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## Equitable Relief in Arbitration: A Survey of American Case Law

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# Equitable Relief in Arbitration: A Survey of American Case Law

*Stephen P. Bedell\* and Louis K. Ebling\*\**

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## I. INTRODUCTION

The field of arbitration is growing rapidly.<sup>1</sup> In 1978, the Ameri-

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1. Commentators attribute the growth in arbitration to the greater speed and efficiency associated with arbitration and the costliness and congestion of the judicial system. See, e.g., Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1305 n.7 (1985).

can Arbitration Association conducted 5,675 commercial arbitrations.<sup>2</sup> In 1988, the American Arbitration Association conducted 10,979 commercial arbitrations,<sup>3</sup> representing nearly a 100% increase in the number of arbitrations within the past ten years. The long-term growth of arbitration over the past four decades is even more astonishing. In 1950, the American Arbitration Association arbitrated 1,750 disputes, fewer than 500 of which were commercial. In 1985, the total number of arbitrations increased more than twenty-five times to 45,000, over 8,000 of which were commercial.<sup>4</sup>

In recent years, the United States Supreme Court has given added impetus to the growth of arbitration with a series of pro-arbitration decisions,<sup>5</sup> culminating in its decision in *Shearson/American Express, Inc. v. McMahon*.<sup>6</sup> The *McMahon* decision vastly expanded the scope of arbitrability to include all RICO and securities fraud disputes.<sup>7</sup> As a result of the burgeoning growth in and the judicial acceptance of commercial arbitration, a comprehensive understanding of the scope of arbitration remedies is important.

The nature and extent of the arbitrator's power and authority is a recurring issue in the arbitration context, particularly with respect to commercial arbitration. Of primary concern is the extent of the arbitrator's power to award equitable relief, such as injunctive relief, specific performance, dissolution, reformation, and rescission. This can be a nettlesome problem, especially when an arbitration agreement does not specify the nature and scope of the arbitrator's power to render equitable relief.

The general rule is that the arbitrator's power is derived solely from the language and intent of the arbitration agreement.<sup>8</sup> When an arbitration agreement is drafted broadly, the arbitrator has the

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2. American Arbitration Ass'n, Ten Year Statistical Study: 1976-86 (rev. 1988) (New York unpublished manuscript).

3. *Id.*

4. See Hirshman, *supra* note 1, at 1305 n.7; Furnish, *Commercial Arbitration Agreements and the Uniform Commercial Code*, 67 CAL. L. REV. 317, 317-18 n.1 (1979).

5. See, e.g., Dean Whitter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) (rejecting the "intertwining doctrine"); Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, 473 U.S. 614 (1985) (international antitrust disputes are arbitrable); Southland Corp. v. Keating, 465 U.S. 1 (1984); Moses H. Cone Memorial Hosp. V. Mercury Constr. Co., 460 U.S. 1, 24-25 (1983).

6. 107 S. Ct. 2332 (1987).

7. See Bedell, Harrison & Harvey, *The McMahon Mandate: Compulsory Arbitration of Securities and RICO Claims*, 19 LOY. U. CHI. L.J. 1, 28 (1987).

8. See, e.g., Board of Trustees v. Cook County College Teachers Union, 139 Ill. App. 3d 617, 487 N.E.2d 956 (5th Dist. 1985).

inherent authority to award all forms of legal and equitable relief,<sup>9</sup> with the possible exceptions of reformation and rescission.<sup>10</sup> This is particularly true where the arbitration agreement incorporates by reference the Commercial Rules of the American Arbitration Association.<sup>11</sup> The Commercial Rules expressly grant the arbitrator broad authority to award legal and equitable relief.<sup>12</sup> Nonetheless, the practitioner should specify the nature and extent of the arbitrator's equitable powers in the arbitration agreement itself in order to include or exclude specific types of relief. It is especially important that the practitioner specify the arbitrator's equitable power to reform or rescind an agreement.

This Article will examine the source of the arbitrator's equitable power: the arbitration agreement.<sup>13</sup> The Article will analyze the extent of the arbitrator's power generally, and then analyze the arbitrator's power with respect to specific equitable remedies, such as injunctive relief,<sup>14</sup> specific performance,<sup>15</sup> partnership dissolution,<sup>16</sup> rescission and reformation,<sup>17</sup> child custody,<sup>18</sup> and other equitable remedies.<sup>19</sup> The Article will then analyze and explain the newly emerging and disparate case law with respect to the availability of judicial provisional relief pending arbitration.<sup>20</sup> Finally, the Article will examine practical drafting strategies with respect to the inclusion or exclusion of specific equitable remedies.<sup>21</sup>

## II. THE SOURCE OF THE ARBITRATOR'S POWER

The power of arbitrators to grant equitable, provisional, or extraordinary remedies in a contractual dispute derives from the lan-

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9. *Mogge v. District 8, Int'l Ass'n of Machinists*, 454 F.2d 510 (7th Cir. 1971); *Pavilion Cent. School Dist. v. Pavilion Faculty Ass'n.*, 51 A.D.2d 119, 380 N.Y.S.2d 387 (1976).

10. See *infra* notes 98-111 and accompanying text.

11. *DeLaurentis v. Cinematografica de Las Americas*, 9 N.Y.2d 503, 510, 215 N.Y.S.2d 60, 64 (1961); *United Buying Serv. Int'l Corp. v. United Buying Serv.*, 38 A.D.2d 75, 78, 327 N.Y.S.2d 7, 12 (1971); *Application of Grayson-Robinson Stores*, 9 Misc. 2d 796, 168 N.Y.S.2d 513 (N.Y. Sup. Ct. 1957).

12. COMMERCIAL ARBITRATION RULE 43 (American Arbitration Ass'n 1988). For the text of Rule 43, see *infra* note 45.

13. See *infra* notes 22-30 and accompanying text.

14. See *infra* notes 20-30 and accompanying text.

15. See *infra* notes 31-66 and accompanying text.

16. See *infra* notes 67-97 and accompanying text.

17. See *infra* notes 96-109 and accompanying text.

18. See *infra* notes 110-24 and accompanying text.

19. See *infra* notes 125-39 and accompanying text.

20. See *infra* notes 162-231 and accompanying text.

21. See *infra* notes 244-58 and accompanying text.

guage of the arbitration agreement.<sup>22</sup> As a general rule, contracting parties are free to design the language of their agreements to specify the nature and scope of remedies that the arbitrator may or may not award.<sup>23</sup>

The power of an arbitrator to enjoin a party was addressed in *Sperry International Trade, Inc. v. Government of Israel*.<sup>24</sup> In *Sperry*, the State of Israel challenged the arbitrator's authority to render an award that enjoined the Israeli government from drawing on a letter of credit.<sup>25</sup> The United States District Court for the Southern District of New York confirmed the validity of the award on several grounds, including the specific arbitration contract terms. The arbitration agreement provided that "neither party shall be precluded hereby from seeking provisional remedies in the courts of any jurisdiction including, but not limited to, temporary restraining orders, [and] preliminary injunctions."<sup>26</sup> The *Sperry* ruling illustrates that when a party challenges the propriety of an arbitral award, the court will base its determination primarily upon the language of the arbitration agreement itself.

In the analysis of arbitration agreements, courts will attempt to ascertain the intent of the parties in order to discern the proper scope of arbitration relief. As the *Sperry* case illustrates, this generally is accomplished through a close scrutiny of the contract language. In *Ruppert v. Egelhofer*,<sup>27</sup> a decision which echoes the *Sperry* court's reasoning, the extent of the arbitrator's power was again at issue. The arbitrators in *Ruppert* enjoined a slowdown by employees under their collective bargaining agreement. The *Ruppert* court held that the ability of an arbitrator to award equitable

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22. See *Aetna Casualty & Sur. Co. v. Superior Court of Los Angeles County*, 233 Cal. App. 2d 333, 337, 43 Cal. Rptr. 476, 478 (1965) ("the powers of the arbitrator are determined by the contract by which the matter is submitted to him"). See *supra* notes 8-12 and accompanying text.

23. "An agreement to arbitrate is a contract, the relation of the parties is contractual, and the rights and liabilities of the parties are controlled by the law of contracts." 5 AM. JUR. 2D *Arbitration & Award* § 11, at 527 (1962 & Supp. 1988). Parties to a contract may agree to anything that is not illegal or contrary to public policy. 17 AM. JUR. 2D *Contracts* § 155, at 506-07 (1962 & Supp. 1988). Accordingly, courts have refused to uphold arbitration decisions when the subject of the decision has been considered non-arbitrable under the law or public policy. See, e.g., *Stone v. Stone*, 292 So. 2d 686 (La. 1974); *Schachter v. Lester Witte & Co.*, 52 A.D.2d 121, 383 N.Y.S.2d 316 (1976).

24. 532 F. Supp. 901 (S.D.N.Y.), *aff'd*, 689 F.2d 301 (2d Cir. 1982), *later proceeding*, 602 F. Supp. 1440 (S.D.N.Y. 1985) [hereinafter *Sperry*].

25. *Id.* at 904.

26. *Id.* at 909. See also Hoellering, *Remedies in Arbitration*, 20 FORUM 516, 525-26 n.59-62 (1985).

27. 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958). *Ruppert* is a labor case cited frequently as authority for the power of arbitrators to issue equitable relief.

relief depends upon the language of the arbitration agreement.<sup>28</sup> The court elaborated that if the contract does not expressly grant the arbitrator such equitable power, the arbitrator must discern the implied intent of parties.<sup>29</sup> If the contract expressly or implicitly provides for broad equitable power, then the arbitrator may fashion the legal or equitable relief necessary to resolve the dispute.<sup>30</sup>

### III. THE AVAILABILITY OF SPECIFIC EQUITABLE REMEDIES IN ARBITRATION

#### A. Injunctions

Arbitrators have the power to issue permanent injunctions when their powers are granted by a broad arbitration clause.<sup>31</sup> The recent decision of *Cook v. Mishkin*<sup>32</sup> aptly summarizes this uniform rule allowing arbitrators to award injunctive relief. In *Cook*, the New York Supreme Court, Appellate Division, reinstated an arbi-

28. *Id.* at 578, 148 N.E.2d at 131, 170 N.Y.S.2d at 787.

29. *Id.* at 581, 148 N.E.2d at 131, 170 N.Y.S.2d at 788.

30. See *Dover v. Philadelphia Hous. Auth.*, 318 Pa. Super. 460, 463-64, 465 A.2d 644, 647 (1983) (in overturning an arbitration award because Pennsylvania statute limits arbitral authority to disputes at law, the court noted that the "authority of an arbitrator is determined by the provisions of the agreement to arbitrate").

31. See *Kamakazi Music Corp. v. Robbins Music Corp.*, 684 F.2d 228 (2d Cir. 1982) (arbitrator properly granted plaintiff permanent injunction against copyright infringement); *Television Programs Int'l Inc. v. United States Communications of Philadelphia*, 336 F. Supp. 405 (E.D. Pa. 1972) (when the arbitration clause is broad, courts should not issue injunctions pending the arbitrators decision); *In re Silverberg*, 75 A.D.2d 817, 427 N.Y.S.2d 480 (1980) (provisions of partnership agreement between the parties amounted to a covenant restricting the practice of law in violation of the proscriptions contained in the Professional Code of Responsibility; injunction enforcing such a provision was denied); *Meda Int'l, Inc v. Salzman*, 24 A.D.2d 710, 263 N.Y.S.2d 12 (1965) (temporary judicial injunction overturned because the arbitrator has the power to grant complete relief); *J. Brooks Secs., Inc. v. Vanderbilt Secs., Inc.*, 126 Misc. 2d 875, 484 N.Y.S.2d 472 (N.Y. Sup. Ct. 1985) (arbitrators can issue permanent injunctions).

A "broad" arbitration clause is one that applies arbitration to any dispute "arising from" or "relating to" the parties' contract or relationship. Although all broad arbitration clauses do not employ precisely these terms, they do use similar language. See, e.g., *Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co.*, 706 F.2d 155, 160 (6th Cir. 1983) (clause requiring arbitration of "[a]ny controversy or claim arising out of this Agreement or the refusal by either party thereto to perform the whole or any part thereof" termed by the court as "extremely broad"); *Necchi S.P.A. v. Necchi Sewing Mach. Sales Corp.*, 348 F.2d 693, 695-96 (2d Cir. 1965) (broad clause provided for arbitration of "[a]ll matters, disputes or disagreements arising out of or in connection with this Agreement"). In contrast, a "narrow" clause limits arbitration to particular types of disputes. See, e.g., *Fuller v. Guthrie*, 565 F.2d 259, 260 (2d Cir. 1977) (performance contract included arbitration clause extending only to disputes "involving the musical services arising out of or connected with" the contract); *Beckham v. William Bayley Co.*, 655 F. Supp. 288, 291 (N.D. Tex. 1987) (arbitration restricted to questions "as to the intent of this contract").

32. 95 A.D.2d 760, 464 N.Y.S.2d 761 (1983).

tration award that the lower court had stricken. The *Cook* court held that when the arbitrator determined that one group of stockholders had breached their agreement by refusing to co-sign checks, the arbitrator did not err in enjoining the uncooperative group from objecting that the corporate check did not bear two signatures.<sup>33</sup> In so holding, the *Cook* court stated that arbitrators wield broad power when they fashion remedies and promote justice and, thus, they possess the freedom to grant injunctive relief which even a court would refuse.<sup>34</sup> The court stressed that the function of arbitrators is to reach a just solution to the parties' conflict, and that it is within arbitrators' power to devise an appropriate remedy for the wrong.<sup>35</sup> Finally, the *Cook* court noted that judicial enforcement of the arbitration rulings could not be withheld simply because a court, faced with the same issues, would not or could not have reached the same result.<sup>36</sup>

Although the *Cook* court merely noted scope of review when it refused to vacate the arbitrator's order, other courts have expressly addressed the issue. For instance, in *Linwood v. Sherry*,<sup>37</sup> the plaintiff obtained court enforcement of an arbitral injunction that upheld a restrictive covenant in a partnership agreement.<sup>38</sup> The court noted that it could conduct only a narrow review of arbitration awards because the parties had agreed upon arbitration as the

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33. *Id.* at 761, 464 N.Y.S.2d at 763.

