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# CONTRACTUAL ARBITRATION—*Associated General Contractors v. Savin Brothers, Inc.*— Judicial Review of An Arbitrator's Punitive Award

## THE ISSUE

*Is the judicial policy prohibiting the imposition of penalties for violations of private contracts an overriding policy sufficient to warrant judicial interference with an arbitrator's decision on law?*

The New York Court of Appeals in *Associated General Contractors v. Savin Brothers, Inc.*, recently confronted a conflict between these two strongly supported public policies.<sup>1</sup> The court held that members of a commercial trade association may prearrange the amount of penalties to be exacted by an arbitrator who finds a contracting party in breach of the association's by-laws.<sup>2</sup>

In reaching this decision, the high court of New York strictly applied a balancing test, weighing the strength of the public policy which favors the finality of arbitral decisions against that policy which opposes the imposition of punitive awards. The court's decision accurately reflects the growing trend in both the commercial and labor law sectors towards expansion of an arbitrator's compensatory powers and, conversely, judicial restraint in reviewing arbitration awards.<sup>3</sup>

While the *Savin* court refused to interfere with an arbitrator's punitive award, the facts in this case reveal that it was the association members who pre-determined the minimum penalties to be levied for any breach. The arbitration process was used by the association as a rubber stamp to shield the fixed penalty provision from judicial scrutiny. This article suggests that the scale used in weighing the aforementioned public policies should exhibit a different balance in those situations where it is the contracting parties rather than an independent arbitrator who fix the punitive award.

## THE FACTS

An essential function of today's trade association is the representation of its employer-members in collective bargaining negotiations

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1. 36 N.Y.2d 957, 373 N.Y.S.2d 555, 335 N.E.2d 859 (1975).

2. *Id.*

3. See Note, *Judicial Review of Arbitration: The Role of Public Policy*, 58 Nw. U.L. Rev. 545 (1963); Fleming, *Arbitrators and the Remedy Power*, 48 VA. L. REV. 1199 (1962) (hereinafter referred to as Fleming.)

with its counterpart, the trade union. The Associated General Contractors (hereinafter referred to as AGC) is a national trade association consisting of individuals, firms and corporate enterprises engaged in the construction industry. The by-laws of AGC provide that, as a condition of membership in the association, any employer who engages members of a craft with whom AGC negotiates, must execute a current Designation Bargaining Agent agreement. The essence of these designations is to appoint AGC as the sole and exclusive bargaining representative for the member firm.

Pursuant to this by-law, Savin Brothers, a member of AGC's local New York chapter since 1958, executed successive designations. The designation included a provision calling for the arbitration of all alleged breaches of a member firm's obligations under the agreement. In the event that arbitrators should find that a signatory to the agreement violated its responsibilities it was agreed that the arbitrator:

Shall award damages to the AGC in an amount *no less* than three (3) times the daily liquidated damage amount provided for in each . . . heavy and construction contract to which the undersigned firm is a party within the geographical area of the applicable labor contract . . . for each . . . day the firm complained of is found by the arbitrator to have been in violation of its obligations . . . together with such other and further damages as the arbitrator in his discretion may determine.<sup>4</sup>

Additionally, the designation provided that the agreement was to be binding upon the signatory as long as it was a member of the association. Under the association's by-laws, no member could withdraw, resign or otherwise be relieved of its responsibilities unless it gave at least 30 days notice prior to the commencement of the collective bargaining negotiations. No such notice could be given during negotiations.

In May, 1972, a dispute arose between Savin and AGC centering on a claim that the former had violated its agreement with the latter by entering into an independent contract with the Teamsters—a union with whom the AGC was then collectively negotiating.<sup>5</sup> Fol-

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4. *Associated General Contractors v. Savin Bros., Inc.*, 45 A.D.2d 136, 356 N.Y.S.2d 374, 376 (1974) (emphasis added).

5. On March 31, 1972 the collective bargaining agreement which AGC had negotiated with the Teamsters union expired. Both prior and subsequent to that date, AGC, representing Savin, entered into negotiations with the Teamsters. On April 1, 1972 certain Teamsters' unions began a strike against member firms, including Savin, which continued until June 3, 1972. On May 5, 1972, while the strike was in progress, Savin entered into an independent one year agreement with the Teamsters. On May 15, 1972, AGC notified Savin that it had

lowing a hearing, the arbitrators found that Savin had violated the designation agreement during the period of 58 days. At the time of the breach, Savin had only one contract in the applicable geographic area. It contained a liquidated damage provision of \$600.00 per day. Trebling this amount and then multiplying by the number of days of violation pursuant to the formula in the designation, the arbitrators awarded AGC damages in the sum of \$104,400.00.

