 138 N. E. 427 (1922); *accord*, *Matter of Marchant v. Mead-Morrison Co.*, 252 N. Y. 284, 169 N. E. 386 (1929).

<sup>29</sup> “Observe reader your old books, for they are the fountains out of which these resolutions issue . . .” Lord Coke, commenting on *Spencer’s Case*, 5 Co. 16a, 17b, 77 Eng. Rep. 72, 76 (K. B. 1583).

<sup>30</sup> *See Young v. Crescent Development Co.*, 240 N. Y. 244, 148 N. E. 510 (1925).

<sup>31</sup> *Bachmann, Emmerich & Co. v. S. A. Wenger & Co.*, 204 App. Div. 282, 197 N. Y. Supp. 879 (1st Dep’t 1923).

<sup>32</sup> *Buxton v. Mallery*, 245 N. Y. 337, 157 N. E. 259 (1927).

<sup>33</sup> *Smith Fireproof Construction Co. v. Thompson-Starrett Co.*, 247 N. Y. 277, 160 N. E. 369 (1928).

<sup>34</sup> *Matter of Lehman v. Ostrovsky*, 264 N. Y. 130, 190 N. E. 208 (1934).

compel arbitration because of unpaid notes given pursuant to a contract which provided for arbitration was denied on the ground that there was no dispute since the defendant admitted liability.<sup>35</sup>

On the other hand, a clause reading, "any dispute arising out of this contract shall be arbitrated" gave arbitrators the power to determine any dispute as to the construction of the contract;<sup>36</sup> a clause stating, "any dispute arising under this contract shall be submitted to an arbitrator" included a claim for damages for breach of contract;<sup>37</sup> customer's contract with broker authorizing the latter to close out former's account when broker deemed it necessary and including a clause, "any controversy arising between us shall be determined by arbitration" was held to cover a dispute over a guaranty by the customer of his brother's account with the broker made three years later.<sup>38</sup>

Parties, fearing judicial interpretation not in accord with their intent, may tend to incorporate the unlimited type of clause. Caution should be exercised in implementing an unlimited clause, because arbitrators are not bound by rules of law, such as contract and evidence principles, nor by precedent. Thus, prudently drawn protective clauses may be ignored by the arbitrator. Each situation will require careful consideration so that the intention of the parties as to the type of dispute they wish to be settled by arbitration will be carried out.<sup>39</sup>

Section 1449 provides for the necessity of a writing. To fall within the scope of this article, a contract to arbitrate must be in writing. A submission agreement to arbitrate an existing dispute is void unless it or some memorandum thereof be in writing and subscribed by the party to be charged or by his lawful agent. It is to be noted that only a submission agreement must be subscribed while the contract to arbitrate future controversy need only be in writing.<sup>40</sup>

The direct enforcement of arbitration agreements by an order compelling arbitration is authorized by Section 1450. Proceedings under this section presuppose the existence of a valid and enforceable contract at the time the remedy is sought, since arbitration clauses are directed to the remedy and not to the validity or existence of the contract itself.<sup>41</sup> Thus, a provision for arbitration may be

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<sup>35</sup> *Matter of Webster v. Van Allen*, 217 App. Div. 219, 216 N. Y. Supp. 552 (4th Dep't 1926) (strong dissenting opinion).

<sup>36</sup> *Itoh & Co., Ltd. v. Boyer Oil Co., Inc.*, 198 App. Div. 881, 191 N. Y. Supp. 290 (1st Dep't 1921). See Note, 136 A. L. R. 366 (1942).

<sup>37</sup> *General Footwear v. A. C. Lawrence Leather Co.*, 252 N. Y. 577, 170 N. E. 149 (1929).

<sup>38</sup> *Matter of Newburger v. Lubell*, 257 N. Y. 213, 177 N. E. 424 (1931).

<sup>39</sup> WILLISTON, *CONTRACTS* § 1924 (rev. ed. 1938).

<sup>40</sup> *Samuel Kaplan & Sons, Inc. v. Fascinator Blouse Co.*, 70 N. Y. S. 2d 8 (Sup. Ct. 1947).