34. *Id.* Other cases also have focused upon arbitrators' granting of injunctions. In *W.M. Girvan, Inc. v. Robilotto*, 33 N.Y.2d 425, 309 N.E.2d 422, 353 N.Y.S.2d 958 (1974), the New York Court of Appeals upheld an arbitrator's exercise of his equitable powers to award a mandatory injunction. *Id.* at 428, 309 N.E.2d at 423, 353 N.Y.S.2d at 959. Acting under a very broad arbitration clause, the arbitrator ordered the reinstatement of two discharged employees accused of theft. *Id.* at 427, 309 N.E.2d at 423, 353 N.Y.S.2d at 959. The arbitration clause included "[g]rievances [not otherwise defined or limited] which cannot be settled between the parties" and authorized arbitration "[w]here an employee has reason to believe that any provision of this Agreement has not been complied with." *Id.* The arbitrator based his decision upon a finding that the employees' discharge was not for "just cause." *Id.* at 428, 309 N.E.2d at 423, 353 N.Y.S.2d at 960. The court upheld the arbitrator's action. *Id.* at 428, 309 N.E.2d at 423, 353 N.Y.S.2d at 959. Likewise, in *Meda Int'l, Inc. v. Salzman*, 24 A.D.2d 710, 263 N.Y.S.2d 12 (1965), the court approved the arbitration of a controversy in which the plaintiffs sought an injunction restraining the defendants from using the plaintiffs' names, representing the plaintiffs, or competing with the plaintiffs. *Id.* at 711, 263 N.Y.S.2d at 13. In *Salzman*, the arbitration agreement provided for arbitration of "all disputes and controversies arising out of, under or in connection with this Agreement." *Id.*

35. *Cook*, 95 A.D.2d at 761, 464 N.Y.S.2d at 763.

36. *Id.* See also *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 578, 148 N.E.2d 129, 131, 170 N.Y.S.2d 785, 787 (1958); *De Vitre v. Bohn*, 22 A.D.2d 856, 254 N.Y.S.2d 235 (1964) (arbitration award was enforceable even though no court could render the same relief).

37. 6 Misc. 2d 488, 178 N.Y.S.2d 492 (N.Y. Sup. Ct. 1958).

38. *Id.* at 492, 178 N.Y.S.2d at 494.

method to resolve their dispute.<sup>39</sup> The *Linwood* court explained that arbitration was the parties' forum of choice. Consequently, the arbitration award was final and conclusive unless a statutory ground existed that would authorize a court to disturb the award.<sup>40</sup> The court reasoned that absent such a statutory ground, it could only review the arbitration decision for an error of fact or law that was evident on the face of the award.<sup>41</sup> According to the *Linwood* court, this scope of review is narrower than judicial review of a trial court decision.<sup>42</sup>

Based on these decisions, an arbitrator may award injunctive relief on the basis of an express or implied grant of authority. The authority to award injunctive relief may be implied from the language of a broad arbitration clause or an arbitration clause that incorporates administrative rules that specifically provide the arbitrator with the necessary power. Moreover, when courts analyze the arbitrator's decision, they will employ a very narrow scope of review.

### B. Specific Performance

Arbitration clauses generally incorporate by reference standing administrative rules to govern the arbitration proceeding in the event of a dispute. Most commonly, arbitration agreements incorporate the Commercial Arbitration Rules of the American Arbitration Association ("A.A.A. Commercial Rules").<sup>43</sup> The A.A.A. Commercial Rules expressly provide for the award of specific performance by an arbitrator.<sup>44</sup>

The availability of specific performance is best illustrated in the watershed ruling in *Application of Grayson-Robinson Stores, Inc.* ("*Grayson I*").<sup>45</sup> The *Grayson I* court upheld an arbitration award that ordered a developer to complete construction of a department

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39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. See generally COMMERCIAL ARBITRATION RULES (American Arbitration Ass'n 1988).

44. Specifically, the A.A.A. Commercial Rules state: "*Scope of Award* — The Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." COMMERCIAL ARBITRATION RULE 43 (American Arbitration Ass'n 1988).

45. 9 Misc. 2d 796, 168 N.Y.S.2d 513 (N.Y. Sup. Ct. 1957), *aff'd*, 7 A.D.2d 367, 183 N.Y.S.2d 695 (1959), *aff'd*, *Grayson-Robinson Stores, Inc. v. Iris Constr. Corp.*, 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960).



store.<sup>46</sup> In *Grayson I*, a construction agreement executed by the parties provided for arbitration in the event of a dispute, and it incorporated by reference the A.A.A. Commercial Rules.<sup>47</sup> The court noted that the A.A.A. Commercial Rules expressly authorize an arbitrator to award specific performance.<sup>48</sup> Consequently, the court held the award valid despite the defendant's contention that a lack of ready mortgage money rendered performance impossible.<sup>49</sup> The court concluded that there are no grounds for vacatur of an arbitration award when arbitrators have acted within their powers and when no statutory grounds for vacatur exist.<sup>50</sup>

In a subsequent proceeding, *Grayson-Robinson Stores, Inc. v. Iris Construction Corp.* ("*Grayson II*"),<sup>51</sup> the New York Court of Appeals affirmed the *Grayson I* award and compelled specific performance.<sup>52</sup> The *Grayson I* court had rejected the defendant's argument that courts traditionally have not ordered specific performance of construction contracts due to the difficulty of supervision.<sup>53</sup> Therefore, in *Grayson II*, the defendant argued that courts should not affirm an arbitrator's specific performance decision involving a construction contract. The *Grayson II* court observed that it would be extraordinary if courts could frustrate the entire arbitration process by refusing to confirm the award after the parties had agreed that the arbitrators could award specific performance and the arbitrators had exercised their authority.<sup>54</sup> In ordering the construction firm to fulfill its obligations under the agreement, the *Grayson II* court properly noted that the equitable defense of difficulty of supervision was not germane to a motion to confirm a valid arbitration award that "conform[ed] in all respects to the express conferral of authority on the arbitrators and [met] all statutory requirements for confirmation."<sup>55</sup>

The *Grayson* line of authority indicates that arbitrators' powers

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46. *Id.* at 798, 168 N.Y.S.2d at 514.

47. *Id.* at 797, 168 N.Y.S.2d at 514.

48. *Id.*

49. *Id.*

50. *Id.*

51. 8 N.Y.2d 133, 168 N.E.2d 377, 202 N.Y.S.2d 303 (1960).

52. *Id.* at 138, 168 N.E.2d at 379, 202 N.Y.S.2d at 307.

53. *Id.* at 137, 168 N.E.2d at 379, 202 N.Y.S.2d at 306-07. The defendant argued that courts should not order specific performance with respect to construction contracts because they are too difficult to supervise. *Id.*

54. *Id.* at 137, 168 N.E.2d at 379, 202 N.Y.S.2d at 306.

55. *Id.* at 138, 168 N.E.2d at 379, 202 N.Y.S.2d at 306-07. The dissent argued that: Where difficulty of enforcement is the reason for nonintervention by courts of equity, it is equally a reason on account of which restraint should be exercised in confirming and entering judgment upon arbitration awards where the diffi-

are governed by the scope of the arbitration agreement. The *Grayson* decisions also indicate that incorporation of the A.A.A. Commercial Rules by reference is a practical method of providing for specific performance.

Consistent with *Grayson I* and *Grayson II*, courts have regularly upheld arbitral awards of specific performance. In *Staklinski v. Pyramid Electric Co.*,<sup>56</sup> for example, arbitration had been conducted on the issue of disability under an employment contract between Staklinski and his employer, Pyramid Electric Company.<sup>57</sup> The contract not only provided for an employment period of eleven years, but it also provided for termination and reduced compensation for three years in the event of permanent disability.<sup>58</sup> Staklinski was discharged by his employer on the basis of an alleged permanent disability.<sup>59</sup> Staklinski disagreed with his discharge and demanded arbitration pursuant to the terms of the employment agreement.<sup>60</sup>

The arbitrators found that Staklinski had been wrongfully discharged and, therefore, ordered his reinstatement.<sup>61</sup> In confirming this award, the court suggested that even though a court of equity would not grant such relief,<sup>62</sup> the parties contemplated this equitable remedy because the employment agreement incorporated by reference the A.A.A. Commercial Rules.<sup>63</sup>

In *Suffolk Development Corp. v. Pat-Plaza Amusement Corp.*,<sup>64</sup> the court took *Staklinski* one step further and allowed an arbitra-

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culty of enforcement is precisely the same whether the judgment has been entered on the decision of a court or on an award in arbitration.

*Id.* at 140, 168 N.E.2d at 380-81, 202 N.Y.S.2d at 308 (Van Voorhis, J., dissenting). Nevertheless, this argument overlooks the fact that the parties to the agreement specifically requested the availability of specific performance as a form of relief by virtue of their incorporation of the A.A.A. Commercial Rules into their agreement. Given the nature of the agreement, the availability of such relief may have been fundamental to the agreement.

56. 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959).

57. *Id.* at 163, 160 N.E.2d at 79, 188 N.Y.S.2d at 542.

58. *Id.* According to the *Staklinski* court, the arbitration clause provided "that any controversy arising out of [the contract] should be settled by arbitration in accordance with A.A.A. rules." *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 163-64, 160 N.E.2d at 80, 188 N.Y.S.2d at 542-43. The defendant argued that New York public policy could not permit an arbitrator to compel a corporation to retain an officer whose services are unsatisfactory to the directors. The court responded that "whether a court of equity could issue a specific performance decree in a case like this is beside the point." *Id.* at 163-64, 160 N.E.2d at 80, 188 N.Y.2d at 543.

63. *Id.*

64. 236 N.Y.S.2d 71 (N.Y. Sup. Ct. 1962) [hereinafter *Suffolk*].

tion award of specific performance in the absence of an express contractual provision authorizing the remedy.<sup>65</sup> In *Suffolk*, a dispute arose between a commercial landlord and his tenant over the landlord's failure to provide parking as the lease required.<sup>66</sup> The lease contained an arbitration provision, but the arbitration clause did not include an express grant of authority to decree specific performance.<sup>67</sup> The tenant brought an equitable action in court for specific performance of the lease, as well as damages and injunctive relief.<sup>68</sup> The landlord moved to stay the action pending arbitration and the court granted the motion.<sup>69</sup> In granting the motion,<sup>70</sup> the *Suffolk* court noted that "in a proper case, arbitrators may direct specific performance."<sup>71</sup> The court succinctly stated the rule that "arbitrators are empowered to make an award in accordance with the intent and purpose of the lease. If specific performance is indicated the arbitrators have the power to direct it."<sup>72</sup>

The *Suffolk* decision may be an anomaly. Unlike the arbitration clause in the *Grayson* decisions, the contested agreement in *Suffolk* contained an arbitration clause that did not contain a reference to the A.A.A. Commercial Rules. Accordingly, *Suffolk* does not stand unequivocally for the proposition that an arbitrator may award specific performance in the absence of a specific grant of authority in the arbitration agreement.

Regardless of the uncertain precedent that *Suffolk* set, earlier decisions have upheld the availability of specific performance in an arbitration award when the underlying agreement did not mention the A.A.A. Commercial Rules. An example of such a decision is *Freydberg Brothers, Inc. v. Corey*,<sup>73</sup> an early employment contract dispute case. In *Freydberg*, the plaintiff sought to stay an arbitra-

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65. *Id.* at 73.

66. *Id.* at 72.

67. *Id.* The lease did not incorporate by reference the A.A.A. Commercial Rules. The lease required arbitration "of any dispute . . . as to any matter involving the performance or failure to perform any of the terms and provisions of the lease." *Id.* at 72. The arbitrator was empowered to "determine the facts in dispute and to make such award as they deem proper and in accordance with the intent and the purpose of this lease." *Id.*

68. *Id.* at 71-72.

69. *Id.* at 72.

70. *Id.* at 73.

71. *Id.* (citing *Grayson-Robinson Stores, Inc. v. Iris Constr. Corp.*, 7 A.D.2d 367, 183 N.Y.S.2d 695 (N.Y. App. Div. 1959)). The *Suffolk* decision arguably misplaced its reliance on *Grayson I* because the agreements in that case contained express references to the A.A.A. Commercial Rules.

72. *Id.*

73. 177 Misc. 560, 31 N.Y.S.2d 10 (N.Y. Sup. Ct.), *aff'd*, 263 A.D. 805, 32 N.Y.S.2d 129 (1941) [hereinafter *Freydberg*].

tion order of specific performance.<sup>74</sup> The court denied the motion. The *Freydberg* decision indicates that judicial support for arbitrator-mandated specific performance has existed for quite some time.

In more recent rulings, arbitrators have been permitted to consider or award the remedy of specific performance. Specifically, courts have permitted arbitrators to award specific performance with respect to a landlord's denial of a tenant's request for more electricity,<sup>75</sup> the enforceability of a restrictive covenant,<sup>76</sup> and the specific performance of unfinished work.<sup>77</sup>

In summary, there are decisions upholding specific performance awards absent an express provision for the remedy. Nonetheless, to ensure the availability of specific performance as a remedy in a commercial dispute, an arbitration agreement should either expressly provide for such relief or incorporate rules, such as the A.A.A. Commercial Rules, that provide for such relief.