Savin immediately requested the New York Special Term to vacate the arbitrator's award. Savin claimed that the damage provision in the designation agreement imposed a penalty rather than liquidated damages and therefore contravened public policy so as to be unenforceable even when awarded by arbitrators. Both the arbitrators and Special Term held that the liquidated damages provision was reasonable and did not prescribe a penalty.<sup>6</sup>

As previously indicated, the damage provision contained in the Designation of Bargaining Agent agreement imposed damages at three times the daily liquidated damage amount provided for in each construction contract to which the defaulting member was a party.<sup>7</sup> The New York Court of Appeals reached a consensus that the liquidated damage clause was in actuality a penalty.<sup>8</sup>

In order to sustain a provision for payment of a definite sum as liquidated damages, it is a prerequisite that the sum stipulated stands as a reasonable pre-estimate of the loss likely to be caused by a breach.<sup>9</sup> The award granted by the arbitrator pursuant to the damage provision in the designation agreement clearly bore no reasonable relationship to the amount of damages which may have been sustained by AGC. The liquidated damages were to be dependent upon two unpredictable variables: (1) the number of contracts to which a breaching party was a member at the time of the breach and (2) the amount of liquidated damages provided for in such contracts. Each variable could differ from week to week depending upon the number of contracts still in effect at any given time and the terms thereof.<sup>10</sup>

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breached its obligations and demanded arbitration. On May 17, 1972, Savin notified AGC that it was resigning as a member of the association, effective immediately.

6. *Associated General Contractors v. Savin Bros., Inc.*, 45 A.D.2d 136, 139, 356 N.Y.S.2d 374, 377 (1974).

7. See text accompanying note 4 *supra*.

8. 36 N.Y.2d 957, 373 N.Y.S.2d 555, 335 N.E.2d 859 (1975).

9. RESTATEMENT OF CONTRACTS § 339(1) (1932); 5 CORBIN, CONTRACTS § 1057 (1964).

10. In this contract the parties promised performances of varying degrees of importance and value. However, payment of a pre-determined sum of money was required as damages for any breach whatever. Since such a contract promises the same reparation for the breach of a trivial provision as for the breach of the most important one, it is obvious that the parties

Moreover, even if the two variables could be predicted with some reasonable degree of accuracy the parties are hard pressed to explain the relationship between the daily liquidated damages payable for a contractor's breach of damages to an owner and the damages suffered by the AGC as the result of the withdrawal of such member. Any relationship that might exist becomes even more tenuous when, as in this case, the daily liquidated damage provision is arbitrarily trebled and the arbitrator is given power to impose damages in addition to those prescribed by the formula.

While recognizing the traditional policy against the awarding of penalties in contract actions,<sup>11</sup> the court, nevertheless, refused to interfere with the arbitrators' determination that the damages clause was not a penalty. The court maintained that in the field of collective bargaining, public policy favors the peaceful and final resolution of disputes through arbitration and contrariwise it looks with disfavor on the exaction of penalties. The court went on to hold that in situations such as this where "[t]here are involved no interests of third persons which can be said to transcend the concerns of the parties to the arbitration . . . there is no question involving public policy of such magnitude as to call for judicial intrusion."<sup>12</sup>

#### ANALYSIS

The result of the *Savin* court's balancing test becomes suspect in those situations where the contracting parties themselves fix the minimum penalties to be levied by the arbitrator upon a finding of violations.

#### *The Policy Against Penalties*

A distinction was adopted in early common law between bonds "where the party might be put in as good a plight as where the condition itself was literally performed," and situations "where the condition was collateral and no recompense or value could be put on the breach of it."<sup>13</sup> In the former case, equity would offer relief, while in the latter case it would not. This distinction in equity has been adopted in modern times under the terms of liquidated dam-

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have not made a reasonable forecast of just compensation for each of these varying breaches. See 5 CORBIN, CONTRACTS § 1066 (1964).

11. RESTATEMENT OF CONTRACTS § 342 (1932); Simpson, *Punitive Damages for Breach of Contract*, 20 OHIO ST. L.J. 284 (1959).

12. 36 N.Y.2d at 958, 373 N.Y.S.2d at 556, 335 N.E.2d at 859.