<sup>41</sup> *Matter of Kramer & Uchitelle*, 288 N. Y. 467, 43 N. E. 2d 493 (1942).

resisted.<sup>42</sup> A motion to compel arbitration is generally upheld or denied on the following rationale. Whether the parties made a contract to arbitrate is to be decided by the court regardless of whether that question be one of law or fact.<sup>43</sup> This is so, even though a case may involve inquiry to determine whether the apparent consent of one party was induced by fraud<sup>44</sup> or duress.<sup>45</sup> The same is applicable to infants'<sup>46</sup> and illegal<sup>47</sup> transactions. Where the arbitration clause is but an incidental part of an indivisible contract which has been ended by *force majeure* after its formation, the clause falls along with the other parts of the contract and arbitration will not be ordered,<sup>48</sup> as in the above situations where the primary contract is either void, voidable or unenforceable.<sup>49</sup> But where the contract has been made providing for arbitration of controversies, arbitration is generally ordered, even though it is claimed that the contract was cancelled by act of the parties,<sup>50</sup> and even though one party has so acted as to give ground for rescission, unless rescission has already been obtained by judicial decree.<sup>51</sup> It is thought that such facts should be ascertained by the arbitrator.<sup>52</sup> The distinguishing feature appears to be that in the former where the motion to arbitrate was denied the parties defended on the ground that there was no valid or enforceable contract or that the contract was put to an end by a *force majeure*, whereas in the latter where the motion to arbitrate

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<sup>42</sup> *Manufacturers Chemical Co., Inc. v. Caswell Strauss & Co.*, 259 App. Div. 321, 19 N. Y. S. 2d 171 (1st Dep't 1940), *appeal dismissed*, 283 N. Y. 679, 28 N. E. 2d 404 (1940).

<sup>43</sup> But by virtue of Section 1450 of this article a jury may be demanded.

<sup>44</sup> *Newburger v. Gold*, 229 App. Div. 572, 243 N. Y. Supp. 51 (1st Dep't), *aff'd without opinion*, 255 N. Y. 532, 175 N. E. 301 (1930); *Ermolieff v. Liss*, 140 Misc. 214, 250 N. Y. Supp. 235 (Sup. Ct. 1931); *Horli Chemical Sales Corp. v. Aliphant*, 68 N. Y. S. 2d 177 (Sup. Ct. 1945). See *Metro Goldwyn Mayer v. Dewitt Development Corp.*, 150 Misc. 408, 269 N. Y. Supp. 104 (Sup. Ct. 1931).

<sup>45</sup> *Application of Gruen*, 173 Misc. 765, 18 N. Y. S. 2d 999 (Sup. Ct. 1940).

<sup>46</sup> *Farin v. Sercarz*, 179 Misc. 490, 39 N. Y. S. 2d 482 (Sup. Ct. 1942).

<sup>47</sup> *Metro Plan v. Miscione*, 257 App. Div. 652, 15 N. Y. S. 2d 35 (1st Dep't 1939) (usury); *cf. In re Gale v. Hilts*, 262 App. Div. 834, 28 N. Y. S. 2d 270 (1st Dep't 1941) (usury); STURGES, COMMERCIAL ARBITRATION & AWARDS § 61 (1930).

<sup>48</sup> *Matter of Kramer & Uchitelle, Inc.*, 288 N. Y. 467, 43 N. E. 2d 493 (1942).

<sup>49</sup> *But cf. Matter of Exeter Mfg. Co.*, 254 App. Div. 496, 5 N. Y. S. 2d 438 (1st Dep't 1938) (majority held that since this legislation had its own Statute of Frauds section, that Section 85 of the New York Personal Property Law was not a defense to a motion for arbitration, but see strong dissenting opinion).

<sup>50</sup> *Lipman v. Haeuser Shellac Co.*, 289 N. Y. 76, 43 N. E. 2d 817 (1942); *Aqua Mfg. Co. v. Warshow & Sons*, 179 Misc. 949, 40 N. Y. S. 2d 564 (Sup. Ct. 1943).

<sup>51</sup> *Matter of Kahn's Application*, 284 N. Y. 515, 32 N. E. 2d 534 (1940).