### C. Partnership Disputes and Dissolution

Generally, an arbitrator may, pursuant to a valid arbitration agreement, resolve any partnership dispute, including issues of partnership dissolution. The case of *Steinberg v. Steinberg*<sup>78</sup> illustrates the general rule. In *Steinberg*, the appellants sought arbitration of a number of issues relating to certain limited partnerships, including partnership dissolution.<sup>79</sup> The court ruled that the appellants were entitled to an opportunity to reframe their arbitration demand which was defective in certain respects.<sup>80</sup> In reaching this holding, the *Steinberg* court specifically noted that arbitrators have the power to direct the dissolution of a partnership.<sup>81</sup> The *Stein-*

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74. *Id.* at 560, 31 N.Y.S.2d at 10. In denying the motion, the *Freydberg* court noted that "[t]here is no rule of law limiting the relief which an arbitrator may award to money judgments, even in cases where no equitable decree would be proper if the controversy between the parties were being determined by a court rather than by arbitrators." *Id.* at 561, 31 N.Y.S.2d at 11. The arbitration agreement provided that "[a]ny dispute of any nature that might arise between us is to be adjusted by the A.A.A., and the award is final and binding on both." *Id.*

75. *Nedick's Store, Inc. v. Ben Beahanver Assocs.*, N.Y.L.J., April 22, 1971, at 2, col. 3 (N.Y. County Sup. Ct.).

76. *All State Tax Serv. of Area 5 v. Kerekes Bros., Inc.*, 34 A.D.2d 935, 312 N.Y.S.2d 166 (1970). Although the court's opinion did not include the actual arbitration clause, the court did deem the clause "broad." *Id.* at 935, 312 N.Y.S.2d at 166.

77. *Bradigan v. Bishop Homes, Inc.*, 20 A.D.2d 966, 249 N.Y.S.2d 1018 (1964). The court's opinion did not provide the actual arbitration clause language.

78. 38 A.D.2d 57, 327 N.Y.S.2d 245 (1971), *aff'd*, 32 N.Y.2d 671, 295 N.E.2d 798, 343 N.Y.S.2d 133 (1973).

79. *Id.* at 57-58, 327 N.Y.S.2d at 247.

80. *Id.*

81. *Id.* at 58, 327 N.Y.S.2d at 247.

*berg* court reasoned that when the breach of a partnership agreement is placed before an arbitrator and when the resolution of these issues is within the scope of the agreement, the arbitrator generally possesses the power to order dissolution and the terms of such dissolution.<sup>82</sup> The *Steinberg* court stressed that the power to direct dissolution is especially evident when the agreement provides for arbitration according to the A.A.A. Commercial Rules.<sup>83</sup>

The *Steinberg* ruling illustrates judicial willingness to confer a broad interpretation upon the language of the A.A.A. Commercial Rules which provide for "any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement of the parties."<sup>84</sup> Judicial authorities have applied the broad interpretation employed by the *Steinberg* court to allow arbitration awards of remedies beyond traditional legal boundaries. Courts have reasoned from *Steinberg* that a broad arbitration clause will embrace all partnership disputes, whether or not the clause incorporates the A.A.A. Commercial Rules.

An early example of this principle is found in *Simon v. Vogel*,<sup>85</sup> in which the parties to a partnership agreement failed to agree on the distribution of the partnership's assets.<sup>86</sup> Despite the existence of an arbitration clause, the plaintiff filed a judicial proceeding for specific performance of the dissolution clause in the partnership agreement.<sup>87</sup> The *Vogel* court granted the defendant's a stay of action on appeal because the terms of the agreement provided for arbitration in the event of a dispute regarding distribution of the partnership assets.<sup>88</sup>

A later example of these precepts is *State Farm Mutual Automobile Insurance Co. v. Hanover Development Corp.*,<sup>89</sup> which involved a partnership agreement containing a broad arbitration clause.<sup>90</sup> State Farm filed a lawsuit seeking termination and dissolution of

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82. *Id.*

83. *Id.*

84. COMMERCIAL ARBITRATION RULE 43 (American Arbitration Ass'n 1988). For the text of Rule 43, see *supra* note 44.

85. 9 A.D.2d 63, 191 N.Y.S.2d 248 (1959).

86. *Id.* at 64, 191 N.Y.S.2d at 249.

87. *Id.*

88. *Id.* at 65, 191 N.Y.S.2d at 250. The partnership agreement provided that "[i]f [the partners] cannot agree upon the terms of such distribution, then the same shall be determined by arbitration as hereinafter provided." *Id.* at 64, 191 N.Y.S.2d at 249. The agreement further provided that "[a]ny and all disputes arising hereunder shall be determined by arbitration." *Id.*

89. 73 Ill. App. 3d 326, 391 N.E.2d 562 (2d Dist. 1979).

90. *Id.* at 329, 391 N.E.2d at 564. The arbitration clause provided for arbitration of "any act or omission of any partner, or any other matter in any way relating to the

the partnership, plus an accounting and money damages.<sup>91</sup> Hanover Development Corp. obtained a judicial decree compelling arbitration of the dispute.<sup>92</sup> On appeal, the court observed that the parties had not only agreed to submit contract interpretation and application disputes to arbitration, but also to submit conflicts involving the acts or omissions of any partner or any other subject relating to partnership affairs, rights, duties, and liabilities.<sup>93</sup>

Similarly, in *Wolf v. Baltimore*,<sup>94</sup> the partnership agreement contained a broad arbitration clause.<sup>95</sup> The defendant filed a demand for arbitration seeking a partnership dissolution, but the arbitrators granted an adjournment to allow the court to determine the arbitrability of the dispute.<sup>96</sup> Even though the trial court granted the plaintiff a preliminary injunction, the appellate court held that the partnership dissolution issue related to the agreement or the breach thereof and was, therefore, embraced by the arbitration clause.<sup>97</sup> The court reasoned that "a clear right to injunctive relief cannot be shown since the breadth of the arbitration clause precludes a reasoned interpretation that excludes the instant dispute."<sup>98</sup>

Other partnership disputes may also be subject to arbitration. In the case of *Waddell v. Shriber*,<sup>99</sup> the court held that issues relating to the capital accounts of a securities brokerage partnership in the process of dissolution were arbitrable in a proceeding under the auspices of the New York Stock Exchange.<sup>100</sup> In *Tullis v. Vose*,<sup>101</sup>

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partnership business or the affairs of the partnership, or the rights, duties and the liabilities of any person hereunder." *Id.*

91. *Id.* at 328, 391 N.E.2d at 562.

92. *Id.*

93. *Id.* at 329, 391 N.E.2d at 564.

94. 250 Pa. Super. 230, 378 A.2d 911 (1977).

95. *Id.* at 231-22, 378 A.2d at 913. The arbitration clause provided that "[a]ny controversy or claim arising out of or relating to [the partnership agreement] or the breach thereof, shall be settled by arbitration in accordance with the rules then obtaining of the A.A.A." *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 232, 378 A.2d at 913.

99. 465 Pa. 20, 348 A.2d 96 (1975).

100. *Id.* at 27, 348 A.2d at 99. The partners in *Waddell* had all executed applications for allied membership in the New York Stock Exchange ("NYSE"). According to the signed applications, they agreed "to abide by the Constitution and Rules . . . of the NYSE." *Id.* at 26-27, 348 A.2d at 99. The NYSE constitution provided that "[a]ny controversy between parties who are . . . allied members . . . shall at the instance of any such party . . . be submitted for arbitration, in accordance with the provisions of the Constitution and rules of the Board of Directors." *Id.*

101. 348 So. 2d 1277 (La. Ct. App. 1977).

the court held that a dispute relating to the withdrawal of one partner was embraced by a broad arbitration clause.<sup>102</sup> In *Bregman v. Lashins*,<sup>103</sup> the respondents sought a turnover of partnership books and records and a termination of the petitioner's authority to act for the partnership.<sup>104</sup> The court denied a motion by the appellant to stay arbitration on these issues.<sup>105</sup> Finally, in *Lehr v. Baransky*,<sup>106</sup> and *Pacific Investment Co. v. Townsend*,<sup>107</sup> the courts held that disputes relating to the management of partnership assets were arbitrable.

The application of arbitration to partnership disputes represents the broadest possible extension of the arbitrator's equitable power: the power to dissolve, modify, or create legal relationships. Whether arbitrators have dissolved, valued, reconstituted a partnership, or rearranged the partnership finances, the judiciary has shown no reluctance to uphold the fullest extent of the arbitrator's equitable powers. A broad arbitration clause undoubtedly provides the arbitrator with virtually unlimited power over all partnership disputes.

102. *Id.* at 1281.

103. 57 A.D.2d 529, 393 N.Y.S.2d 720 (1977).

104. *Id.* at 529, 393 N.Y.S.2d at 721.

105. *Id.* The partnership agreement provided that any "dispute or controversy arising under, out of, in connection with or in relation to this agreement . . . or the breach thereof, or in connection with the dissolution of the partnership." *Id.*

106. 32 Misc. 2d 755, 224 N.Y.S.2d 651 (N.Y. Sup. Ct. 1962). The partnership agreement in *Baransky* stated:

All and any disputes . . . which shall arise, either during the partnership or afterwards, between any of the partners and the representatives of any other partner, touching [sic] these presents, or the construction or application thereof, or any account, valuation, or division of assets, debits, or liabilities to be made hereunder, or any act or omissions of any partner, or any other matter in any way relating to the partnership business or the affairs of the partnership, or the rights, duties, and liabilities of any person, hereunder, shall be referred to a single arbitrator on whom the parties agree upon, otherwise to a board of three arbitrators, of whom one shall be selected by each party to the difference, and a third person shall be selected by the aforementioned two; and the decision and award . . . shall be final and binding upon the said parties and their respective representatives.

*Id.* at 756, 224 N.Y.S.2d at 652.

107. 58 Cal. App. 3d 1, 129 Cal. Rptr. 489 (1976). In *Townsend*, the partnership agreement's arbitration clause provided:

In the event of any disagreement between one or more of the partners and the limited partnership, or with reference to any of the activities of the General Partnership that cannot properly be settled or adjudicated by the General Partner under its general authority as created herein, such dispute or disagreement shall be arbitrated pursuant to the rules and regulations of the A.A.A. then in effect.

*Id.* at 7, 129 Cal. Rptr. at 491.

#### D. Rescission and Reformation

There is significant confusion in the case law over an arbitrator's power to grant the remedies of rescission and reformation absent an express grant of authority in the arbitration agreement.<sup>108</sup> Until the mid-1970s, many courts considered the reformation issue non-arbitrable even when the arbitration agreement was broad. The decision in *In re Vincent J. Smith, Inc.*,<sup>109</sup> illustrates the courts' traditional reluctance to permit arbitrators to confer the remedies of rescission and reformation.<sup>110</sup>

In *Smith*, a dispute arose between a general contractor and a subcontractor regarding excavation services.<sup>111</sup> The parties' agreement contained a broad arbitration clause, but no express consent to reformation.<sup>112</sup> Citing no authority, the court held that reformation was unavailable as a remedy:

No case has been cited which goes this far, and cases dealing generally with arbitration are of little help. Arbitration cannot change \$20 to \$30 when the written contract clearly provides for \$20 without going completely outside the contract signed by both parties and relying upon oral testimony relating to prior negotiations and subsequent alleged "understandings." If arbitration can result in "reforming" or changing the terms of the contract itself there would be no need of having one in the first place.<sup>113</sup>

In the past decade, however, an increasing number of courts have favored the arbitrability of rescission and reformation. In

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108. For example, cases allowing reformation or rescission in the absence of an express contractual provision include: *American Home Assurance Co. v. American Fidelity & Casualty Co.*, 356 F.2d 690 (2d Cir. 1966); *SCM Corp. v. Fisher Park Lane Co.*, 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398 (1976); *Swartz v. Swartz*, 49 A.D.2d 254, 374 N.Y.S.2d 857 (1975); *Agora Dev. Corp. v. Low*, 19 A.D.2d 126, 241 N.Y.S.2d 126 (1963). Cases that did not allow such relief in the absence of a contractual provision include: *Coty Elec. v. Local Union 77, Int'l Bhd. of Elec. Workers*, 517 F.2d 616 (9th Cir.), cert. denied, 423 U.S. 894 (1975); *Stewart-Scott Constr. Corp. v. Schaefer Brewing Co.*, 41 A.D.2d 788, 341 N.Y.S.2d 269 (1973); *Glenwood Jewish Center v. Marard Caterers*, 39 A.D.2d 536, 331 N.Y.S.2d 115 (1972); *In re Vincent J. Smith, Inc.*, 19 A.D.2d 763, 241 N.Y.S.2d 507 (1963).

109. 19 A.D.2d 763, 241 N.Y.S.2d 507 (1963).

110. *Id.* at 763, 241 N.Y.S.2d at 508.

111. *Id.* at 764, 241 N.Y.S.2d at 508.

112. *Id.* Although the *Smith* court did not indicate the agreement's specific language, the court did note that "[t]he contract contained a broad arbitration clause as to disputes under the contract, but . . . did not consent to arbitration to reform, remake or change it." *Id.*

113. *Id.* at 764, 241 N.Y.S.2d at 508-09. Accord *Glenwood Jewish Center v. Marard Caterers, Inc.*, 39 A.D.2d 536, 331 N.Y.S.2d 115 (1972). For an excellent exposition of the traditional position against arbitrator reformation, see *SCM Corp. v. Fisher Park Lane Co.*, 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398 (1976) (Fuchsberg, J., concurring).



