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Arbitration--Not "Suit" Within Meaning of Insurance Policy (Madawick Cont. Co. v. Travelers Ins. Co., 281 App. Div. 754 (2d Dep't 1953))

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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 obligations²⁶ 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,

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).

arbitration has long been accorded the status of a quasi-judicial tribunal,⁴ recognized by the established courts as a legitimate and conclusive method of determining facts and issues of law as between the parties to the contract or submission.⁵ The requirement of notice before hearing,⁶ the administration of the oath to witnesses, the right to cross-examine⁷—all bespeak the judicial nature of the proceeding.⁸ Recent statutes have added to its dignity by designating arbitration a "special proceeding,"⁹ including it within the laws regulating the established courts,¹⁰ and putting the coercive power of the law behind the docketed award of the arbitrators.¹¹ The arbitration award is conclusive, unless it can be vacated on the grounds specifically defined by statute¹² or limited by decisional law.¹³

The term "suit" has been defined generally as a "proceeding in a court of justice."¹⁴ This is not limited, however, to a specific form or type of action,¹⁵ but includes any proceeding whereby the plaintiff

⁴ Cf. *Atlantic Rayon Corp. v. Goldsmith*, 277 App. Div. 554, 100 N. Y. S. 2d 849 (1st Dep't 1950), *leave to appeal denied*, 302 N. Y. 842, 100 N. E. 2d 40 (1951); *Application of Steuben*, 97 N. Y. S. 2d 613 (Sup. Ct. 1950); *Produce Refrigerator Co. v. Norwich Union Fire Ins. Soc.*, 91 Minn. 210, 97 N. W. 875 (1904); *see American Eagle Fire Ins. Co. v. New Jersey Ins. Co.*, *supra* note 3, at 405, 148 N. E. at 564.

⁵ *See Matter of Fletcher*, 237 N. Y. 440, 446, 143 N. E. 248, 250 (1924); *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N. Y. 392, 399 (1875); *Webster v. Van Allen*, 217 App. Div. 219, 221, 216 N. Y. Supp. 552, 554 (4th Dep't 1926).

⁶ Cf. *Stefano Berizzi Co. v. Krausz*, 239 N. Y. 315, 146 N. E. 436 (1925); *Shirely v. Knoblock*, 8 Ind. App. 433, 35 N. E. 1028, 1030 (1893); *see Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards*, 1 Wash. 2d 401, 96 P. 2d 257, 260 (1939).

⁷ Cf. *People v. Board of Supervisors*, 15 N. Y. Supp. 748, 750 (Sup. Ct. 1891); *see KELLOR, ARBITRATION IN ACTION* 91 (1941).

⁸ *See Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards*, *supra* note 6.

⁹ N. Y. CIV. PRAC. ACT § 1459 ("Arbitration . . . [in accordance with this article] . . . shall be deemed a special proceeding . . .").

¹⁰ Cf. *Brody v. Owen*, 259 App. Div. 720, 18 N. Y. S. 2d 28 (2d Dep't 1940); *Matter of Friedman*, 215 App. Div. 130, 213 N. Y. Supp. 369 (1st Dep't 1926); *Schechter v. Atlas Shirt Co.*, 86 N. Y. S. 2d 220, 222 (Sup. Ct. 1949); *see N. Y. CIV. PRAC. ACT § 1456* (Power of Arbitrators).

¹¹ N. Y. CIV. PRAC. ACT § 1466 (judgment on award has same force and effect as judgment in action).

¹² *See N. Y. CIV. PRAC. ACT § 1462* (grounds for motion to vacate award); *Smith v. Cutler*, 10 Wend. 589 (N. Y. 1833).

¹³ *See Bennett's Adm'r v. Russell*, 34 Mo. 524 (1864) (no vacating for mere error of judgment, law, or conclusions of fact); *Fudickar v. Guardian Mut. Life Ins. Co.*, 62 N. Y. 392 (1875); *Matter of Friedman*, *supra* note 10; *Everett v. Brown*, 120 Misc. 349, 198 N. Y. Supp. 462 (Sup. Ct. 1923); *Forshay v. G. H. & H. R. R.*, 16 Tex. 516 (1856).

¹⁴ "A suit is a proceeding in a court of justice for the enforcement of a right." *Drake v. Gilmore*, 52 N. Y. 389, 394 (1873); *see Barton v. Reynolds*, 81 Misc. 15, 18, 142 N. Y. Supp. 895, 897 (Sup. Ct. 1913).