13. Note, *Penalties and Forfeitures*, 29 HARV. L. REV. 117, 125-26 (1915) (hereinafter referred to as *Penalties*).

ages and punitive damages.<sup>14</sup>

It can be advanced as a general rule that punitive damages are not recoverable for contractual violations.<sup>15</sup> A strong policy consideration underlying this principle is based upon the incompatibility of penalties with the compensatory nature of damages for breach of an agreement.<sup>16</sup> Additionally, and perhaps of greater significance in its effect upon the courts' reasoning, is the public's hostility to one-sided bargains which become proportionately odious as wealth becomes more widely distributed and capital more secure.<sup>17</sup> The public has a strong aversion to the enforcement of harsh, unequal bargains which are all too often witnessed in contracts containing penalty clauses for future breaches.

Relying upon these public policy considerations, the courts have rejected the proposition that the parties contracted for the imposition of a penalty and therefore must be bound by their own agreement.<sup>18</sup> In this area of damages, the courts have unabashedly created a limitation upon the freedom of contract.

### *The Policy Favoring Arbitration*

A policy of encouraging the employment of voluntary arbitration in settling contractual disputes has risen to national prominence during the last two decades.<sup>19</sup> Arbitration received its earliest and strongest support in the labor law sector, where the arbitration process is viewed by courts as a substitute for national industrial strife.<sup>20</sup> Furthermore, the advantages of commercial arbitration

14. 5 WILLISTON, CONTRACTS § 775A (3d ed. 1938).

15. RESTATEMENT OF CONTRACTS § 339(1) (1932); *Signall v. Gould*, 119 U.S. 495 (1886); *Cochran v. Hall*, 8 F.2d 984 (5th Cir. 1925); *Local 127, United Shoe Workers of America v. Brooks Shoe Mfg. Co.*, 298 F.2d 277 (3d Cir. 1962); *Giesecke v. Cullerton*, 280 Ill. 510, 117 N.E. 777 (1917); *Advance Amusement Co. v. Franke*, 268 Ill. 579, 109 N.E. 471 (1915).

16. 5 CORBIN, CONTRACTS § 1077 (1964).

17. See Penalties, *supra* note 13, at 125.

18. 5 CORBIN, CONTRACTS § 1057 (1964).

19. At early common law, agreements to arbitrate future disputes were unenforceable, as were the awards which resulted therefrom. See *Interstate Bakeries v. Teamsters* 734, 31 Ill. 2d 317, 319, 201 N.E. 2d 452, 453 (1964); *Fleming*, *supra* note 3.

20. See LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. §§ 141-44, 151-58, 159-67, 176-82, 185-87 (1973) [hereinafter referred to as LMRA]. The Supreme Court in *Textile Workers Unions v. Lincoln Mills*, 353 U.S. 448 (1957), not only held that collective bargaining agreements to arbitrate were enforceable in federal courts under section 301 of the LMRA, but also maintained that section 301 empowered the courts to create a federal common law of collective bargaining agreements. The *Lincoln Mills* Court reasoned that judicial enforcement of arbitration clauses is crucial to industrial peace because the agreement to arbitrate is the *quid pro quo* for the union's agreement not to strike.

In a series of three cases handed down in 1960, the Court further outlined the scope of judicial treatment of arbitration provisions in collective bargaining agreements that fall

have also witnessed increased public and judicial acclaim.<sup>21</sup>

Businesses have found the arbitration process to be beneficial for several reasons:

- (1) Arbitration avoids delays attributable to a case-congested court system.<sup>22</sup>
- (2) Arbitration offers an educated judge and jury in the form of an expert arbitrator. As stated in *American Almond Products Co. v. Consolidated Pecan Sales Co., Inc.*, "[I]n trade disputes one of the chief advantages of arbitration is that the arbitrators can be chosen who are familiar with the practices and customs of the calling."<sup>23</sup>
- (3) Arbitration provides an absence of the publicity which frequently accompanies court proceedings.<sup>24</sup>
- (4) Arbitration, by giving an increased rein to contractual freedom, is a means of increasing self-regulation in times where government regulation is placing a stranglehold on private enterprise.<sup>25</sup>

The essence and purpose behind private voluntary arbitration is defeated when reviewing courts participate in or alter the substantive decisions arrived at by the arbitrator.<sup>26</sup> For this reason, the

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under the ambit of section 301 of the LMRA. In *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steelworkers v. Warrior and Gulf Nav. Co.*, 363 U.S. 574 (1960), and *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), the Court held: (1) arbitration will be ordered unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute; (2) doubts as to the arbitrability of a claim will be resolved in favor of arbitration, (3) courts will overrule an arbitrator's decision only if the award fails to draw its essence from the collective bargaining agreement.