*SCM Corp. v. Fisher Park Lane Company*,<sup>114</sup> the court expressed this modern trend that permits the arbitration of rescission and reformation issues under the aegis of a standard arbitration clause. The *SCM Corp.* court stated that arbitrators possess the requisite power to devise adequate remedies to disputes before them. To that end, if arbitrators deem reformation to be the appropriate remedy to settle the conflict presented, then reformation is included within their authority under a broad arbitration clause.<sup>115</sup>

Under different fact situations, reformation decisions similarly have allowed arbitrators to reform or rescind disputed contracts. In *American Home Assurance Co. v. American Fidelity and Casualty Co.*,<sup>116</sup> the court compelled arbitration of the issue of reformation of a reinsurance contract. In *In re Agora Development Corp.*,<sup>117</sup> the court likewise opined that reformation of a contract was within the power of the arbitrator. In the rescission area, the court in *Universal Marine Insurance Co. v. Beacon Insurance Co.*<sup>118</sup> ordered the litigants to arbitrate rescission of a contract of reinsurance.<sup>119</sup> A New York Court of Appeals, in *Coler v. G.C.A.*

114. 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398 (1976).

115. *Id.* at 792-93, 358 N.E.2d at 1028, 390 N.Y.S.2d at 402-03. The concurring opinion reflects the historical reluctance to compel arbitration and stresses that reformation cannot be available unless the parties specifically provide therefore:

With the exception of a contrary dictum contained in *Matter of Agora Development Corp. (Low)*, and a Federal case relying upon the dictum, the courts of this State have consistently held that unless the parties confer the authority upon him, an arbitrator lacks power to reform or change the contract itself.

These decisions, involving arbitration clauses broader than those in the case before us, are based upon the settled rule 'that a party may not be required to submit to arbitration matters which he has not agreed to arbitrate . . . .' 'It is not the function of an arbitrator . . . to decide in what respects the contract in question should be modified . . . . Contract modifications are not traditionally matters for arbitration.'

*Id.* at 794-95, 358 N.E.2d at 1029, 390 N.Y.S.2d at 403-04 (Fuchsberg, J., concurring) (citations omitted).

116. 356 F.2d 690 (2d Cir. 1966). The contract provided for the arbitration according to New York law "in the event of any dispute between the company [Fidelity] and the reinsurers in connection with this agreement." *Id.* at 691.

117. 19 A.D.2d 126, 241 N.Y.S.2d 126 (1963). The contract contained an arbitration clause that stated: "Any controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration." *Id.* at 127, 241 N.Y.S.2d at 127.

118. 588 F. Supp. 735 (W.D.N.C. 1984).

119. *Id.* at 739-40. In the *Universal Marine Insurance Co.* case, fraud in the inducement of the contract was the asserted grounds for rescission. *Id.* at 738. Although the court ordered arbitration of this issue, it did not state whether rescission was within the arbitrator's power under the arbitration agreement. *Id.* The arbitration clause provided:

[S]hould an irreconcilable difference of opinion or dispute arise between the parties to this Agreement as to the interpretation of this Agreement, or transactions with respect to this Agreement, such difference, or dispute shall [be arbi-

*Corp.*,<sup>120</sup> upheld arbitration of a rescission issue. The *Coler* decision was rendered despite the contention that rescission would terminate the very contract that gave rise to the right to arbitrate.<sup>121</sup>

Despite recent decisions allowing an arbitrator to reform or rescind disputed contract terms, the case law is unsettled in the areas of reformation and rescission. Therefore, the contract draftsman is well advised to include specifically or exclude the remedies of rescission and reformation to ensure that the parties' intentions will be effectuated.

### *E. Other Equitable Powers and Remedies*

#### 1. Child Custody and Visitation Rights

Custody and visitation issues arising out of separation and divorce agreements also have brought into question the equitable powers of arbitrators. Although questions of custody and visitation had long been considered non-arbitrable, the New York courts have indicated a willingness to allow arbitration of these issues.

The New York Appellate Division, First Department, has taken the strongest position favoring the arbitration of custody issues.<sup>122</sup> In *Sheets v. Sheets*, a father sought arbitration of his visitation rights under a court-approved separation agreement.<sup>123</sup> The court noted that visitation rights are arbitrable pursuant to a "proper demand for arbitration as to any disputes."<sup>124</sup> In addition, the court confirmed the arbitrability of the issues of custody and related issues, such as times for visitation, choice of schools, summer camp, and vacations. In summary, the court noted that placing conflicts involving custody and visitation matters before voluntary arbitration should be encouraged instead of summarily rejected.<sup>125</sup>

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trated] . . . . It is expressly agreed that the jurisdiction of the arbitrators to make or render any decision or award shall be limited by the limits of liability expressly set forth herein, and that the arbitrators shall not have jurisdiction to make any decision or render any award exceeding such expressly stated liability limit.

*Id.* at 737-38.

120. 39 A.D.2d 656, 331 N.Y.S.2d 938, *aff'd*, 31 N.Y.2d 775, 291 N.E.2d 385, 339 N.Y.S.2d 104 (1972). The *Coler* court noted that the arbitration clause was "sufficiently broad" to cover contract rescission. *Id.* at 656, 331 N.Y.S.2d at 939.

121. *Id.* at 657, 331 N.Y.S.2d at 938-39.

122. *See, e.g.,* *Sheets v. Sheets*, 22 A.D.2d 176, 254 N.Y.S.2d 320 (1964).

123. *Id.* at 177, 254 N.Y.S.2d at 322. The separation agreement provided that "[i]f the parties cannot reach an agreement as to any matter within the scope of [the custody agreement] . . . the dispute shall be settled by arbitration in accordance with the Rules of the American Arbitration Association." *Id.*

124. *Id.* at 180, 254 N.Y.S.2d at 326.

125. *Id.* at 179-80, 254 N.Y.S.2d at 325. Nevertheless, the *Sheets* court stayed the

Nonetheless, the *Sheets* court stressed that if an arbitrator's decision adversely affects the best interests of the child, then courts must disregard the decision and consider the matter *de novo*.<sup>126</sup> Although the court acknowledged that such a standard of review occasionally might create inefficiency, the court believed that arbitration of custody issues should be encouraged as a sound and practical dispute resolution mechanism.<sup>127</sup>

The New York Appellate Division, Second Department, has been skeptical of the First Department's view.<sup>128</sup> In *Agur v. Agur*,<sup>129</sup> the court expressed its doubts as to the general efficacy of the arbitration forum in child welfare matters. The *Agur* court held that arbitration is useful in deciding routine problems such as the amount of support due. In contrast, the court opined that arbitration is not as useful "when the delicate balancing of the factors composing the best interest of the child is the matter at hand."<sup>130</sup> Nevertheless, the court specifically noted that the arbitration of "less weighty aspects" of custody, for example visitation rights, is beneficial.<sup>131</sup>

In *Nestel v. Nestel*,<sup>132</sup> the Second Department intensified its criti-

arbitration sought by the father because he sought punitive damages from the mother for failure to comply with the custody agreement. According to the *Sheets* court, an arbitration clause that allows arbitration of custody issues does not allow an award of money damages. *Id.* at 180, 254 N.Y.S.2d at 326.

126. *Id.* at 180, 254 N.Y.S.2d at 325.

127. *Id.*

128. See, e.g., *Nestel v. Nestel*, 38 A.D.2d 942, 331 N.Y.S.2d 241 (1972); *Agur v. Agur*, 32 A.D.2d 16, 298 N.Y.S.2d 772 (1969).

129. 32 A.D.2d 16, 298 N.Y.S.2d 772 (1969). In *Agur*, the child custody agreement provided:

If any controversy should arise over the meaning, interpretation or application of any part of this agreement, the parties agree to submit such controversy to arbitration. Each party shall designate an arbitrator. The arbitrators so designated and selected shall select an Orthodox Rabbi as a third arbitrator. The decision of the three arbitrators so designated and selected shall be final . . . . The parties agree that any controversies . . . shall be arbitrated under Jewish religious law . . . the arbitrators . . . shall be . . . versed in such law.

*Id.* at 17, 298 N.Y.S.2d at 774. The court refused to direct arbitration of the custody dispute primarily because the arbitration agreement limited the scope of arbitration to Jewish religious law. According to the *Agur* court, this was too limited an inquiry for a decision that, under New York law, must consider the best interests of the child above all else. *Id.* at 21-22, 298 N.Y.S.2d at 777-78.

130. *Id.* at 20, 298 N.Y.S.2d at 777. In making these statements about arbitration of child custody matters, the *Agur* court directly criticized the *Sheets* holding. Specifically, the *Agur* court noted that the *Sheets de novo* standard of review would result in duplication of time, expense, and effort. Therefore, according to the *Agur* court, there is little point to allowing arbitration in the first place. *Id.* at 21, 298 N.Y.S.2d at 778.

131. *Id.* at 21 n.5, 298 N.Y.S.2d 778 n.5.

132. 38 A.D.2d 942, 331 N.Y.S.2d 241 (1972).

cism of the *Sheets* ruling. In *Nestel*, the trial court ordered arbitration of issues relating to a child's residence and schooling.<sup>133</sup> The Supreme Court, Nassau County, vacated the ensuing arbitration award because of arbitrator error and directed re-arbitration with new arbitrators.<sup>134</sup> The appellate division affirmed the supreme court ruling, but expressly disapproved of a policy of arbitrating custody issues because the issues require a complex balancing of the factors that comprise a child's best interests.<sup>135</sup> Moreover, the court opined that arbitration is inappropriate for even "less weighty aspects of custody, such as visitation, choice of schools, summer camps and the like."<sup>136</sup>

The *Nestel* and *Agur* decisions aptly summarize judicial reservations with arbitration of custody issues. Even courts, like *Sheets*, that express a willingness to allow arbitration create a *de novo* standard of review that undermines the arbitrator's authority. Nevertheless, these three opinions undoubtedly indicate that arbitration of minor custody disputes concerning visitation, schooling, and vacations has, at the very least, been permitted.

## 2. Other Equitable Issues

In the context of broad arbitration clauses, arbitrators have been permitted to exercise equitable powers over a variety of disputes. Accordingly, courts have upheld a number of remedies that range far beyond traditional remedies, such as specific performance.

For example, a New York court has confirmed the authority of an arbitrator to "command" a litigant to exercise a contract option and similar contract rights. In *Application of Vogel*,<sup>137</sup> a corporate president and a secretary-treasurer were the sole shareholders of a moving and storage business.<sup>138</sup> They were parties to an arbitration agreement that provided for arbitration of any dispute "in the course of their transaction with each other."<sup>139</sup> They leased a

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133. *Id.* at 942, 331 N.Y.S.2d at 242. The arbitration agreement provided for the submission of any child custody dispute to three arbitrators who would render a decision according to the A.A.A. Commercial Rules. *Id.*

134. *Id.*

135. *Id.* at 943, 331 N.Y.S.2d at 243.

136. *Id.*

137. 25 A.D.2d 212, 268 N.Y.S.2d 237 (1968).

138. *Id.* at 213-14, 268 N.Y.S.2d at 239.

139. *Id.* at 214, 268 N.Y.S.2d at 239. The arbitration agreement in *Vogel* provided:

The parties hereto hereby expressly agree that in the event of a dispute, or difference, arising between them *in the course of their transaction with each other*, under the terms of the agreement, such dispute or difference shall be submitted to arbitration . . . . The parties to the dispute . . . agree to abide by the decision

warehouse for five years with an option to purchase, which the president did not want to exercise. The secretary treasurer filed an arbitration proceeding, claiming that the president was acting in bad faith when he refused to exercise the option to buy at the end of the lease term.<sup>140</sup> The president sought to stay the arbitration proceeding. The court held that it was within the authority of the arbitrator to decide whether or not the option should be exercised.<sup>141</sup>

In *Morris v. Zuckerman*,<sup>142</sup> a joint venturer sought to compel a second joint venturer to join in the sale of some property in which they each held an equal interest to a corporation owned and operated by the first joint venturer.<sup>143</sup> In the arbitration proceeding, the arbitrator noted the "fiduciary relationship" of the two joint venturers and authorized the proposed sale on the condition that the second joint venturer participate as a buyer in equal shares.<sup>144</sup>

In *Register v. Harrin*,<sup>145</sup> the court held that arbitrators had the authority to establish a disputed boundary line.<sup>146</sup> Similarly, replevin issues were deemed arbitrable in *Lease Plan Fleet Corp. v. Johnson Transportation, Inc.*<sup>147</sup> *Lease Plan Fleet Corp.* involved the right to replevin leased motor vehicles prior to and apart from the arbitration.<sup>148</sup> The court noted that the right to retake was not

of the arbitrators; or in the alternative, to abide by the decision of any arbitrator and umpire.

*Id.* (emphasis original).

140. *Id.* at 214, 268 N.Y.S.2d at 240.

141. *Id.* at 216-17, 268 N.Y.S.2d at 240.

142. 69 Cal. 2d 686, 446 P.2d 1000, 72 Cal. Rptr. 880 (1968).

143. *Id.* at 689, 446 P.2d at 1002, 72 Cal. Rptr. at 882.

144. *Id.* at 689, 446 P.2d at 1003, 72 Cal. Rptr. at 882. The joint venture agreement in *Zuckerman* provided that:

In the event a dispute arises between the parties hereto, each of them shall select one disinterested person and the two persons so selected shall select a third disinterested person, and the three persons so selected shall be designated as the arbitrators. A decision by the majority of the arbitrators shall be binding and conclusive upon the disputants . . . . If . . . the arbitrators cannot be chosen in accordance with these provisions, then the dispute . . . shall be arbitrated under the [California Code of Civil Procedure].

*Id.* at 689 n.2, 446 P.2d at 1002-03 n.2, 72 Cal. Rptr. at 882-83 n.2.

145. 110 Ga. App. 736, 140 S.E.2d 82 (1964).

146. *Id.* at 737, 140 S.E.2d at 83. In *Register*, two landowners with adjoining property stipulated to the arbitration of a boundary dispute. Under the stipulation agreement, three surveyors were named to establish their boundary line. *Id.* at 736, 140 S.E.2d at 82. According to the stipulation, questions of payment for the survey should be put to a jury for a decision. *Id.* at 736, 140 S.E.2d at 83.

147. 67 Misc. 2d 822, 324 N.Y.S.2d 928 (N.Y. Sup. Ct. 1971).

