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Punitive Damages in Arbitration: The Search for a Workable Rule

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NOTES

PUNITIVE DAMAGES IN ARBITRATION: THE SEARCH FOR A WORKABLE RULE

A majority of states have enacted statutes that encourage commercial arbitration.[1] Most courts have followed the spirit of these statutes by broadening the range of issues an arbitrator may resolve under a standard arbitration clause[2] and by recognizing the

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[1] *See, e.g.*, CAL. CIV. PROC. CODE §§ 1280-1294.2 (West 1972 & Cum. Supp. 1977); N.Y. CIV. PRAC. LAW §§ 7501-7514 (McKinney 1963 & Cum. Supp. 1976); UNIFORM ARBITRATION ACT, 7 U.L.A. 1 (1970 & Supp. 1977) (adopted in 20 states). *Cf.* Weinrott v. Carp, 32 N.Y.2d 190, 199, 298 N.E.2d 42, 47, 344 N.Y.S.2d 848, 856 (1973) (New York statute evinces legislative intent to encourage arbitration). The United States Arbitration Act (U.S.A.A.) (9 U.S.C. §§ 1-14 (1970)) promotes arbitration of disputes subject to federal jurisdiction. On the issue of the peculiar applicability of the U.S.A.A., see note 64 *infra*. Statutory enactments have been necessary to overcome judicial hostility toward arbitration. *See* Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 984-85 (2d Cir. 1942). Professor Martin Domke lists the essential features of an effective modern arbitration statute:

1. irrevocability of any agreement to submit future disputes to arbitration;
2. power of a party, pursuant to a court directive, to compel a recalcitrant party to proceed to arbitration;
3. provision that any court action instituted in violation of an arbitration agreement may be stayed until arbitration in the agreed manner has taken place;
4. authority of the court to appoint arbitrators and fill vacancies when the parties do not make the designation, or when arbitrators withdraw or become unable to serve during the arbitration;
5. restrictions on the court's freedom to review the findings of facts by the arbitrator and his application of the law;
6. specification of the grounds on which awards may be attacked for procedural defects, and of time limits for such challenges.

M. DOMKE, THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION § 4.01, at 20 (1968).

[2] *See* Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 334, 174 N.E.2d 463, 464, 214 N.Y.S.2d 353, 355 (1961) (mutuality of obligation); Allen Knitting Mills, Inc. v. Dorado Dress Corp., 39 App. Div. 2d 286, 287-88, 333 N.Y.S.2d 848, 850 (1st Dep't 1972) (consequential damages argnably barred by contract); United Buying Serv. Int'l Corp. v. United Buying Serv., Inc., 38 App. Div. 2d 75, 78-81, 327 N.Y.S.2d 7, 12-14 (1st Dep't 1971) (consequential damages), *aff'd mem.*, 30 N.Y.2d 822, 286 N.E.2d 284, 334 N.Y.S.2d 911 (1972). Judicial construction of the scope of an arbitration clause is usually characterized as a determination of the "arbitrability" of a given issue. Under a modern arbitration statute (*see* note 1 *supra*), any dispute that is arbitrable is within the exclusive jurisdiction of the arbitrator. A recalcitrant party may be compelled to arbitrate, and the statute requires courts to stay any judicial action that concerns a dispute subject to arbitration. *See, e.g.*, N.Y. CIV. PRAC. LAW §§ 7501-7514 (McKinney 1963 & Cum. Supp. 1976).

separability of the arbitration clause from the rest of the contract.[3] Moreover, modern courts have become increasingly reluctant to disturb an arbitrator's decision on the merits.[4] Nevertheless, the relationship between courts and arbitrators is still strained by difficult cases concerning the limits of an arbitrator's power. In particular, arbitral remedies that exceed the limits of traditional contract law, such as punitive damages, continue to provoke the judiciary to ignore the statutory command: hands off the merits.[5]

In the past three years, New York's highest court[6] has twice confronted the problem of the punitive power of arbitrators. In *Associated General Contractors v. Savin Brothers*,[7] the court con-

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[3] Separability of the arbitration clause allows an arbitrator to decide a claim alleging that the entire contract is void. As long as the arbitration clause itself is not tainted (*e.g.*, by fraud in the execution), it stands as a separately enforceable agreement, even if the contract embodying it is invalid. The separability doctrine applies to cases arising under the U.S.A.A. (Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 403-04 (1966)), and the New York arbitration statute (Weinrott v. Carp, 32 N.Y.2d 190, 198, 298 N.E.2d 42, 47, 344 N.Y.S.2d 848, 855 (1973)). *See generally* note 1 *supra*. For many years, a claim seeking to void the entire contract precluded arbitration. *See* Wrap-Vertiser Corp. v. Plotnick, 3 N.Y.2d 17, 19-20, 143 N.E.2d 366, 367, 163 N.Y.S.2d 639, 640-41 (1957). One court recently applied the separability concept to allow an arbitrator to determine the reasonableness of a contract made by a minor. Prinze v. Jonas, 38 N.Y.2d 570, 576-77, 345 N.E.2d 295, 299-300, 381 N.Y.S.2d 824, 829-30 (1976).