<sup>52</sup> Prof. Williston is of the opinion that the court should determine these facts, WILLISTON, CONTRACTS § 1920 n. 28 (rev. ed. 1938).

was allowed the defense interposed was the act of the parties themselves and the parties clearly intended to arbitrate disputes arising from their acts under the contract, and just as clearly did not intend to arbitrate the legal effect of government action (*force majeure*) on their contract, or that there was a primary contract at the outset. It is to be noted that there may be an enforceable submission agreement of an existing dispute regardless of the validity of the document which gave rise to it except where the submission contract itself is unenforceable or illegal.<sup>53</sup>

The Supreme Court is exclusively empowered by Section 1451 to enjoin any action brought in violation of an agreement to settle differences extrajudicially.<sup>54</sup> This is the indirect method of compulsion mentioned above. If the issues in an action are clearly referable to arbitration, a motion for an order staying all proceedings until arbitration shall have been had must be granted by the court.<sup>55</sup> The stay provided for in this statute is the exclusive remedy of a defendant, that is, it is exclusive in the sense that it is not proper for him to plead the arbitration agreement as a defense or counterclaim because the maximum legal effect of such pleading is that the defendant evinces a manifestation not to waive his right to compel arbitration under Section 1450. The courts feel that the Legislature has provided a method of enforcing that which was previously unenforceable and thus, the defendant must use those means or none at all. Certainly, it can not be said that a plaintiff fails to state a *prima facie* cause of action merely because the contract upon which suit is brought includes an agreement to arbitrate which is not a condition precedent.<sup>56</sup> As one may waive his right to enforce arbitration, so one may waive his right to compel a stay of proceeding.<sup>57</sup>

Section 1452 provides the machinery for maintaining arbitration where the parties failed to provide for it or where their own arrangement has not succeeded. If no method is set forth in the contract to name an umpire, or if a mode is furnished and any party fails to avail himself of the plan, or if for any reason there is a lapse in designating one, then, upon application of either party to the controversy, the Supreme Court shall appoint an arbitrator or as many as the case requires. But, unless it is otherwise provided for, the arbi-

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<sup>53</sup> WILLISTON, CONTRACTS § 1921 (rev. ed. 1938).

<sup>54</sup> *Kipp v. Hamburg-American Line*, 134 Misc. 481, 235 N. Y. Supp. 450 (Sup. Ct. 1929), *aff'd without opinion*, 228 App. Div. 802, 239 N. Y. Supp. 914 (1st Dep't 1930) (City Court of New York City has no jurisdiction under this section).

<sup>55</sup> *Syracuse Plaster Co. v. Agostine Brothers Bldg. Corp.*, 169 Misc. 564, 7 N. Y. S. 2d 897 (Sup. Ct. 1938).

<sup>56</sup> *American Reserve Insurance Co. v. China Insurance Co.*, 297 N. Y. 322, 79 N. E. 2d 425 (1948).

<sup>57</sup> *Matter of Zimmerman*, 236 N. Y. 15, 139 N. E. 764 (1923). *But cf. Chapman-Kruege Corp. v. Jaffe*, 239 App. Div. 795, 263 N. Y. Supp. 737 (2d Dep't 1933).

tration shall be by a single arbiter. An umpire selected by the court has the same power as if he had been specifically named in the agreement.

The procedure for the appointment of an additional arbitrator is found in Section 1453. But, unless the contract expressly states that an additional umpire shall be selected, an extra one cannot be named. This additional arbitrator must sit with the original arbitrators upon the hearing and if testimony has been taken before his selection, the matter must be reheard unless rehearing is waived in the agreement or by the subsequent written consent of the parties. In construing this statute, it has been held that where the agreement provided for the choosing of a substitute if one of the arbitrators ceases to act, a vacancy need not be filled, if the withdrawal of one of three arbitrators occurs after the case had been heard, considered, and practically decided, since the withdrawal did not prejudice the parties' rights to a hearing before a full board, and because the award to be valid required only a majority vote.<sup>58</sup>

Section 1454 prescribes the method by which the hearings will be carried out subject to any terms in the agreement. The arbitrators must appoint a time and place for a hearing of the differences submitted to them and must notify each of the parties. A majority of them may adjourn the hearing from time to time upon the application of either party for a good cause shown or upon their own volition. However, they cannot adjourn beyond the day fixed for rendering the award unless the time is extended by the written consent of the parties,<sup>59</sup> or unless the parties continue with the proceedings after the adjournment without objecting. The court has the power to order the arbitrators to proceed promptly with the hearing and determination.

At common law the arbiters were not required to take an oath,<sup>60</sup> but by legislation it is now necessary. Section 1455 states, "Before hearing any testimony, arbitrators selected either as prescribed in this article or *otherwise*<sup>61</sup> must be sworn, . . ." By the word "otherwise," the oath is applicable to common law arbitration as well as proceedings under this article.<sup>62</sup> This requirement may be waived by the written consent of the parties, or if they continue with the hearing without objecting to the failure of the umpires to take the oath.