148. *Id.* at 822, 324 N.Y.S.2d at 929.

a matter that the parties had agreed to arbitrate.<sup>149</sup> Nevertheless, the court indicated that the right to replevin was arbitrable in the context of a properly drafted arbitration agreement.<sup>150</sup> Indeed, the court ruled that the replevin should precede any arbitration, but that the issue of wrongful replevy and damages arising therefrom was subject to arbitration.<sup>151</sup>

#### IV. PRELIMINARY INJUNCTIVE RELIEF PENDING ARBITRATION

Interim injunctive relief pending arbitration may be available from an arbitrator or from a judicial tribunal. Generally speaking, if the arbitration agreement either specifically authorizes temporary injunctive relief or grants the arbitrator broad general powers, then the arbitrator may grant temporary relief pending arbitration. There is a split of authority, however, as to the ability of a court to issue injunctive relief pending arbitration. A review of the relevant judicial authorities will serve to highlight the nature of the analysis and the extent of the divergent opinions.<sup>152</sup>

##### A. Arbitrators

Most agreements do not provide specific grants of power to the arbitrator to grant interim relief. The provisions that govern an arbitrator's authority to issue temporary injunctions are found in the administrative rules. These rules are often incorporated by reference into the agreement between the parties.<sup>153</sup> The A.A.A. Commercial Rules grant the arbitrator power to order interim pro-

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149. *Id.* at 826, 324 N.Y.S.2d at 929-30. The lease agreement provided that "any dispute, claim, or controversy arising out of or pertaining to this [lease] agreement, or breach thereof, shall be submitted to and determined by an arbitrator." *Id.* at 822, 324 N.Y.S.2d at 929. The lease agreement also specifically authorized the lessor to replevin the leased property without notice or demand in the event the lessee breached the lease agreement. *Id.*

150. *Id.* at 823, 324 N.Y.S.2d at 929-30.

151. *Id.* at 823, 324 N.Y.S.2d at 929.

152. This issue has been the subject of substantial recent commentary. See generally Karmel, *Injunctions Pending Arbitration And The Federal Arbitration Act: A Perspective From Contract Law*, 54 U. CHI. L. REV. 1373 (1987); Note, *The United States Arbitration Act And Preliminary Injunctions: A New Interpretation Of an Old Statute*, 66 B.U.L. REV. 1041 (1986); Note, *The Federal Arbitration Act: "A Threat To Injunctive Relief,"* 21 WILLAMETTE L. REV. 674 (1985). This Article will not attempt an in-depth analysis of the theoretical underpinnings of the divergent lines of authority. To the contrary, this Article will merely canvass the existing case law in order to provide a useful summary of the current state of the law.

153. The Federal Arbitration Act is silent about whether provisional equitable remedies are available pending arbitration. Karmel, *supra* note 152, at 1043 n.15. See also 9 U.S.C. §§ 1-14 (1982).

tective measures when it is necessary to protect property that is subject to the pending arbitration.<sup>154</sup> According to the A.A.A. Commercial Rules, the arbitrator may order temporary injunctive relief if it will not prejudice the parties' rights or the outcome of the arbitrated dispute.

The A.A.A. Commercial Rules provide that an arbitrator may, as a provisional measure, "issue such orders as may be deemed necessary to safeguard . . . the subject matter of the arbitration."<sup>155</sup> Institutional factors weaken this power. For example, one commentator has noted:

At the early stages of an arbitration, when preliminary relief is most needed, there are no arbitrators. Later when the arbitrators have been appointed, the hearing will not be far away and there will be less need for preliminary relief. Moreover, arbitrators are disinclined to grant any relief until they have heard both sides of the story at the hearing. It is the very rare case that receives preliminary relief from the arbitrators.<sup>156</sup>

Nevertheless, as recent case law indicates, arbitrators have granted interim injunctive relief. When arbitrators have issued interim injunctions, these recent decisions have upheld the authority of arbitrators to issue preliminary injunctive relief pending arbitration.<sup>157</sup> The decision in *Island Creek Coal Sales Co. v. City of Gainesville*,<sup>158</sup> is fairly representative. In *Island Creek*, the City of Gainesville sought to avoid a long-term coal supply agreement

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154. Rule 34 provides: "*Conservation of Property* — The arbitrator may issue such orders as may be deemed necessary to safeguard the property which is the subject matter of the arbitration without prejudice to the rights of the parties or to the final determination of dispute." COMMERCIAL ARBITRATION RULE 34 (American Arbitration Ass'n 1988). This is complemented by Rule 43, which provides: "*Scope of Award* — The Arbitrator may grant any remedy or relief which the Arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract." COMMERCIAL ARBITRATION RULE 43 (American Arbitration Ass'n 1988).

155. COMMERCIAL ARBITRATION RULE 34 (American Arbitration Ass'n 1988).

156. G. GOLDBERG, A LAWYERS GUIDE TO COMMERCIAL ARBITRATION 41-42 (2d ed. 1983). *But see* Merrill Lynch, Pierce, Fenner and Smith, Inc. v. Shubert, 577 F. Supp. 406, 408 (M.D. Fla. 1983) (citing arbitrator's power to grant provisional relief as one justification for not granting a preliminary injunction). *See also* Karmel, *supra* note 152, at 1059 nn.125-30.

157. *See, e.g.,* *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046 (6th Cir. 1984), *later proceeding*, 764 F.2d 437 (6th Cir. 1985), *cert. denied*, 474 U.S. 948 (1985); *Sperry Int'l Trade, Inc. v. Government of Israel*, 532 F. Supp. 901 (S.D.N.Y. 1982), *aff'd*, 689 F.2d 301 (2d Cir. 1982), *later proceeding*, 602 F. Supp. 1440 (S.D.N.Y. 1985) (interim award prohibiting the drawing down on a letter of credit pending arbitration).

158. 729 F.2d 1046 (6th Cir. 1984), *later proceeding*, 764 F.2d 437 (6th Cir.), *cert. denied*, 474 U.S. 948 (1985) [hereinafter *Island Creek*].

with the Island Creek Coal Sales Company ("Island Creek") because of a drop in market prices.<sup>159</sup> While the arbitral proceeding was pending, the City of Gainesville announced its intention to terminate the agreement.<sup>160</sup> Island Creek submitted a request to the arbitrators for an injunction requiring the City of Gainesville to comply with the supply agreement pending arbitration.<sup>161</sup> The arbitrators issued the requested relief.<sup>162</sup>

The City of Gainesville refused to comply with the order and sought to vacate the order in the United States District Court for the Southern District of Florida.<sup>163</sup> Island Creek sought confirmation of this order in the United States District Court for the Western District of Kentucky — the district in which the arbitration was pending.<sup>164</sup> The Western District of Kentucky preliminarily enjoined the Florida action and entered judgment confirming the interim order.<sup>165</sup> The City of Gainesville appealed.<sup>166</sup>

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed the interim award as final and properly within the power of the arbitrators.<sup>167</sup> The court observed that A.A.A. Commercial Rule 43 vests the arbitrators with the power to issue provisional relief in the absence of a provision to the contrary in the agreement between the parties. In so holding, the court noted:

The authority for equitable relief arises from Rule 43 of the AAA Commercial Arbitration Rules which the Agreement incorporates by reference . . . . Under this Rule an arbitrator can order specific performance to preserve the status quo under the contract unless the contract expressly prevents such relief. The Agreement here does not provide any specific limitations on the power of the arbitrators under Rule 43, and we are required to give deference to the arbitrators' interpretation of the Rule and the Agreement unless they have clearly exceeded their authority. We conclude that the interim award in the instant case requiring specific performance is not outside the scope of the Agreement

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159. *Id.* at 1047. The coal supply agreement provided that "any dispute between the parties should be settled by arbitration and provides further that the A.A.A. Commercial Arbitration Rules are incorporated in the Agreement." *Id.* at 1048. Accordingly, the *Island Creek* court concluded that the arbitrator's authority to award equitable relief arose from Rule 43 of the A.A.A. Commercial Rules. *Id.* at 1049. *See supra* note 144.

160. *Island Creek*, 729 F.2d at 1047-48.

161. *Id.* at 1048.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at 1050.



and, thus, does not exceed the arbitrators' powers.<sup>168</sup>

In a later proceeding,<sup>169</sup> the Sixth Circuit affirmed the district court ruling clarifying the arbitration award, as allowed by section 11 of the Federal Arbitration Act.<sup>170</sup>

In summary, under a sufficiently broad arbitration clause, arbitrators have the authority to enter interim injunctive relief during the course of the arbitration proceedings. This is particularly true where the arbitration clause incorporates by reference the A.A.A. Commercial Rules which specifically provide the arbitrators with this authority.<sup>171</sup> In addition, the provisional arbitration award is only appealable to the extent that it is a partial *final* award that disposes of an issue that is separable and discrete.<sup>172</sup> Furthermore, only a partial final award of this nature may be subject to judicial confirmation and, thus, judicial enforcement.<sup>173</sup>

### B. Courts

There is a split of authority as to the propriety of judicial injunctive relief pending arbitration. For example, the First,<sup>174</sup> Second,<sup>175</sup> Fourth,<sup>176</sup> and Seventh Circuits<sup>177</sup> have granted provisional relief in necessary and appropriate matters, while the Eighth<sup>178</sup> and Tenth Circuits<sup>179</sup> have refused to grant any provisional relief pend-

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168. *Id.* at 1049.

169. *See* *Island Creek Coal Sales Co. v. City of Gainesville*, 764 F.2d 437 (6th Cir.), *cert. denied*, 474 U.S. 948 (1985).

170. *Id.* at 441 (citing 9 U.S.C. § 11(c) (1982)).

171. *See supra* note 144.

172. *See, e.g.*, *Sperry Int'l Trade, Inc. v. Government of Israel*, 532 F. Supp. 901 (S.D.N.Y.), *aff'd*, 689 F.2d 301 (2d Cir. 1982), *later proceeding*, 602 F. Supp. 1440 (S.D.N.Y. 1985).

173. *See, e.g.*, *Island Creek Coal Sales Co. v. City of Gainesville*, 729 F.2d 1046 (6th Cir. 1985) (interim award confirmed); *Atlantic Shipping Corp. v. International Modular Hous., Inc.*, 547 F. Supp. 1356 (S.D.N.Y. 1982) (interim award confirmed); *Eurolines Shipping Co. v. Metal Transp. Corp.*, 491 F. Supp. 590 (S.D.N.Y. 1980) (partial award confirmed).

174. *See* *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986).

175. *See* *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y.*, 749 F.2d 124 (2d Cir. 1984); *Connecticut Resources Recovery Auth. v. Occidental Petroleum Corp.*, 705 F.2d 31 (2d Cir. 1983).

176. *See* *Merrill Lynch Pierce Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985).

177. *See* *Sauer-Getriebe, KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir.), *cert. denied*, 464 U.S. 1070 (1984).

178. *See* *Merrill Lynch Pierce Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984).

179. *See* *Merrill Lynch Pierce Fenner & Smith, Inc. v. Scott*, No. 83-1480, slip op. (10th Cir. 1983).

ing arbitration.<sup>180</sup> In addition, state judiciaries that have considered the issue are equally split.<sup>181</sup>

The courts that have denied judicial provisional relief pending arbitration ordinarily express a reluctance to tread upon the powers granted to the arbitrators. These courts base their holdings on the mandatory language of the Federal Arbitration Act.<sup>182</sup> The courts that favor provisional relief while arbitration pends express the need to preserve the status quo and the efficacy of the arbitration proceeding.<sup>183</sup> Nevertheless, the courts that favor judicial provisional relief disagree over the rationale for the issuance of such provisional relief.<sup>184</sup>

At the outset, it may be helpful to examine the rationale by which courts have refused to grant provisional relief pending arbitration. In one such case, *Merrill Lynch Pierce Fenner & Smith, Inc. v. Shubert*,<sup>185</sup> the court denied the defendant's motion for preliminary injunctive relief pending arbitration primarily on the grounds of the mandatory language of the Federal Arbitration Act and public policy.<sup>186</sup> In denying relief, the *Shubert* court applied a

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180. See also *Merrill Lynch Pierce Fenner & Smith, Inc. v. Thomson*, 574 F. Supp. 1472 (E.D. Mo. 1983); *Merrill Lynch Pierce Fenner & Smith, Inc. v. DeCaro*, 577 F. Supp. 616 (W.D. Mo. 1983).

181. See *Merrill Lynch Pierce Fenner & Smith, Inc. v. District Court of Denver*, 672 P.2d 1015 (Colo. 1983) (granting preliminary injunction under the Federal Arbitration Act); *New England Petroleum Corp. v. Asiatic Petroleum Corp.*, 82 Misc. 2d 561, 368 N.Y.S.2d 930 (N.Y. Sup. Ct. 1975) (parties may obtain preliminary injunctive relief pending arbitration); *E.F. Hutton & Co. v. Bokelmann*, 56 Misc. 2d 910, 290 N.Y.S.2d 415 (N.Y. Sup. Ct. 1968) (court may grant provisional remedy or temporary injunctive relief pending arbitration). *But see* *Merrill Lynch Pierce Fenner & Smith, Inc. v. McCullom*, 666 S.W.2d 604 (Tex. Ct. App. 1984), *cert. denied*, 469 U.S. 1127 (1985) (preliminary injunction denied pursuant to the Federal Arbitration Act).

182. See *Merrill Lynch Pierce Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286 (8th Cir. 1984); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Schubert*, 577 F. Supp. 406 (M.D. Fla. 1983); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Thomson*, 574 F. Supp. 1472 (E.D. Mo. 1983); *Merrill Lynch Pierce Fenner & Smith, Inc. v. DeCaro*, 577 F. Supp. 616 (W.D. Mo. 1983); *Klien Sleep Prods. v. Hillside Bedding Co.*, 563 F. Supp. 904 (S.D.N.Y. 1982).