21. In 1925, Congress passed the Federal Arbitration Act, 9 U.S.C. § 1, as amended 9 U.S.C. § 10 (1973) which evidences legislative approval of arbitration as a viable alternative to the litigation of contractual disputes. The UNIFORM ARBITRATION ACT, ILL. REV. STAT. ch. 10, § 101 (1973), amending ILL. REV. STAT. ch. 10, § 1 (1917), which expands the powers of arbitrators, has also been adopted in the following jurisdictions: Alaska, Arizona, Arkansas, Delaware, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, North Carolina, South Dakota, Texas, Wyoming. N.Y. CIV. PRAC. LAW § 7511 (1963); see also CAL. CODE CIV. PRAC. § 1286.2 (1970); Note, *Scope of the United States Arbitration Act in Commercial Arbitration: Problems in Federalism*, 58 NW. U.L. REV. 468 (1963).

22. *Saltown and McWherter, Arbitration in Illinois—Need for a Change*, 49 ILL. BAR J. 330, 333 (1961) [hereinafter referred to as *Saltown*].

23. 144 F.2d 448, 450 (2d Cir. 1944).

24. *Saltown*, *supra* note 22, at 333.

25. Fleming, *supra* note 3, at 1199.

26. In *Fudickar v. Guardian Mutual Life Ins. Co.*, 62 N.Y. 392, 400 (1875), the court reasoned:

If courts should assume to rejudge the decision of arbitrators upon the merits, the value of this method of settling controversies would be destroyed and an award

judiciary, through exercise of the policy of self-restraint,<sup>27</sup> and the legislative branch, through the enactment of modern arbitration legislation,<sup>28</sup> have sought to limit the jurisdiction of reviewing courts.

The Federal Arbitration Act<sup>29</sup> and the Uniform Arbitration Act<sup>30</sup> limit a court's power to vacate an arbitrator's award to those instances where:

- (1) The award is procured by corruption or other undue means or,
- (2) There is evident partiality by an arbitrator or,
- (3) The arbitrator exceeds his powers.

In complying with these legislative guidelines, courts have refused to vacate awards which are merely based on erroneous interpretations of law or insufficient supporting facts.<sup>31</sup> Instead, the courts have required a showing of manifest disregard of law by the arbitrator before they will refuse to enforce his award.<sup>32</sup> This is not to say that courts are hesitant in vacating arbitration awards which order parties to violate the United States Constitution<sup>33</sup> or federal and state statutes.<sup>34</sup>

instead of being a final determination of a controversy would be but one of the steps in its progress.

See also *Federal Commerce and Nav. Co. v. Kanematsu-Gosho*, 457 F.2d 387, 389 (2d Cir. 1972); Note, *Judicial Review of Arbitration Awards on the Merits*, 63 HARV. L. REV. 681 (1950).

27. Note, *Judicial Control of the Arbitrator's Jurisdiction: A Changing Attitude*, 58 NW. U.L. REV. 521 (1963).

28. Federal Arbitration Act, 9 U.S.C. § 10 (1973), amending 9 U.S.C. § 1 (1925); UNIFORM ARBITRATION ACT, ILL. REV. STAT. ch. 10, § 112 (1973), amending ILL. REV. STAT. ch. 10, § 1 (1917).

29. 9 U.S.C. § 10 (1973), amending 9 U.S.C. § 1 (1925).

30. ILL. REV. STAT. ch. 10, § 112 (1973), amending ILL. REV. STAT. ch. 10, § 1 (1917).

31. *Wilko v. Swan*, 346 U.S. 427 (1953); *Podolsky v. Raskin*, 294 Ill. 443, 128 N.E. 534 (1920); *Cohen v. Meyers*, 115 Ill. App. 2d 286, 253 N.E.2d 144 (1969).

32. The *manifest disregard* standard was first formulated by the Supreme Court in *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953) where the Court held that "[T]he interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." Manifest disregard of the law has been interpreted as something beyond and different from a mere error in the law or failure on the part of an arbitrator to understand or apply the law. Instead, for the court to vacate an award on this ground, it must be established that the arbitrator understood and correctly stated the law but proceeded to ignore it. See *I/S Stavborg v. National Metal Converters Inc.*, 500 F.2d 424 (2d Cir. 1974); *Sobel v. Hertz Warner and Co.*, 469 F.2d 1211 (2d Cir. 1972).