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<sup>58</sup> Matter of A. E. Fire Insurance Co., 240 N. Y. 398, 148 N. E. 562 (1925).

<sup>59</sup> Matter of Slater, 236 App. Div. 694, 258 N. Y. Supp. 253 (2d Dep't 1932).

<sup>60</sup> STURGES, COMMERCIAL ARBITRATION AWARD § 208 (1930).

<sup>61</sup> Italics mine.

<sup>62</sup> Hinkle v. Zimmerman, 184 N. Y. 114, 76 N. E. 1080 (1906); Keppler v. Nessler, 225 App. Div. 99, 232 N. Y. Supp. 232 (1st Dep't 1928).

It should be observed that neither this section nor Section 1453 requires the swearing of witnesses as an indispensable part of the proceedings.<sup>63</sup>

At common law where the arbitration necessitated a hearing by three, with authority in two to make an award, two had the right to hear when the third was notified and refused to attend;<sup>64</sup> but today under Section 1456 all of them are required to hear all of the evidence, otherwise, the award is a nullity.<sup>65</sup> Even though all must attend the hearing, an award by a majority is valid unless the concurrence of all is expressly required in the agreement. They may require any person to appear before them as a witness, and they have the same powers which are conferred upon a board authorized by law to receive testimony.<sup>66</sup>

In the absence of an express agreement in the contract, the fees and expenses of the arbitrators are governed by Section 1457. The award may require the payment, by either party, of their fees and expenses not to exceed the amount which is allowed to a like number of referees in the Supreme Court. If they claim under this section, they may not demand the monies in advance of the award.<sup>67</sup> The fact that an award allowed fees in excess of the amounts stipulated by this section does not in and of itself require *vacatur* of the award.<sup>68</sup> And they are not denied compensation by reason of the refusal of the court to enforce their award where there is no claim of fraud or corruption.<sup>69</sup>

Confirmation and enforceability of the award is authorized by Section 1458 without previous adjudication of the existence of a contract to arbitrate. However, a party who has not participated in any of the proceedings and who has not been served with an application to compel arbitration under Section 1450 may put in issue the making of the contract, when confirmation of the award is sought. But, if a notice of an intention to conduct the proceedings has been personally served upon him, he may only raise the above issue by a motion to stay arbitration. Notice of this motion must be served within ten days after the service of the notice of an intention to arbitrate. The notice to arbitrate must expressly state that unless within ten days after its service, the party served therewith, serve

<sup>63</sup> *Hano v. Isaac H. Blanchard Co.*, 199 N. Y. Supp. 227 (Sup. Ct. 1922).

<sup>64</sup> *Crofoot v. Allen*, 2 Wend. 494 (N. Y. 1829).

<sup>65</sup> *Bullard v. Morgan H. Grace Co., Inc.*, 240 N. Y. 388, 148 N. E. 559 (1925); *cf. Matter of A. E. Fire Insurance Co. v. N. J. Insurance Co.*, 240 N. Y. 398, 148 N. E. 562 (1925).

<sup>66</sup> *Cf. Matter of Sun-Ray Cloak Co., Inc.*, 256 App. Div. 620, 11 N. Y. S. 2d 202 (1st Dep't 1939) (power to issue subpoena).

<sup>67</sup> *Hub Industries v. George Mfg. Corp.*, 269 App. Div. 177, 54 N. Y. S. 2d 741 (2d Dep't), *aff'd without opinion*, 294 N. Y. 897, 63 N. E. 2d 28 (1945).

<sup>68</sup> *In re Blaike*, 119 Misc. 791, 198 N. Y. Supp. 291 (Sup. Ct. 1922), *aff'd without opinion*, 206 App. Div. 740, 199 N. Y. Supp. 911 (1st Dep't 1923).