¹⁵ *See Didier v. Davison*, 10 Paige 515, 517 (N. Y. 1844).

seeks to enforce a right by judicial means.¹⁶ The gist of the idea expressed by the word seems to be a controversy which is determined in a fair and orderly fashion.¹⁷ It would appear, therefore, that if a tribunal other than a regularly established court nevertheless determines controversies in an orderly and just fashion, the action before such tribunal should be denominated a "suit."¹⁸ Arbitration proceedings appear to fall into this category.¹⁹

In a suit on an insurance policy, the general rule is to construe the instrument against the party who prepared it.²⁰ Rather than adhere to fine distinctions, the interpretation sought is that which the ordinary person of average intelligence would attach to the words of the policy were he to buy the insurance.²¹ In applying this test, the subject matter of the policy, its purpose, and the circumstances surrounding its issuance must be taken into consideration.²² Evidence of a trade custom is admissible to explain the intent of the parties;²³

¹⁶ Cf. *Weston v. City Council*, 2 Pet. 449, 464 (U. S. 1829). "The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding . . . is a suit." *Ibid.*; cf. *Syracuse Plaster Co. v. Agostini Bros. Bldg. Corp.*, 169 Misc. 564, 7 N. Y. S. 2d 897 (Sup. Ct. 1938); *Matter of Hayt*, 39 Misc. 356, 358, 79 N. Y. Supp. 845, 846 (Sup. Ct. 1902) (suit includes ". . . every judicial proceeding for the enforcement of a right . . ."); see *Tilden v. Aitkin*, 37 App. Div. 28, 31, 55 N. Y. Supp. 735, 737 (3d Dep't 1899) (suit might include special proceeding).

¹⁷ Cf. *Barrett v. Consolidated Coal Co.*, 65 F. Supp. 291 (N. D. Ala. 1946) (elements of suit: proper complaint, final determination on pleadings); *McWilliams v. Hopkins*, 11 F. 2d 793, 795 (S. D. Cal. 1926) ("The only real limitation is that it must be between persons or parties, with the result that it settles an issuable dispute, and not have its effect purely in rem. . ."); *Box v. Straight Bayou Drainage Dist.*, 121 Miss. 850, 84 So. 3 (1920).

¹⁸ Cf. *People v. Burke*, 141 Misc. 663, 254 N. Y. Supp. 22 (Sup. Ct. 1931). When proceedings ". . . pass beyond the stage of administration and reach the point of requiring judicial determination, then a 'suit' results . . ." *Id.* at 672, 254 N. Y. Supp. at 33.

¹⁹ *But cf. In re Red Cross Line*, 277 Fed. 853 (S. D. N. Y. 1921) (arbitration not suit since not authorized by Federal statute); *Crook v. Chambers*, 40 Ala. 239 (1866) (Alabama did not include arbitration under its Judiciary Law; New York does).

²⁰ See *Firemen's Ins. Co. v. Brooks*, 32 F. 2d 451, 452 (6th Cir. 1929); see *Taylor v. United States Cas. Co.*, 269 N. Y. 360, 199 N. E. 620 (1936).

²¹ Cf. *Dupee v. Travelers Ins. Co.*, 253 App. Div. 278, 2 N. Y. S. 2d 62 (2d Dep't 1938); see 13 APPLEMAN, INSURANCE LAW AND PRACTICE § 7384 (1943).

²² Cf. *Carl Ingalls, Inc. v. Hartford Fire Ins. Co.*, 137 Cal. App. 741, 31 P. 2d 414 (1934); *Shore Bridge Corp. v. New York*, 186 Misc. 1005, 61 N. Y. S. 2d 32 (Ct. Cl.), *aff'd mem.*, 271 App. Div. 811, 66 N. Y. S. 2d 921 (4th Dep't 1946); *Alterman v. Home Ins. Co.*, 112 Misc. 445, 183 N. Y. Supp. 62 (Sup. Ct. 1920).

²³ Cf. *Gumbinsky Bros. Co. v. Smalley*, 203 App. Div. 661, 667, 197 N. Y. Supp. 530, 536 (1st Dep't 1922), *aff'd mem.*, 235 N. Y. 619, 139 N. E. 758 (1923) (parol admissible where words have peculiar significance under the circumstances); see *Oswego Falls P. & P. Co. v. Strecher Lith. Co.*, 215 N. Y. 98, 109 N. E. 92 (1915); 3 WILLISTON, CONTRACTS § 650 (1936) (evidence of usage admissible to explain or give particular meaning to words of doubtful as well as clear meaning).

and any doubt is to be decided in favor of the insured.²⁴ If the insured was justified in assuming that the usage of his trade²⁵ was known to the insurer when the policy was issued, then the insurer will be bound thereby since it had actual or constructive notice of such usage.²⁶ In liability policies, as in other forms of insurance, compliance with the terms of the policy specifying the risks covered is a condition precedent to successful suits against the insurer.²⁷ Where such compliance depends upon the meaning of the terms, no construction should be employed which will serve to defeat the effectiveness of the policy and recovery by the insured²⁸ unless no other alternative is available.²⁹

In the instant case, the contract between the plaintiff and its general contractor was of a standard form prepared by the New York Building Congress,³⁰ providing for arbitration of all disputes arising out of or relating to the contract, and for liability insurance to be obtained by the plaintiff.³¹ In the light of these facts, use of the word "suit" in the policy was ambiguous; and under the rules of construction outlined above, its meaning should be construed in favor of the insured. The majority of the court in the Appellate Division, however, chose to ignore this consideration, and held the policy a vain gesture, and the insurer not obligated either to defend in the arbitration, or to pay any judgment entered on an award.