33. *Dewey v. Reynolds Metals Co.*, 69 L.R.R.M. 2601 (W.D. Mich. 1968).

34. Compliance with the law cannot be avoided by authorizing an arbitrator to order the parties to adhere to an illegal agreement. See *Botany Industry Inc. v. N.Y. Joint Bd. Amalgamated Clothing Workers of America*, 375 F. Supp. 485 (S.D.N.Y. 1974), vacated 506 F.2d 1246 (2d Cir. 1974); *Gulf States Tel. Co. v. Local 1692*, 416 F.2d 198, 201 (5th Cir. 1969);

*The Judicial Balance of the Policies*

A more difficult question confronting the courts concerns the enforcement of arbitration awards that contravene public policy. In wrestling with this perplexing issue, the courts have uniformly relied upon a balancing test in which the benefits of arbitration<sup>35</sup> are weighed against those principles protected by the public policy allegedly violated.<sup>36</sup>

In *Publishers' Association v. Newspaper and Mail Deliverers' Union*,<sup>37</sup> the Appellate Division of the Supreme Court of New York vacated an arbitrator's award of a conditional \$5000 penalty, awarded in addition to \$2000 actual damages, for a union violation of its collective bargaining agreement. The agreement gave express authority to the arbitrators to "impose damages, money or other penalties upon any party hereto found guilty of a violation."<sup>38</sup> The court, in expounding the policy reasons against the use of penalties as damages,<sup>39</sup> refused to "lend its power to the enforcement of the

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Franklin v. National C. Goldstone Agency, 33 Cal. 2d 628, 204 P.2d 37 (1949); Loving & Evans v. Blick, 33 Cal. 2d 603, 204 P.2d 23 (1949).

In labor arbitration, whether violations of state statutes will be a basis for setting aside an arbitrator's award poses more difficult questions than does violation of federal statutes, since federal law is being applied in section 301(a) (LMRA) cases. Any inconsistent state policy must fall before the federal law. *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). See Dunau, *Three Problems in Labor Arbitration*, 55 VA. L. REV. 427, 439 (1969).

35. See text accompanying notes 20 through 25 *supra* which lists the benefits attributed to the arbitration process.

36. The case of *Local 453, Intern. Union of Electrical, Radio and Machine Workers v. Otis Elevator Co.*, 201 F. Supp. 213 (S.D.N.Y. 1962), *rev'd*, 314 F.2d 25 (2d Cir. 1963) is a clear illustration of the balancing test employed by the courts in solving the public policy problem. In *Otis*, an arbitrator hearing a labor dispute reinstated an employee who had been discharged following a state conviction for gambling on his employer's premises. The district court vacated the award on the ground that there was an overriding public policy against organized gambling which outweighed the value of affirming the arbitrator's award. The Court of Appeals, however, in reversing the lower court, held that there was no such public policy prohibiting reinstatement in that situation. *Id.* at 29. Other cases in which this balancing test was recognized by the courts as an instrument to be applied in settling public policy disputes include: *Gulf States Tel. Co. v. Local 1692*, 416 F.2d 198 (5th Cir. 1969); *International Ass'n of Machinists, District No. 8 v. Campbell Soup Co.*, 406 F.2d 1223 (7th Cir. 1969) *cert. denied*, 396 U.S. 820; *Ludwig Honold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 1128 n.27 (3d Cir. 1969); *Union Employers Division of Printing Industry v. Columbia Typographical Union*, 353 F. Supp. 1348 (D.D.C. 1973), *aff'd* 492 F.2d 669 (D.C. Cir. 1974); *Exercycle Corp. v. Maratta*, 9 N.Y.2d 329, 174 N.E.2d 463 (1961); *Ruppert v. Egelhofer*, 3 N.Y.2d 576, 148 N.E.2d 129 (1958); *Black v. Cuttler Laboratories*, 43 Cal. 2d 788, 278 P.2d 905 (1955); *Western Union Tel. Co. v. American Communications Ass'n*, 299 N.Y. 177, 86 N.E.2d 162 (1949). See also Note, *Judicial Review of Arbitration: The Role of Public Policy*, 58 NW. U.L. REV. 545 (1963); Jones, *The Nature of the Courts' "Jurisdiction" in Statutory Arbitration Post-Award Motions*, 46 CAL. L. REV. 411 (1958).