<sup>69</sup> *Everett v. Erie County*, 148 Misc. 778, 266 N. Y. Supp. 299 (Sup. Ct. 1933).

a notice of a motion to stay the arbitration, he will thereafter be barred from putting in issue the making of the contract. This provision is necessary so that a party is not denied "due process of law" because such a statement sets forth the consequences to follow on a failure to act.<sup>70</sup> Where a party in either a motion to stay, or in opposition to the award, sets forth evidentiary facts raising a substantial issue as to the making of the contract, an immediate trial of this issue, without a jury, shall be had. The provision that a notice of an intention to arbitrate be personally served is not mandatory. The only consequence of personal service of such notice is to require the objectant to raise the issue by a motion for a stay, while if it is not personally served, he may raise the objection on the motion to confirm the award.<sup>71</sup>

Section 1459 declares that arbitration of a controversy shall be deemed a special proceeding<sup>72</sup> of which the court specified in the contract or if none is specified, the Supreme Court shall have jurisdiction,<sup>73</sup> and that any application to the court shall be made and heard in the manner provided by law for the making and hearing of motions except as otherwise expressly provided for in this article. Thus, a bill of particulars<sup>74</sup> or examination before trial<sup>75</sup> is not allowed.

Under Section 1460, the award to be enforceable must be in writing, and must be made within the time limited by the agreement,<sup>76</sup> subscribed by the arbiters,<sup>77</sup> acknowledged<sup>78</sup> or proved and certified in the same manner as a recorded deed and either filed with the clerk of the court having jurisdiction as set forth in Section 1459 or delivered to one of the parties.

In order to confirm the award, Section 1461 requires that either party to the controversy must apply to the court having jurisdiction

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<sup>70</sup> *MacNamara v. Doubleday*, 270 App. Div. 645, 62 N. Y. S. 2d 369 (3d Dep't 1946); *Schafran & Finkel v. Lowenstein & Sons*, 280 N. Y. 164, 19 N. E. 2d 1005 (1939).

<sup>71</sup> *Matter of United Culinary Employees*, 272 App. Div. 491, 71 N. Y. S. 2d 160 (1st Dep't 1947), *aff'd without opinion*, 299 N. Y. 577, 86 N. E. 2d 104 (1949); *Matter of Hesslein & Co.*, 281 N. Y. 26, 22 N. E. 2d 149 (1939).

<sup>72</sup> *In re Vanguard Films*, 188 Misc. 796, 67 N. Y. S. 2d 893 (Sup. Ct. 1947).

<sup>73</sup> *Wolf X-Ray Products, Inc. v. Sun Tool & Gauge Corp.*, 52 N. Y. S. 2d 924 (Sup. Ct. 1944).

<sup>74</sup> *Smyth v. Board of Education of the Town of North Hempstead*, 128 Misc. 49, 217 N. Y. Supp. 231 (Sup. Ct. 1925).

<sup>75</sup> *Matter of Isador Schwartz*, 127 Misc. 452, 217 N. Y. Supp. 233 (Sup. Ct. 1925).

<sup>76</sup> *Matter of Broadway-Fortieth St. Corp.*, 296 N. Y. 165, 71 N. E. 2d 451 (1947).

<sup>77</sup> *Matter of Yeshiva Rabbi Solomon Kluger*, 188 Misc. 179, 65 N. Y. S. 2d 524 (Sup. Ct. 1946).

<sup>78</sup> *Abrams v. Lewis Purses, Inc.*, 172 Misc. 579, 15 N. Y. S. 2d 903 (Sup. Ct. 1939); *Amfo Realty Corp. v. Triad Portable Case Corp.*, 72 N. Y. S. 2d 326 (Sup. Ct. 1947); *In re Herman*, 170 Misc. 852, 10 N. Y. S. 2d 46 (Sup. Ct. 1938).

within one year of its making. The court must grant such an order<sup>79</sup> unless the award is vacated, modified, or corrected<sup>80</sup> as prescribed in the next two sections or is unenforceable by virtue of Section 1458.

Section 1462 makes it mandatory for the court to vacate an award on the application of any party to the dispute:<sup>81</sup> where it was procured by corruption, fraud, or other undue means;<sup>82</sup> where there was evident partiality<sup>83</sup> or misconduct by refusing to adjourn on a good cause shown,<sup>84</sup> or by refusing to hear pertinent evidence,<sup>85</sup> or by any misbehavior which prejudiced the rights of the parties;<sup>86</sup> where the arbitrators exceeded their authority<sup>87</sup> or imperfectly executed their powers;<sup>88</sup> and where there was no valid contract and the objections had been raised under the conditions set forth in Section 1458. The court will not interfere unless there is shown a ground as set forth specifically in this section.<sup>89</sup> If none is forthcoming, the award is considered impregnable.<sup>90</sup>

Section 1462(a) requires the court to modify the award<sup>91</sup> where there was an evident miscalculation of figures<sup>92</sup> or an evident mistake in the description of any person, thing, or property referred to in the award, where the arbitrators have awarded upon matters not submitted to them which do not affect the merits of the decision,<sup>93</sup> and where the award is imperfect in a matter of form.<sup>94</sup>

<sup>79</sup> *Everett v. Brown*, 120 Misc. 349, 198 N. Y. Supp. 462 (Sup. Ct. 1923).