[4] *Compare* Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 25 N.Y.2d 451, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969) (arbitrator's failure to apply contractual limit on consequential damages held grounds for vacatur where arbitrator did not explain his rationale), *with* Lentine v. Fundaro, 29 N.Y.2d 382, 278 N.E.2d 633, 328 N.Y.S.2d 418 (1972) (arbitrator's failure to distribute dissolved partnership's assets in accordance with agreement *not* grounds for vacatur despite lack of explanation for rationale of award). *See* Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 CORNELL L.Q. 519 (1960); Comment, *Judicial Review of Arbitration: The Role of Public Policy*, 58 NW. U.L. REV. 545 (1963); Comment, *Commercial Arbitration Under the Federal Act: Expanding the Scope of Judicial Review*, 35 U. PITT. L. REV. 799 (1974).

[5] N.Y. CIV. PRAC. LAW § 7501 (McKinney 1963), set out in note 17 *infra*. *See* 9 U.S.C. § 10 (1970) (limited grounds for judicial review of arbitration award upon motion for judicial confirmation); UNIFORM ARBITRATION ACT § 12 (limited grounds for judicial review of arbitration award).

[6] Although this Note focuses primarily on recent New York Court of Appeals cases, the problem raised and the solution proposed apply to all states with modern arbitration statutes. *See* note 1 *supra*. The first state to enact a statute encouraging arbitration, New York has been a pioneer in the development of arbitration law, providing guidance for other states both because of the wealth of precedent it produces and because statutes in other jurisdictions have drawn upon New York's experience. *See generally* M. DOMKE, *supra* note 1, §§ 4.01-4.03. In many jurisdictions, the statutory provisions invoked by courts reviewing unusual awards—provisions dealing with initial arbitrability and judicial review upon motion for confirmation of an award—are similar, if not identical, to New York law. *Compare* N.Y. CIV. PRAC. LAW §§ 7501, 7511 (McKinney 1963), *with* UNIFORM ARBITRATION ACT §§ 1, 12 *and* United States Arbitration Act, 9 U.S.C. §§ 2, 10-12 (1970).

[7] 36 N.Y.2d 957, 335 N.E.2d 859, 373 N.Y.S.2d 555 (1975), *aff'g per curiam* 45 App. Div. 2d 136, 356 N.Y.S.2d 374 (3d Dep't 1974).

firmed arbitral enforcement of a stipulated monetary remedy that amounted to a penalty.[8] Yet in *Garrity v. Lyle Stuart, Inc.*,[9] the court held that public policy forbids private punishment, and declared that under no circumstances could an arbitrator award punitive damages. Although *Garrity* did not involve a contractual stipulation expressly authorizing the assessment of a penalty, the court stressed that "[a]n arbitrator has no power to award punitive damages, *even if agreed upon by the parties.*"[10]

The patent inconsistency of *Savin* and *Garrity* highlights the need for a more sophisticated approach to judicial review of the arbitrator's remedial power. Both modern developments in contract law and the flexibility of the arbitral forum require this revised analysis. In some contractual relations, for example, private punishment is both permissible and necessary.[11] Applied to such contracts, the sweeping rule of *Garrity* is simply incorrect. Moreover, given the statutory limits on judicial review of arbitration awards,[12] it is usually impossible to determine whether an arbitrator's award amounts to compensation or punishment. An arbitrator may decide both the issue of liability and the measure of damages free from the traditional formulations of causes of action[13] and judicial limitations on compensability.[14] His findings of fact are nonreviewable.[15] The arbitrator need not explain how he reached his conclusion; a simple order that the defendant pay the plaintiff is judicially enforceable.[16] All these factors make the rule of *Garrity* both inaccurate and unworkable.

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[8] *See* note 41 *infra*.

[9] 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976), *noted in* 43 BROOKLYN L. REV. 546 (1977).

[10] 40 N.Y.2d at 356, 353 N.E.2d at 794, 386 N.Y.S.2d at 832 (emphasis added). *See* notes 46-50 and accompanying text *infra*.

[11] *See* text accompanying notes 114-17 *infra*.

[12] *See* note 5 *supra*.

[13] Paver & Wildfoerster v. Catholic High School Ass'n, 38 N.Y.2d 669, 677, 345 N.E.2d 565, 569-70, 382 N.Y.S.2d 22, 26 (1976) (when considering applicable statute of limitations, arbitrator need not define cause of action in terms of "contract" or "tort"). *See* SCM Corp. v. Fisher Park Lane Co., 40 N.Y.2d 788, 793, 358 N.E.2d 1024, 1028, 390 N.Y.S.2d 398, 403 (1976) (arbitration is "free from the requirements and expectations familiar to judicial proceedings with respect both to the formulation of pleadings and causes of action and to historical and current legal theories as to the availability of remedies").

[14] East India Trading Co. v. Halari, 280 App. Div. 420, 421, 114 N.Y.S.2d 93, 94 (1st Dep't 1952), *aff'd mem.*, 305 N.Y. 866, 114 N.E.2d 213 (1953).