37. 280 App. Div. 500, 114 N.Y.S.2d 401 (1952).

38. *Id.* at 402.

39. See text accompanying notes 13 through 17 *supra* which discusses the policy reasons

kind of a decision in arbitration which it would neither allow nor enforce as the subject of an action maintained before it directly."<sup>40</sup>

The principles behind that policy which opposes punitive awards are adequately safeguarded in those situations where the imposition and amount of the penalty are post-determined by an independent arbitrator. The assessment of the amount after the breach occurs avoids the injustice of a pre-arranged penalty unrelated to degree of fault. The parties' authorization of the exaction of penalties for future breaches removes the element of surprise objectionable in punitive damages. The danger of an unfair bargain arising from differences in bargaining strength is also obviated where the parties are able to select an arbitrator on the basis of his expertise and fairness.<sup>41</sup> Finally, in allowing the arbitrator to exact punitive awards, the penalty is maintained as an effective device in deterring deliberate violations of trade association by-laws or collective bargaining agreements which might provoke industrial chaos.

In circumstances such as *Savin*,<sup>42</sup> where the contracting parties predetermine minimum penalties to be levied by an arbitrator, the very abuses of punitive awards which society abhors are manifest. The penalty sum fixed before the breach bears no relation to the breaching party's degree of fault and the stronger contracting party is able to impose his will, in the form of a penalty provision, upon the weaker party. In such cases, the arbitrator functions merely as an involuntary lackey who protects the punitive award from judicial review. Moreover, a unique function of the arbitration process is circumvented in that the arbitrator is no longer permitted to lend his expertise in the determination of awards. His independent

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against the exactment of penalties as damages for civil contractual violations.

40. 114 N.Y.S.2d at 407. In *East India Trading Co. v. Halari*, 280 App. Div. 420, 114 N.Y.S.2d 93 (1952), the same court affirmed an arbitrator's award of a \$436.80 penalty, in addition to actual damages, levied pursuant to trade association by-laws authorizing the imposition of a penalty, as determined by arbitration, of not less than 2% and not more than 10% of the market value. The penalty was upheld as a means, within the arbitrator's discretion, of compensating for those losses not covered under the legal measure of damages. See also *South East Atlantic Shipping LTD v. Garnac Grain Co.*, 356 F.2d 189 (2d Cir. 1966), where the court refused to determine the question of whether an arbitrator's award could be so clearly punitive as to exceed his contractual powers or to be otherwise unenforceable. *But see Harbor Island Spa, Inc. v. Norwegian America Line A/S*, 314 F. Supp. 471 (S.D.N.Y. 1970).

41. Any partiality or misconduct by an arbitrator in the levying of punitive awards is subject to judicial review under both the Federal Arbitration Act, 9 U.S.C. § 10 (1973), amending 9 U.S.C. § 1 (1925) and the UNIFORM ARBITRATION ACT, adopted in Illinois as ILL. REV. STAT. ch. 10, § 112 (1973), amending ILL. REV. STAT. ch. 10, § 1 (1917).

42. 36 N.Y.2d 957, 373 N.Y.S.2d 555, 335 N.E.2d 859 (1975).

decision-making power in the volatile area of awards is, in effect, terminated.<sup>43</sup>

It is therefore incumbent upon the judiciary to review those arbitration awards which have been pre-fixed by the contracting parties. For in these limited circumstances, the scale which balances the policy against penalties versus the policy in favor of arbitration, must tip toward the former.

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43. It is recognized that the arbitrator in a *Savin* case does retain the option of finding the liquidated damage clause to be a penalty and thus preventing injustice. However, his options are severely limited in that he must either award the pre-determined penalty which he finds excessive or refuse to award any penalty although in his judgment a less severe penalty would be appropriate. The arbitrator may also decide to ignore the penalty clause agreed upon by the parties and, instead, exact a lower punitive damage figure. In so doing, however, the arbitrator exceeds his authority as defined in the agreement and faces possible judicial reversal upon appeal. Federal Arbitration Act, 9 U.S.C. § 10(d) (1973); UNIFORM ARBITRATION ACT, ILL. REV. STAT. ch. 10 § 112(3) (1973); *United Steel Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Bd. of Ed. of Community Unit School Dist. No. 4 Champaign County v. Champaign Ed. Assn.*, 15 Ill. App. 3d 335, 304 N.E. 2d 138 (1973).