<sup>80</sup> *Everitt v. Board of Education of City of Buffalo*, 131 Misc. 507, 228 N. Y. Supp. 222 (Sup. Ct.), *aff'd without opinion*, 224 App. Div. 779, 230 N. Y. Supp. 832 (4th Dep't 1928).

<sup>81</sup> *Cf. Romanoff v. Nilow Realty Corp.*, 273 App. Div. 788, 75 N. Y. S. 2d 666 (2d Dep't 1947) (not a party to the proceeding).

<sup>82</sup> *Brody v. Owen*, 259 App. Div. 720, 18 N. Y. S. 2d 28 (2d Dep't 1940).

<sup>83</sup> *Miller v. Weiner*, 260 App. Div. 444, 23 N. Y. S. 2d 120 (1st Dep't 1940); *Shirley Silk Co., Inc. v. American Silk Mills, Inc.*, 260 App. Div. 572, 23 N. Y. S. 2d 254 (1st Dep't 1940).

<sup>84</sup> *Navarro's Application*, 266 App. Div. 181, 41 N. Y. S. 2d 585 (1st Dep't 1943).

<sup>85</sup> *Universal Metal Products Co. v. U. E. R. & M. W. of A. Local 1225 Union*, 179 Misc. 1044, 40 N. Y. S. 2d 265 (Sup. Ct. 1943).

<sup>86</sup> *Cf. Bridgeman & Holtzman v. Gondok*, 235 App. Div. 129, 256 N. Y. Supp. 491 (2d Dep't 1932).

<sup>87</sup> See note 82 *supra*.

<sup>88</sup> *Hauck v. Rochester Taxicab Co.*, 127 Misc. 759, 217 N. Y. Supp. 2 (Sup. Ct. 1926).

<sup>89</sup> *Goff & Sons, Inc. v. Rheinauer*, 199 App. Div. 617, 192 N. Y. Supp. 92 (1st Dep't 1922).

<sup>90</sup> *Pine Street Realty Co., Inc. v. Coutroulos*, 233 App. Div. 404, 253 N. Y. Supp. 174 (1st Dep't 1931).

<sup>91</sup> See note 79 *supra*.

<sup>92</sup> *In re Blaikie*, 206 App. Div. 740, 199 N. Y. Supp. 911 (1st Dep't 1923) (reduction of arbitrator's fees); *Kutsukian v. Bossom*, 270 App. Div. 396, 60 N. Y. S. 2d 27 (1st Dep't 1946) (mistake in multiplication).

<sup>93</sup> *Amalgamated Watch v. Jaeger Watch*, 270 App. Div. 802, 59 N. Y. S. 2d 731 (1st Dep't 1946).

<sup>94</sup> *Accord, Bond v. Shubert*, 264 App. Div. 484, 36 N. Y. S. 2d 147 (3d Dep't 1942), *aff'd without opinion*, 290 N. Y. 901, 50 N. E. 2d 299 (1943).

If a party wishes to modify or affirmatively vacate the award, Section 1463 requires notice of a motion to this effect to be served upon the adverse party within three months after the award is filed or delivered. The timeliness of this motion is mandatory and may not be disregarded whether the discrepancy is in matter of form or of substance.<sup>95</sup> However, by virtue of this section, a defendant may oppose a motion to confirm an award at any time on any of the grounds specified in Section 1462.