183. See *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986); *Merrill Lynch Pierce Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985); *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co.*, 749 F.2d 124 (2d Cir. 1984); *Sauer-Getriebe, KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983); *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468 (2d Cir. 1980).

184. Compare *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986) and *Guinness-Harp Corp. v. Joseph Schlitz Brewing Co.*, 613 F.2d 468 (2d Cir. 1980) with *Merrill Lynch Pierce Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985).

185. 577 F. Supp. 406 (M.D. Fla. 1983) [hereinafter *Shubert*].

186. *Id.* at 407. The plaintiff alleged that the defendant had breached his employment contract when, upon his resignation, he copied some of the plaintiff's records and solicited some former customers. *Id.* at 406. The plaintiff sought a preliminary injunction to preserve the status quo pending arbitration of the dispute. *Id.*

tripartite analysis. First, the court concluded that the controversy fell within the parties' arbitration agreement.<sup>187</sup> Second, the court noted the mandatory language of the Federal Arbitration Act<sup>188</sup> which requires a stay of judicial proceedings when there is a valid arbitration agreement.<sup>189</sup> Third, the court concluded that any judicial interference in the arbitration process would not only impede the statutory scheme, but also could interfere with the arbitration process itself.<sup>190</sup>

In three decisions similar to *Shubert*, federal courts have also denied the issuance of preliminary injunctive relief pending arbitration. In *Merrill Lynch Pierce Fenner & Smith, Inc. v. Thomson*,<sup>191</sup> an investment firm sought a preliminary injunction to prevent former employees from using confidential information in violation of their employment agreements, and to prohibit the solicitation by these former employees of Merrill Lynch customers.<sup>192</sup> Merrill Lynch claimed that without preliminary injunctive relief pending arbitration of these issues, it would suffer irreparable harm, and that it lacked an adequate remedy at law.<sup>193</sup>

The district court applied a literal interpretation to the Federal Arbitration Act.<sup>194</sup> As a result, the court held that in the context

187. *Id.* at 407. The *Shubert* court also found that the agreement fell within the Federal Arbitration Act because it involved "a transaction involving commerce" for purposes of section 2 of the Act. *Id.* (citing 9 U.S.C. § 2 (1982)).

188. 9 U.S.C. § 2 (1982).

189. *Id.*

190. *Shubert*, 577 F. Supp. at 407. The *Shubert* court noted that to issue temporary injunctive relief, the plaintiff must establish a substantial likelihood of success on the merits. *Id.* The court stated:

Were [it] to adjudicate the probability of the plaintiff's success on the merits of the very issues which are subject to arbitration, the judicial process might well interfere with the ability of the arbitration panel to fashion appropriate relief through the arbitration process. Furthermore, the inquiry necessary to make such an adjudication would clearly be inconsistent with the purpose of the arbitration act to unburden the court system.

*Id.*

In denying the plaintiff's request for injunctive relief, the court distinguished *Erving v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972). The *Shubert* court noted that, unlike the *Erving* court, it was not called on to adjudicate primary arbitration issues and the arbitration agreement did not expressly allow injunctive relief pending arbitration. *Shubert*, 577 F. Supp. at 407.

191. 574 F. Supp. 1472 (E.D. Mo. 1983) [hereinafter *Thomson*].

192. *Id.* at 1473.

193. *Id.* at 1478.

194. *Id.* According to the *Thomson* court, the Federal Arbitration Act's requirement that judicial action be stayed pending arbitration prohibits courts from addressing the merits of a dispute until after arbitration. *Id.* (citing 9 U.S.C. § 3 (1982)). The court noted that a preliminary injunction would necessarily require a time consuming exploration of the merits. *Id.*

of the valid arbitration clause and the involvement of arbitrable issues, it could not "do anything further on the merits save compel arbitration and stay the [judicial] proceedings pending arbitration."<sup>195</sup> Moreover, the court noted that the time and expense entailed in a preliminary injunction hearing would require unnecessary duplication of effort and intolerable delay.<sup>196</sup>

The United District Court for the Western District of Missouri also denied a request for a preliminary injunction pending arbitration in *Merrill Lynch Pierce Fenner & Smith, Inc. v. DeCaro*.<sup>197</sup> The *DeCaro* court echoed the sentiments expressed in the *Thomson* opinion and denied the request for preliminary injunctive relief on the grounds of duplication of effort and undue delay.<sup>198</sup>

In a similar factual context as *Thomson* and *DeCaro*, the Eighth Circuit reached the same conclusion in *Merrill Lynch Pierce Fenner & Smith, Inc. v. Hovey*.<sup>199</sup> The *Hovey* court declined to permit the issuance of injunctive relief on the basis of the Federal Arbitration Act's directive and on the grounds of delay and duplication of effort.<sup>200</sup> Furthermore, the Eighth Circuit expressed concern that the issuance of preliminary injunctive relief would unnecessarily enmesh federal tribunals in the arbitration process and rob the arbitration process of its proper role in the statutory scheme.<sup>201</sup>

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195. *Id.*

196. *Id.* at 1479.

197. 577 F. Supp. 616 (W.D. Mo. 1983) [hereinafter *DeCaro*]. In *DeCaro*, Merrill Lynch brought an action against the defendant for alleged violations of their employment agreement. *Id.* at 617. Under the agreement, any controversies or disputes were to be submitted to arbitration. *Id.* To that end, the defendant responded to the action by moving for a court order to arbitrate the dispute and to stay the preliminary injunction action. *Id.*

198. *Id.* at 625. The *DeCaro* court noted two factors that prohibited judicial injunctive relief. First, the court noted that the Supreme Court has repeatedly stated that the Federal Arbitration Act provides courts with a very narrow role in the arbitration process — determining whether a claim is within the arbitration agreement. *Id.* at 624 (citing *Buffalo Forge Co. v. United States Steelworkers of Am.*, 428 U.S. 397 (1976); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *United States Steelworkers of Am. v. American Mfg. Co.*, 363 U.S. 564 (1960)). Second, a decision to issue a preliminary injunction involves an inquiry into the merits of a dispute and, thus, requires considerable involvement in the arbitrable dispute. According to the *DeCaro* court, this would undermine the purpose of the Act — speedy and efficient dispute resolution. *Id.* at 624-25.

199. 726 F.2d 1286 (8th Cir. 1984) [hereinafter *Hovey*]. In *Hovey*, Merrill Lynch sought to enjoin five former employees from using company records and soliciting company customers. Four of the former employees had contracts that required the arbitration of employment related disputes. *Id.* at 1287, 1289. Accordingly, the former employees counterclaimed seeking to force arbitration of the dispute without a preliminary injunction. *Id.* at 1287, 1291.

200. *Id.* at 1292.

201. *Id.* According to the *Hovey* court, the Federal Arbitration Act was intended to

In a completely different factual context, the Southern District of New York denied preliminary injunctive relief.<sup>202</sup> In *Klien Sleep Products v. Hillside Bedding Co.*, the plaintiff brought a copyright infringement action against Hillside Bedding Co. ("Hillside"), a franchisor of retail bed and bedding stores. Hillside filed a third-party claim against the alleged infringer, SBS Bedding, Inc. ("SBS").<sup>203</sup> The copyright infringement action was settled between all parties, but the conflict between Hillside and SBS escalated into a dispute over their franchise agreement.<sup>204</sup> Hillside sought a preliminary injunction enjoining SBS from operating a store alleged to be in violation of the agreement.<sup>205</sup> The court first noted the strong statutory policy favoring arbitration.<sup>206</sup> The court then noted that even though it "ha[d] the power in proper circumstances to issue injunctive relief pending arbitration," to do so in this case would invade the province of the arbitrator and undermine the arbitration process.<sup>207</sup>

The decisions that deny provisional relief pending arbitration possess a common rationale that rests upon three theoretical underpinnings: contract language, statutory scheme, and public policy. The judiciary finds it a simple matter to base a denial of provisional relief upon the parties' arbitration agreement which is the best evidence of the parties' intentions. Concomitantly, the courts have based their conclusions upon the mandatory language of the Federal Arbitration Act which specifically dictates that the court "shall" compel arbitration in the context of a valid arbitration agreement.<sup>208</sup> Finally, the courts have resisted involvement in arbitration proceedings on the grounds of public policy, noting that

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aid "quick" and "expeditious" resolution of properly arbitrable disputes. *Id.* at 1291. Any judicial intervention in a properly arbitrable dispute would run counter to this purpose. *Id.* at 1292. See also *Merrill Lynch Pierce Fenner & Smith, Inc. v. Scott*, No. 83-1480, slip op. (10th Cir. 1983).

202. *Klien Sleep Prods. v. Hillside Bedding Co.*, 563 F. Supp. 904 (S.D.N.Y. 1982).

203. *Id.* at 905.

204. *Id.*

205. *Id.*

206. *Id.* at 906 (citing 9 U.S.C. § 2 (1982)). The *Klien Sleep Products* court noted that the Federal Arbitration Act so strongly favors arbitration of arbitrable disputes that it overrides state law or regulation that would indicate the contrary. *Id.*

207. *Id.* at 906. The *Klien Sleep Products* court noted that judicial, injunctive relief would undermine the arbitration process because a preliminary injunction inquiry would necessarily involve an exposition of the merits of the dispute in arbitration. *Id.* The court believed that judicial injunctive relief would invade the province of the arbitrator because the arbitrator can grant preliminary injunctive relief pending arbitration of the primary issue. *Id.* at 907 (citing COMMERCIAL ARBITRATION RULE 43 (American Arbitration Ass'n 1983)).

208. 9 U.S.C. §§ 2, 3 (1982).

the entry of provisional relief might delay the arbitration process and result in a duplication of effort.

Although many courts that have considered temporary injunctive relief pending arbitration have upheld its propriety, they employ a variety of rationales to support their conclusions. These rationales include the "hollow formality" test<sup>209</sup> and the preliminary injunction test.<sup>210</sup> Both of these judicial tests permit the consideration of provisional relief pending arbitration and focus upon a common objective — the necessity of preserving the status quo pending arbitration.

The decision in *Teradyne, Inc. v. Mostek Corp.*,<sup>211</sup> exemplifies the preliminary injunction test. In *Teradyne*, the First Circuit held that a court may issue preliminary injunctive relief pending arbitration, provided that the First Circuit's four-part test for the issuance of a preliminary injunction is satisfied.<sup>212</sup> In reaching this decision, the court stated that the overriding purpose of the Federal Arbitration Act is to "enforce [arbitration] agreements into which the parties had entered."<sup>213</sup> According to the court, without preliminary injunctive relief to preserve the status quo, the arbitration process could be impaired and, thus, the arbitration agreement would not be enforced.<sup>214</sup>

As a practical matter, under this four-part test, preliminary injunctive relief may be issued when it enhances the enforcement of arbitration agreements.<sup>215</sup> In other words, the *Teradyne* decision is grounded upon the notion that courts may issue preliminary injunctive relief when it will preserve the status quo pending arbitration, and thereby preserve the meaningfulness of the arbitration process itself.<sup>216</sup>

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209. See *Merrill Lynch Pierce Fenner & Smith, Inc. v. Bradley*, 756 F.2d 1048 (4th Cir. 1985).

210. See *Teradyne, Inc. v. Mostek Corp.*, 797 F.2d 43 (1st Cir. 1986); *Roso-Lino Beverage Distribs., Inc. v. Coca-Cola Bottling Co. of N.Y.*, 749 F.2d 124 (2d Cir. 1984); *Sauer-Getriebe, KG v. White Hydraulics, Inc.*, 715 F.2d 348 (7th Cir. 1983).

211. 797 F.2d 43 (1st Cir. 1986).

212. *Id.* at 51. Under the four-part, preliminary injunction test, a court must find:

(1) [that] the plaintiff will suffer irreparable injury if the injunction is not granted; (2) that the plaintiff's injury outweighs any harm which granting injunctive relief will inflict on the defendant; (3) that the plaintiff has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction.

*Id.* at 51-52.

213. *Id.* at 51 (quoting *Dean Whitter Reynolds v. Byrd*, 470 U.S. 213, 220 (1985)).

214. *Id.*

215. *Id.*

216. *Id.* Similarly, the Second and Seventh Circuits also have adopted this four-part

Although the Second Circuit rejected the preliminary injunction test in *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*,<sup>217</sup> the court echoed the status quo rationale that underlies the preliminary injunction test. In *Guinness-Harp*, the plaintiff, Guinness, and the defendant, Schlitz, had entered into a beer distributorship agreement in which Guinness agreed to distribute certain Schlitz products.<sup>218</sup> The agreement included specific provisions that either party was required to follow before achieving termination. These steps included, in procedural order: (a) a notice and cure period; (b) review by a panel chosen by Schlitz; and (c) arbitration.<sup>219</sup> Schlitz became dissatisfied with the performance of Guinness under the agreement.<sup>220</sup> After complying with the first two of the above provisions, Schlitz terminated the agreement contrary to the agreed upon arbitration and Guinness's demands.<sup>221</sup> Guinness filed suit, and the United States District Court for the Eastern District of New York issued a preliminary injunction requiring Schlitz to continue the agreement pending arbitration. Schlitz appealed.<sup>222</sup>

The Second Circuit affirmed the preliminary injunction because the agreement required arbitration prior to termination.<sup>223</sup> At the outset, the court noted that "what comes to us for review labeled a preliminary injunction is in substance a final injunction, albeit one of limited duration."<sup>224</sup> As a result, the court found that the traditional preliminary injunction test need not be met.<sup>225</sup> Instead, the court reasoned that "the plaintiff must satisfy the traditional equi-

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preliminary injunction test. See *Roso-Lino Distribs. v. Coca-Cola Bottling Co.*, 749 F.2d 124, 125 (2d Cir. 1984); *Sauer Getriebe KG v. White Hydraulics, Inc.*, 715 F.2d 348, 351-52 (7th Cir. 1983), *cert. denied*, 464 U.S. 1070 (1984).