In the dissenting opinion, the Presiding Justice asserted that the defendant is obligated to pay ". . . any judgment which may be entered on the arbitration award." The insurance policy referred to ". . . judgment against the insured after actual trial." It would

²⁴ Cf. *Mutual Life Ins. Co. v. Hurni Packing Co.*, 263 U. S. 167 (1923); *Bushey & Sons v. American Ins. Co.*, 237 N. Y. 24, 142 N. E. 340 (1923); *McMartin v. Fidelity & Cas. Co.*, 239 App. Div. 296, 267 N. Y. Supp. 473 (3d Dep't 1933), *rev'd on other grounds*, 264 N. Y. 220, 190 N. E. 414 (1934).

²⁵ See 3 WILLISTON, *CONTRACTS* § 649 (1936) (usage is habitual practice among certain classes or in a trade).

²⁶ See 3 WILLISTON, *CONTRACTS* §§ 656, 661 (1936) (if parties knew or should have known of the usage they are bound by it).

²⁷ Cf. *Mehl v. Patriotic Ins. Co.*, 69 N. Y. S. 2d 408 (Sup. Ct. 1947); *755 Seventh Ave. Corp. v. Carroll*, 266 N. Y. 157, 194 N. E. 69 (1935).

²⁸ Cf. *American Mut. Liability Ins. Co. v. Buckley & Co.*, 117 F. 2d 845 (3d Cir. 1941); *Zeig v. Massachusetts Bonding & Ins. Co.*, 23 F. 2d 665 (2d Cir. 1928) (strict terms of policy not followed); *Rogers v. Aetna Ins. Co.*, 95 Fed. 103 (2d Cir. 1899) (policy had clause excluding loss due to lack of ordinary care, but it was disregarded, and the policy enforced).

²⁹ Cf. *McMartin v. Fidelity & Cas. Co.*, 239 App. Div. 296, 267 N. Y. Supp. 473 (3d Dep't 1933), *rev'd on other grounds*, 264 N. Y. 220, 190 N. E. 414 (1934); see 13 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 7386 (1943) ("Results harmful to the insured and of no rational advantage to the insurer should be reached only when the terms of the insurance policy permit no other result.").

³⁰ See *Madawick Cont. Co. v. Travelers Ins. Co.*, 281 App. Div. 754, 755 (2d Dep't 1953) (dissenting opinion).

³¹ See *Madawick Cont. Co. v. Travelers Ins. Co.*, 202 Misc. 411, 114 N. Y. S. 2d 300 (Sup. Ct. 1952).

seem, therefore, that the arbitration proceeding has achieved recognition, at least in the eyes of the learned dissenting justices, as an "actual trial."³² Such a conclusion is entirely sound, and accords with both the nature of the arbitration proceeding and with the rules of construction for the interpretation of insurance policies.



COPYRIGHT INFRINGEMENT — MEASURE OF DAMAGES WHERE INFRINGER'S PROFIT SHOWN.—Plaintiff sued under a subdivision of the damage section of the Copyright Act¹ for his actual loss and the infringer's profits, or, in the alternative, statutory damages. The appellate court² found that the copyright owner had *suffered* damage due to the infringement, but could not *prove* his actual injury; and that the infringing party, Woolworth Company, had realized a profit of \$899.16. Based upon this evidence, the court awarded the maximum statutory damages pursuant to the "in lieu" provision of the Act. The infringer appealed, asserting that the proof of actual profits precluded the court from resorting to the statutory award. The Supreme Court *held* that since the owner could not prove its actual damage, statutory damages could be awarded even though actual profits were proven. *Woolworth Co. v. Contemporary Arts, Inc.*, 73 Sup. Ct. 222 (1952).

The damage section of the Copyright Act was enacted to serve a dual purpose: to provide an effective remedy for a copyright owner who could not prove the actual amount of his damage³ and to com-

³² It is interesting, however, to note that the dissenters nevertheless concurred with their brothers on the bench in maintaining that arbitration was *not* a suit within the meaning of the policy, though it *would* be an "actual trial" if judgment were entered on the award.

¹ Any person infringing a copyright in any work protected under the copyright laws shall be liable:

(b) "To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement . . . or in lieu of actual damages and profits, such damages as to the court shall appear to be just [damages for certain cases are specified] and such damages shall in no other case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty." 35 STAT. 1081 (1909), as amended, 17 U. S. C. § 101 (Supp. 1952). None of the amendments to the original Act of 1909 have been material to the problems discussed in the article. All cases cited under this Act have been decided under the same provisions of the statute.

² 193 F. 2d 162 (1st Cir. 1951), *cert. granted*, 343 U. S. 963 (1952).

³ Unless he proved specific damages, an injured copyright owner could recover only nominal damages at common law. *See Douglas v. Cunningham*, 294 U. S. 207, 209 (1935).