If the award be confirmed, Section 1464 provides for the entry of judgment thereon and Section 1465 sets forth what shall constitute the judgment roll.<sup>96</sup> By virtue of Section 1466, the judgment entered is regarded in all respects as a judgment in an action subject to all the provisions of law relating to such judgment.<sup>97</sup> Section 1467 allows an appeal to be taken from the judgment entered upon an award as from an order or judgment in an action.<sup>98</sup>

Section 1468 authorizes the continuance of arbitration agreements on the death or incompetency of either party. The right to arbitration will not be lost since whoever succeeds to the dispute succeeds also to the manner of settling it.<sup>99</sup>

The final section of this article, 1469, has been interpreted as a saving clause. The use of the words as set forth in this statute manifest an intention on the part of the Legislature to recognize and permit common law arbitration although an alternative and broader method is permitted by this legislation.<sup>100</sup> It states, ". . . And, except as otherwise expressly prescribed therein [in Article 84], this article does not affect a . . . contract made otherwise than as prescribed therein . . ." If the parties demonstrate their intention to arbitrate under the article, its requirements will prevail. If the parties do not so manifest their purpose, common law principles control<sup>101</sup> except where this legislation is construed to be applicable to both types of arbitration.<sup>102</sup>

During recent years, arbitration has been increasingly adopted in the settlement of commercial disputes. Prior to 1920 it had been utilized only occasionally because of its unenforceability. In thirty years it has become a recognized procedure of American business and

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<sup>95</sup> *In re Mayo Realty Corp.*, 68 N. Y. S. 2d 843 (Sup. Ct. 1947). See note 94 *supra*.

<sup>96</sup> *Cf. Jacobowitz v. Herson*, 268 N. Y. 130, 197 N. E. 169 (1935).

<sup>97</sup> *Arcadu v. Levinson*, 250 N. Y. 355, 165 N. E. 809 (1929).

<sup>98</sup> *Kutsukian v. Bossom*, 270 App. Div. 396, 60 N. Y. S. 2d 27 (1st Dep't 1946).

<sup>99</sup> *Buccini v. Paterno Construction Co.*, 253 N. Y. 256, 170 N. E. 910 (1930) (executor); *In re Lowenthal*, 199 App. Div. 39, 191 N. Y. Supp. 282 (1st Dep't), *aff'd without opinion*, 233 N. Y. 621, 135 N. E. 944 (1922) (receiver of a corporation). See Note, 142 A. L. R. 1092 (1943).

<sup>100</sup> See note 63 *supra*.

<sup>101</sup> See *Sandford Laundry, Inc. v. Simon*, 285 N. Y. 488, 493, 35 N. E. 2d 182, 185 (1941).

<sup>102</sup> *Hinkle v. Zimmerman*, 184 N. Y. 114, 76 N. E. 1080 (1906).

commerce. Its growth can be accredited to sponsorship by organizations such as the American Arbitration Association, and to the general practicality of most merchants. It is difficult to ascertain its development statistically because the number of arbitration cases may give an illusory picture. For example, a collapse in a certain market or a run in specific goods in a particular market can cause a large number of cases in a certain industry in any one year. Yet, we know that the merchant is adapting himself more and more to its process by insisting that some type of arbitration clause be included in his contracts. This, in itself, is indicative of the trend.

"The language, spirit, and purpose of the Arbitration Law were to keep such proceedings free from the technical practice of courts of law and to avoid recourse to formal procedure required in court actions."<sup>103</sup> Arbitration is a salutary arrangement recognized as beneficial in practically every industry today. That it has become increasingly advantageous to and approved by the merchant is convincingly clear when one considers its role as a time and expense saver. By this proceeding, parties are assured of a speedy disposition of their case because a prompter hearing results. By fixing a time which is mutually desirable and convenient to all concerned parties avoid adjournment and frequent appearances in court. The arbitrators are generally in session more hours per day than their counterparts in the legal forum and because of the absence of a jury, much of the oratorical gibberish and byplay frequently necessary in jury trials, is missing. This saving of time unquestionably tends to reduce the costs involved to a necessary minimum. The proceeding is simple and free from the many technicalities which confront and retard litigation. The arbitrators are usually persons possessing the qualifications necessary to immediately and completely appreciate the issues involved, which in contrast to the preliminary and continual enlightenment of the judge and jury in many court proceedings, is highly desirable.

In a word, arbitration provides an accelerated and inexpensive procedure resulting in an award conclusive in most cases, with little of the enmity which often erupts in court litigation, destroying a merchant's good will.

HARRY L. BRISTOL.

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<sup>103</sup> *Smyth v. Board of Education of the Town of North Hempstead*, 128 Misc. 49, 50, 217 N. Y. Supp. 231, 232 (Sup. Ct. 1925).