217. 613 F.2d 468 (2d Cir. 1980).

218. *Id.* at 470.

219. *Id.* The agreement further provided that these provisions would become effective prior to termination of Guinness as its distributor by Schlitz. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 473.

224. *Id.* at 471. The *Guinness-Harp* court perceived the preliminary relief as permanent or final because:

The merits of their fundamental dispute — whether grounds exist for ultimate termination of the distributorship — is a matter for arbitration not for the court. The "merits" of their lawsuit concern only whether there can be termination in the interval prior to the completion of arbitration. As to this issue, the injunction issued by the District Court is for all practical purposes a final injunction; it maintains the distributorship pending arbitration, and that is the relief for which Guinness brought this lawsuit.

*Id.* In essence, the *Guinness-Harp* court perceived its role as ruling on a request for specific performance of a contract term. *Id.* at 471-72.

225. *Id.* at 471.

table standards for specific performance of a contract.”<sup>226</sup> The court held that these standards were met, stating: “Here maintenance of the status quo pending arbitration relates in a substantial way to the performance of the agreement. Guinness is therefore entitled to specific performance of its arbitration agreement, including the status quo provision.”<sup>227</sup>

*Guinness-Harp* illustrates that a specific provision requiring preservation of the contractual status quo between the parties pending arbitration may be upheld by a court through judicial provisional relief. A “status quo provision” may resolve any doubts that a court may harbor regarding issuance of provisional relief pending arbitration.

In contrast to the preliminary injunction test and its status quo underpinnings, the Fourth Circuit has recently formulated a new test for the issuance of preliminary relief: the “hollow formality” test. In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bradley*,<sup>228</sup> the court held that when a dispute is subject to compulsory arbitration, a preliminary injunction to preserve the status quo may be granted “if the . . . conduct [sought to be enjoined] would render that process a ‘hollow formality.’”<sup>229</sup> According to the court, this point of “hollow formality” is reached if “the arbitral award when rendered could not return the parties substantially to the status quo ante.”<sup>230</sup>

On the state court level, the majority rule also favors the judicial issuance of provisional relief pending arbitration. All of the state decisions in favor of provisional relief pending arbitration rest upon a pair of pre-eminent objectives: the preservation of the efficacy of the arbitration process and the prevention of irreparable damage to a disputant during the pendency of the arbitration proceeding.

In *J. Brooks Securities, Inc. v. Vanderbilt Securities, Inc.*,<sup>231</sup> the court held preliminary relief pending arbitration to be available in a virtually identical factual context to federal decisions like *Thom-*

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226. *Id.*

227. *Id.* at 472 (footnotes omitted).

228. 756 F.2d 1048 (4th Cir. 1985).

229. *Id.* at 1053.

230. *Id.* at 1053-54. It has been suggested that the Fourth Circuit test, set out in *Bradley*, is really no more than a restatement of the standard criteria for preliminary injunctions. One commentator has made a convincing argument for this proposition by a close examination of *Bradley's* recently adopted test. See Karmel, *supra* note 152, at 1378-80.

231. 126 Misc. 2d 875, 484 N.Y.S.2d 472 (N.Y. Sup. Ct. 1985) [hereinafter *Brooks*].



son, *DeCaro*, and *Hovey*.<sup>232</sup> In *Brooks*, the plaintiff, a securities dealer, filed a motion for a preliminary injunction enjoining its former employee and his new employer, Vanderbilt, from soliciting Brooks's customers during the period pending arbitration.<sup>233</sup> The court held that Brooks was entitled to the preliminary injunction pending arbitration and forbade Vanderbilt and the former employee from soliciting Brooks's customers. In reaching this holding, the court noted that it was important to preserve the status quo, so that the parties' choice of forum and the arbitrator's ability to render a remedy could be preserved. According to the *Brooks* court, ordering temporary restraint would maintain the status quo.<sup>234</sup>

Similarly, in *McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co.*,<sup>235</sup> a brokerage firm sought, based upon an allegation of proprietary rights, to enjoin its former employees from soliciting its customers upon their departure from the firm.<sup>236</sup> The court, in relevant part, compelled arbitration and issued preliminary injunctive relief.<sup>237</sup> In holding that temporary injunctive relief was proper, the *McLaughlin* court noted that injunctive relief is not precluded because a dispute is subject to pending arbitration. Rather, the court noted that, pursuant to its power to enforce an arbitration agreement, it could issue temporary injunctive relief to assure that any arbitration decision "is not rendered a nullity."<sup>238</sup>

Finally, in *Shay v. 746 Broadway Corp.*,<sup>239</sup> the plaintiffs obtained a preliminary injunction enjoining the defendant from disposing of real estate pending arbitration.<sup>240</sup> The plaintiff, Shay, filed a demand for arbitration, claiming that 746 Broadway Corporation ("Broadway") had committed an anticipatory breach of a joint

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232. *Id.* at 878, 484 N.Y.S.2d at 474.

233. *Id.* at 876, 484 N.Y.S.2d at 473. In *Brooks*, the plaintiff had entered into an employment agreement with its former employee. The agreement did not contain an arbitration clause, but the agreement did require that the employee maintain any and all licenses with the National Association of Securities Dealers. These licenses required arbitration. *Id.*

234. *Id.* at 877-78, 484 N.Y.S.2d at 474.

235. 114 A.D.2d 165, 498 N.Y.S.2d 146 (1986) [hereinafter *McLaughlin*].

236. *Id.* at 167, 498 N.Y.S.2d at 148-49. The plaintiff in *McLaughlin* was a member of the NYSE. The defendants were registered representatives of the NYSE. As such, both sides had pledged to abide by NYSE rules that, among other things, required arbitration of "[a]ny controversy between parties who are members." *Id.* at 169, 498 N.Y.S.2d at 149 (quoting N.Y. Stock Exch. Const. art. VIII, § 1).

237. *Id.* at 175, 498 N.Y.S.2d at 153.

238. *Id.* at 172, 498 N.Y.S.2d at 151.

239. 96 Misc. 2d 346, 409 N.Y.S.2d 69 (N.Y. Sup. Ct. 1978).

240. *Id.* at 349, 409 N.Y.S.2d at 71.

venture agreement to renovate and re-develop two adjoining buildings.<sup>241</sup> Shay sought to have Broadway enjoined from transferring ownership of or impairing Shay's interest in the two buildings.<sup>242</sup> The court held that it possessed inherent jurisdiction to prevent irreparable damage to a disputant during the pendency of an arbitration proceeding and enjoined Broadway from conveying ownership of the buildings pending designation of the arbitrators.<sup>243</sup>

Despite the various approaches taken by the majority of courts issuing temporary injunctive relief pending arbitration, they all possess a common underlying concern. The courts issue injunctive relief to preserve the status quo and assure that the arbitration process is meaningful. To this end, courts appear particularly willing to issue temporary injunctions when there is a "status quo provision" expressly requiring maintenance of the status quo pending arbitration.

#### V. ARBITRATOR'S POWER TO GRANT EQUITABLE RELIEF WHEN COURT WOULD NOT

Arbitrators have broad power to do justice in fashioning appropriate remedies and may even grant relief that a court would not.<sup>244</sup> Indeed, the Uniform Arbitration Act, which has been enacted in twenty-eight jurisdictions, specifies that "the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award."<sup>245</sup> Similarly, New York arbitration law specifies that

241. *Id.* at 347, 409 N.Y.S.2d at 70. There was no disagreement between the litigants that their dispute was to be ultimately resolved through arbitration. *Id.*

242. *Id.*

243. *Id.* at 348-49, 409 N.Y.S.2d at 70-71.

244. *See* *Konkar Maritime Enters., S.A. v. Compagnie Belge D'Affretement*, 668 F. Supp. 267, 271 (S.D.N.Y. 1987); *Compania Chilena de Navegacion Interocania v. Norton Lilly & Co.*, 652 F. Supp. 1512, 1516 (S.D.N.Y. 1987); *Sperry Int'l Trade, Inc. v. Government of Israel*, 532 F. Supp. 901, 905 (S.D.N.Y.), *aff'd*, 689 F.2d 301 (2d Cir. 1982), *later proceeding*, 602 F. Supp. 1440 (S.D.N.Y. 1985); *SCM Corp. v. Fisher Park Lane Co.*, 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398 (1976); *Freydberg Bros., Inc. v. Corey*, 177 Misc. 560, 31 N.Y.S.2d 10 (N.Y. Sup. Ct. 1941).

245. UNIFORM ARBITRATION ACT § 12(a)(5), in *DOMKE ON COMMERCIAL ARBITRATION* app. II, at 13 (1984 & Supp. 1988). *See* ALASKA STAT. §§ 09.43.010 to 09.43.180 (1983); ARIZ. REV. STAT. ANN. §§ 12-1501 to 12-1518 (1982); COLO. REV. STAT. §§ 13-22-201 to 13-22-223 (1973); DEL. CODE ANN. tit. 10, §§ 5701 - 5725 (1975); 1981 D.C. Stat. 16-4301 to 16-4319; HAW. REV. STAT. §§ 658-1 to 658-15 (1985); IDAHO CODE §§ 7-901 to 7-922 (1979); ILL. REV. STAT. ch. 10, paras. 101 - 123 (1987); IND. CODE. §§ 34-4-2-1 to 34-4-2-22 (1983); IOWA CODE §§ 679A.1 - 679A.18 (1987); KAN. STAT. ANN. §§ 5-401 to 5-422 (1982); KY. REV. STAT. ANN. §§ 417.050 - 417.240 (Michie/Bobbs-Merrill 1984 & Supp. 1988); LA. REV. STAT. ANN. §§ 9:4201 - 9:4217 (West 1983); ME. REV. STAT. ANN. tit. 14, §§ 5927 - 5949 (1980); MD. CTS. & JUD.

arbitration agreements are enforceable "without regard to the justiciable character of the controversy."<sup>246</sup>

Courts that have considered the extent of an arbitrator's equitable powers have reached holdings that are consistent with these statutes. For example, the Second Circuit discussed this issue extensively in *Sperry International Trade, Inc. v. Government of Israel*.<sup>247</sup> The *Sperry* court noted that New York law provides arbitrators with considerable latitude in adopting remedies.<sup>248</sup> The *Sperry* court further noted that parties who choose arbitration realize that "arbitration procedures and awards often differ from what may be expected in courts of law."<sup>249</sup> As a result, the *Sperry* court concluded that a court may not reverse an arbitrator's decision, because doing so would exceed the equitable powers that a similarly situated court could exercise.<sup>250</sup>

Likewise, in *Staklinski v. Pyramid Electric Co.*,<sup>251</sup> the court pointed out that an arbitrator's powers and remedies do not necessarily mirror those of a court. In *Staklinski*, an employer and the plaintiff entered into valid long-term employment agreement containing an arbitration clause by which they agreed to submit any dispute to arbitration.<sup>252</sup> Despite the employer's contention that it was against public policy to compel employment of an unacceptable employee, the court upheld the arbitration award directing specific performance in favor of the employee.<sup>253</sup> A strong dissent posited that such an award "is without precedent and violates set-

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PROC. CODE ANN. §§ 3-201 to 3-234 (1989); MASS. GEN. L. ch. 251, §§ 1-19 (1980); MINN. STAT. §§ 572.08 - 572.30 (1988); MO. REV. STAT. §§ 435.350 - 435.470 (1989); NEB. REV. STAT. §§ 25-2601 to 25-2622 (1985); NEV. REV. STAT. §§ 38.015 - 38.205 (1974); N.M. STAT. ANN. §§ 44-7-1 to 44-7-22 (1978); N.C. GEN. STAT. §§ 1-567.1 to 1-567.20 (1983); N.D. CENT. CODE §§ 32-29.2-01 to 32-29.2-20 (1976); OKLA. STAT. ANN. tit. 15, §§ 801 - 818 (West Supp. 1989); PA. STAT. ANN. tit. 42, §§ 7301 - 7320 (Purdon 1982); S.C. CODE ANN. §§ 15-48-10 to 15-48-240 (Law. Co-op. 1977); S.D. CODIFIED LAWS ANN. §§ 21-25A-1 to 21-25A-38 (1987); WYO. STAT. §§ 1-36-101 to 1-36-119 (1977).

246. N.Y. CIV. PRAC. L. & R. §§ 7501-7514 (McKinney 1980).

247. 689 F.2d 301 (2d Cir. 1982), *later proceeding*, 602 F. Supp. 1440 (S.D.N.Y. 1985) [hereinafter *Sperry*].

248. *Id.* at 306 (citing *Sprinzen v. Nomberg*, 46 N.Y.2d 623, 629, 389 N.E.2d 456, 458, 415 N.Y.S.2d 974, 976-77 (1979)).

249. *Id.* (quoting *Rochester City School Dist. v. Rochester Teachers Ass'n*, 41 N.Y.2d 578, 582, 362 N.E.2d 977, 981, 394 N.Y.S.2d 179, 182 (1977)).

250. *Id.* See also *Haulage Enters. Corp. v. Hempstead Resources Recovery Corp.*, 74 A.D.2d 863, 426 N.Y.S.2d 52 (1980); *Park City Assocs. v. Total Energy Leasing Corp.*, 58 A.D.2d 786, 396 N.Y.S.2d 377 (1977).

251. 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959).

252. *Id.* at 163, 160 N.E.2d at 79, 188 N.Y.S.2d at 542.

253. *Id.*

tled principles of equity," and noted that the award was "not possible either at law or equity."<sup>254</sup> Nevertheless, the court upheld the award, stating:

Whether a court of equity could issue a specific performance decree in a case like this is beside the point. There is no controlling public policy which voids an arbitration agreement like this one and the courts are not licensed to announce a new public policy to fit the supposed necessities of the case.<sup>255</sup>

Arbitrators may wield more power than the courts in fashioning remedies. Moreover, arbitrators may wield their power without the constraints of either *stare decisis* or public policy. Therefore, in the preparation of an arbitration agreement, the draftsman is well-advised to consider whether this type of unfettered power is acceptable and to draft accordingly.

## VI. DRAFTING ISSUES: THE ALTERNATIVES TO STANDARD ARBITRATION CLAUSES

The evolving case law with respect to equitable powers of arbitrators rests upon a single, unifying theme: the primacy of the arbitration agreement. As a general matter, the analysis of the arbitrator's equitable power begins and ends with the express and implied intentions of the parties, as reflected in the arbitration agreement. A broad arbitration clause, for example, universally will be construed to permit the arbitrator to award injunctive relief, specific performance, and a panoply of other equitable remedies. Even in the areas of ambiguity — for example, the issues of rescission, reformation, and provisional relief — the draftsman may dispel uncertainty merely by the express language of the arbitration agreement. Therefore, it is well worth the effort for the practitioner to prevent any undesirable construction by employing careful draftsmanship.

### A. *The Conflict Resolution Provision*

At the outset, a litigant may find that any traditional remedy, legal or equitable, is less desirable than informal conflict resolution procedures in the pre-litigation setting. This is particularly true where the subject matter of the contract is perishable or otherwise sensitive to delay. In this situation, one or both of the parties may desire to ensure continued performance while they engage in the

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254. *Id.* at 164, 160 N.E.2d at 80-81, 188 N.Y.S.2d at 544 (Burke, J., dissenting).

255. *Id.* at 163-64, 160 N.E.2d at 80, 188 N.Y.S.2d at 543 (citations omitted).

most expeditious and economical method of dispute resolution: informal conflict resolution.

The standard conflict resolution provision may be employed in the context of a long-term contractual relationship where neither party profits by the delay or cessation of performance. The delay and disruption necessitated by the suspension of performance during arbitration can lead both parties to include a conflict resolution clause in their contract.<sup>256</sup> To avoid disruption through performance suspension, the parties to the contract should draft a conflict resolution clause expressly stating that they shall perform notwithstanding any dispute under the contract. Moreover, the conflict resolution provision should require that the parties first attempt informal dispute resolution before proceeding to arbitration. Finally, the clause should establish more than one stage of informal dispute resolution.<sup>257</sup>

In drafting these terms into a conflict resolution provision, the parties may, for the most part, obtain interim specific performance by agreement instead of by provisional relief. Concomitantly, the conflict resolution provision prevents either party from suspending performance as a vehicle for delay or leverage because any whole-

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256. See, e.g., *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468, 470 (2d Cir. 1980).

257. Multiple stages of informal resolution procedure give the disputants more time to resolve their differences and enable them to consider whether they want to push the dispute into arbitration. A conflict resolution clause that includes these terms might read:

1. *Conflict Resolution.*

1.1 In the event any dispute arises under this Agreement or under any modification hereto, the parties involved agree to act immediately to resolve any disputes. All parties shall, the existence of a dispute notwithstanding, continue without delay to carry out all of their respective responsibilities under this Agreement and any modification hereto which are not affected by the dispute. If Vendor and Purchaser, via their respective designated representatives, cannot resolve a dispute within ten (10) days following notification in writing by either party of the existence of said dispute, then the following procedures shall apply:

(a) Vendor's Director of Installation and Purchaser's Director of Purchasing will meet to attempt to resolve said dispute within five (5) days of a request in writing by either party for such meeting.

(b) In the event that the meetings described in Section 1.1(a) do not result in a resolution of said dispute to the satisfaction of both parties within five (5) days of the written request for such meetings, then Vendor's Executive President will meet with Purchaser's Executive Vice President to discuss and attempt to resolve the dispute within five (5) days of a request in writing by either party for such meetings.

(c) In the event that the meetings described in this Section 1.1(b) do not result in a resolution of said dispute to the satisfaction of both parties within five (5) days of the written request for such meetings, then the dispute shall be submitted to binding arbitration pursuant to Section 2.

sale suspension of performance would constitute a blatant violation of the conflict resolution clause and may give rise to the inference of bad faith.

### B. *The Standard Arbitration Clause*

As the case law indicates, the nature and extent of the arbitrator's powers, as well as the scope of permissible remedies, are defined by the arbitration agreement.<sup>258</sup> In employing this standard, courts have ascribed broad equitable powers to arbitrators when the arbitration agreement is drafted broadly. One means of achieving such a broad grant of authority is through the A.A.A. Commercial Rule's standard arbitration clause. The standard arbitration clause provides that the parties to the contract agree to submit their dispute to arbitrators selected by the A.A.A. and to abide by the A.A.A. arbitration rules. Moreover, the parties agree to "abide by . . . any award rendered by the arbitrators."<sup>259</sup>

Courts are familiar with the A.A.A. arbitration clause for the arbitration of future disputes and generally accord it a broad interpretation.<sup>260</sup> Of course, this standard arbitration clause may provide the arbitrators with power that the parties deem too extensive. At the same time, this standard arbitration clause fails to address expressly the issues of reformation and rescission or the availability of provisional remedies. As the case survey indicates, courts are not willing to read these remedies into general arbitration

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258. See *supra* notes 12-66 and accompanying text.

259. COMMERCIAL ARBITRATION RULES 3-4 (American Arbitration Ass'n 1988). The standard clauses state as follows:

1. Submission of existing disputes:

We, the undersigned parties, hereby agree to submit to arbitration under the Commercial Arbitration Rules of the American Arbitration Association the following controversy: (cite briefly). We further agree that the above controversy be submitted to (one) (three) Arbitrator(s) selected from the panels of Arbitrators of the American Arbitration Association. We further agree that we will faithfully observe this agreement and the Rules and that we will abide by and perform any award rendered by the Arbitrator(s) and that a judgment of the Court having jurisdiction may be entered upon the award.

2. Arbitration of future disputes:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the Arbitrator(s) may be entered in any Court having jurisdiction thereof.

*Id.*

260. See, e.g., *Klein Sleep Prods. v. Hillside Bedding Co.*, 563 F. Supp. 904, 906 (S.D.N.Y. 1982).

clauses.<sup>261</sup> Thus, the practitioner may be well-advised to draft the arbitration clause with these issues in mind.

For example, a party may wish to arbitrate the issues of breach, causation, and damages, but may not desire to confer equitable powers upon the arbitrator due to the nature of the transaction or the drastic nature of the remedy. Therefore, the practitioner may draft an arbitration clause that specifically excludes equitable remedies from the arbitration process. The clause initially should embrace the A.A.A. Commercial Rules and then expressly exclude some of the remedies that might be available under the A.A.A. Commercial Rules.<sup>262</sup>

In this manner, the parties maintain control over the scope of the arbitrator's power. This may be significant in a case in which the parties may require the exercise of equitable powers in a very expeditious manner or may require more extensive discovery and evidentiary hearings than are readily available in arbitration. For example, in the context of a substantial and sophisticated commercial transaction, the parties may have to avail themselves of a temporary restraining order which the courts may grant and enforce in a more expeditious and effective manner than arbitrators. In addition, in this type of a commercial case, the parties may require evidence that is available and effective on a short-term basis only through the subpoena powers of a state or federal court. Certainly, the judicial process offers broader and more effective discovery tools in this regard.

On the other hand, if these concerns are not present, the parties may seek to ensure that the arbitrator's equitable powers are as

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261. See *supra* notes 98-111 and accompanying text.

262. An arbitration clause that restricts the arbitrator's ability to render equitable remedies might provide:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association — exclusive of A.A.A. Rule 43 — and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The Arbitrators may arbitrate any controversy or claim to the extent of awarding money damages; however, the parties hereby agree that no arbitrator shall possess or exercise equitable powers or issue or enter any equitable remedies. The A.A.A. Commercial Rules are hereby modified to this extent for the purposes of the arbitration of any disputes between the parties hereto. The parties reserve their right to file a claim for equitable relief in any court of competent jurisdiction, either prior to, during or subsequent to the pendency of any arbitration proceeding. The parties hereby expressly agree that the filing of an equitable claim in a court of competent jurisdiction shall not be deemed a waiver of the right to arbitrate a claim for money damages.

broad as possible. Thus, the parties should seek to modify the standard arbitration clause accordingly. The modified clause should grant the arbitrator the authority to award any legal or equitable remedy. To assure that a court will uphold an arbitrator's decision to rescind or reform, the clause should expressly grant the arbitrator that authority.<sup>263</sup> Of course, because reformation and rescission are among the most drastic and perhaps most unpredictable equitable remedies, parties may seek to include all legal and equitable remedies, with the exception of reformation and rescission.<sup>264</sup>

In addition to specific reference to equitable remedies, such as reformation or rescission, the practitioner especially must be careful to account for the relative necessity and availability of provisional relief (*i.e.*, preliminary injunctive relief pending arbitration). The split of authority<sup>265</sup> renders this issue all the more unpredictable, and a carefully worded provision all the more necessary. At the least, this issue should be addressed in the context of a transaction that may require broad and expeditious injunctive relief in the event of breach or non-performance. An arbitration clause that accounts for preliminary injunctive relief may be drafted so as to accord this authority to the arbitrator *or* a judicial tribunal.<sup>266</sup>

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263. A clause that gives the arbitrator the broadest range of equitable remedies might read:

Any controversy or claim — legal or equitable — arising out of or relating to this contract or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. The parties expressly agree that the arbitrator may award any legal or equitable remedy, including the remedies of reformation and rescission.

264. Such a clause could be drafted as follows:

Any controversy or claim — legal or equitable — arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Notwithstanding the above, the arbitrators may not arbitrate the issues of reformation and rescission, and may not enter any order or award which alters, amends, modifies, reforms or rescinds this contract or any portion thereof. Any party may file a claim for reformation or rescission with any court of competent jurisdiction, either prior to, during or subsequent to the filing of any arbitration proceeding. The parties expressly agree that the filing of a claim for reformation or rescission in a court of competent jurisdiction shall not be deemed or construed as a waiver of the right of arbitration.

265. See *supra* notes 174-245 and accompanying text.

266. To obtain provisional relief pending arbitration, the arbitration clause might state:



In the event that the parties elect to confer upon the arbitrator the power to award provisional relief, the parties should consider the inclusion of specific rules for expeditious proceedings.<sup>267</sup> Specific rules will ensure that the provisional relief truly is effective and that the arbitration proceeding is not rendered a nullity by virtue of irreparable injury in the interim.

Due to the difficulty of providing for and obtaining truly expeditious results in the arbitration setting, the parties should generally provide for the availability of provisional relief from a judicial tribunal. In this way, the parties will assure expeditious judicial review, avoid the necessity of judicial confirmation of an interim arbitration award, and avoid the risk of irreparable harm in the interim.

The practitioner may also wish to address the issue of the appeal and confirmation of a partial final arbitration award providing for interim relief. Even though courts generally will confirm partial final awards dealing with an independent and separable issue,<sup>268</sup> a specific contract provision addressing this issue may clarify the matter in the event of confirmation proceedings.

As this discussion illustrates, arbitration remedies are most likely to be exercised effectively when the agreement between the parties provides therefor. The A.A.A. Commercial Rule clause relating to future controversies<sup>269</sup> is suitable for use in most commer-

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*Provisional Relief By A Judicial Tribunal*

Any controversy or claim — legal or equitable — arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. Notwithstanding the above, any party may seek provisional relief pending arbitration, including a temporary restraining order or preliminary injunction, from any court of competent jurisdiction.

*Provisional Relief By The Arbitrator*

Any controversy or claim — legal or equitable — arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. In addition, any claim for provisional relief, including a claim for a temporary restraining order or preliminary injunctive relief pending arbitration, shall be resolved by arbitration in accordance with this provision.

267. For an instance when specific rules were effective, see *Guinness-Harp Corp. v. Jos. Schlitz Brewing Co.*, 613 F.2d 468 (2d Cir. 1980).

268. See, e.g., *Atlantic Shipping Corp. v. International Modular Hous., Inc.*, 547 F. Supp. 1356 (S.D.N.Y. 1982); *Eurolines Shipping Co. v. Metal Transp. Corp.*, 491 F. Supp. 590 (S.D.N.Y. 1980).

269. COMMERCIAL ARBITRATION RULE 3 (American Arbitration Ass'n 1988).

cial situations. Courts are familiar with the clause and they generally accord it a broad scope. Such a clause, however, leaves little control to the parties over the scope of the arbitration or the specific remedies to be awarded therein. Parties with special concerns should consider using additional language in their arbitration clauses to embrace or exclude specific remedies or to anticipate contingencies that may be unique to their situation.

## VII. CONCLUSION

As a general rule, a broad arbitration clause confers upon the arbitrator the power to award any type of legal or equitable remedy, with the possible exception of reformation and rescission. The law is unsettled with respect to the arbitrability of the issues of reformation and rescission because an arbitration award of rescission, for example, nullifies the very contract that gives rise to the arbitrator's power. In order to resolve this conundrum, the parties should expressly address the issues of reformation and rescission in the arbitration agreement.

The most nettlesome problem relates to the issue of provisional relief, most commonly, judicial, preliminary injunctive relief pending arbitration. The split of authority as to the availability of provisional relief from the courts and the institutional difficulty of obtaining adequate provisional relief in the course of the arbitration proceeding present a true Hobson's choice. The most realistic resolution of this problem may lie in express language providing for provisional relief from a judicial tribunal in order to preserve the efficacy of the arbitration process itself.

The hallmark of the arbitration forum is the contractual nature of the process, in both substantive and procedural respects. Therefore, contracting parties are capable of expressly defining the arbitrator's powers, be they legal or equitable. The arbitration agreement should be more explicit and expansive in direct proportion to the sophistication and complexity of the commercial transaction. Only in this way can the parties be assured of the preservation of their rights and remedies under all circumstances.