[15] Lentine v. Fundaro, 29 N.Y.2d 382, 383, 278 N.E.2d 633, 634, 328 N.Y.S.2d 418, 419-20 (1972); Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 336-37, 174 N.E.2d 463, 466, 214 N.Y.S.2d 353, 359 (1961).

[16] *See* notes 118 & 142 and accompanying text *infra*.

This Note proposes the use of a more complex analysis when a court fears that parties have granted excessive power to an arbitrator. Careful examination of *Savin* and *Garrity*, in light of New York case law and in comparison with federal arbitration cases, suggests a number of factors that should replace the simple litmus test (*viz.*, punitive or not punitive) of *Garrity*. A court should consider the nature of the contractual relationship involved (continuing cooperation or short-term exchange) and the role of an arbitrator in providing salutary protection of expectations where the legal system is inadequate. Moreover, a court must acknowledge the arbitrator's peculiar competence to fashion extra-legal theories of liability and compensation.[17]

An analysis based on these concerns would more accurately reflect the realities of an arbitrator's relationship to contract law than does the simple rule of *Garrity*. More important, it would promote predictability and reliability in arbitration. An arbitrator who wishes to punish or to compensate noneconomic losses can usually do so. He need merely cloak his rationale and calculations in silence. Thus, the *Garrity* rule discourages explanation and obstructs judicial review in those few cases where it is really necessary. To be effective, judicial supervision must be limited to those situations in which there exists no rational explanation of an award as compensatory or permissibly punitive.

I

PENALTIES IN NEW YORK

A. *Publishers' Association: The Traditional Rule*

For more than twenty years, the rule of *Publishers' Association v. Newspaper & Mail Deliverers' Union*[18] governed punitive awards in arbitration. In *Publishers' Association* the Appellate Division vacated

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[17] For example, the New York statute making agreements to arbitrate specifically enforceable provides:

> A written agreement to submit any controversy thereafter arising or any existing controversy to arbitration is enforceable *without regard to the justiciable character of the controversy* and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. *In determining any matter arising under this article, the court shall not consider whether the claim with respect to which arbitration is sought is tenable, or otherwise pass upon the merits of the dispute.*

N.Y. CIV. PRAC. LAW § 7501 (McKinney 1963) (emphasis added).

[18] 280 App. Div. 500, 114 N.Y.S.2d 401 (1st Dep't 1952), *noted in* 52 COLUM. L. REV. 943 (1952), 22 FORDHAM L. REV. 202 (1953), *and* 66 HARV. L. REV. 525 (1953).

an award of $5,000 conditional punitive damages assessed against a striking union under a collective bargaining agreement that expressly permitted arbitral punishment.[19] The decision recounted the wealth of judicial precedent denying punitive damages in contract actions and argued that this precedent represented a strong "public and legal policy."[20] The court stated that when an arbitral award ordered violation of the penal law, enforced a usurious agreement, or applied a statutory treble-damage right, public policy required vacatur.[21] Thus, the policy against punitive damages, even those provided for by agreement of the parties, likewise compelled a court to overturn such an award. The court asserted that the arbitration statute permitted this judicial intrusion:

> It has been seen that in an action at law the court would not send any such agreed measure of damage to a jury. The court would rule that in such a case it would allow the actual, but not the punitive, measure; and the test for statutory arbitration is a *controversy which "may be the subject of an action."* (Civ. Prac. Act, § 1448). . . .
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> We are of opinion that the penalty provision of the contract is unenforcible [*sic*] under any admissible theory under our law . . . .[22]

Siguificantly, however, not all the precedent cited by the court for vacatur on public policy grounds involved disputes that could not be the "subject of an action."[23] Nor is it clear that the section of the Civil Practice Act making arbitration agreements enforceable provided a legitimate basis for judicial intrusion since the case involved the limits of post-arbitration review.[24] More important, the

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[19] "The contract pursuant to which the arbitration was had gave express authority to the arbitrators 'to impose damages, money or other penalties upon any party hereto found guilty of a violation' of the agreement." 280 App. Div. at 501, 114 N.Y.S.2d at 402. The award specified that the $5,000 in punitive damages "were not to be payable by the union 'unless and until' the [arbitration board] 'finds or awards' tbat the union has 'again' violated the contract, upon which finding the $5,000 shall 'instantly' become payable." *Id.* at 502, 114 N.Y.S.2d at 403 (quoting arbitrators' award).

[20] *Id.* at 505, 114 N.Y.S.2d at 406.

[21] *Id.* at 505-06, 114 N.Y.S.2d at 406-07.

[22] *Id.* at 507, 114 N.Y.S.2d at 407 (emphasis added).

[23] *E.g.*, Kingswood Management Corp. v. Salzman, 272 App. Div. 328, 70 N.Y.S.2d 692 (1st Dep't 1947). *Kingswood* struck down an arbitration award of attorney's fees, incident to an out-of-court settlement of a treble-damage claim under a rent control act. The treble-damage claim was an exclusively judicial remedy under the statute involved. Clearly, the claim could be the "subject of an action" and therefore was not excluded from arbitration by N.Y. Civ. Prac. Act § 1448 (Clevenger 1952) (repealed 1962), set out in note 24 *infra*. Rather, the rent control statute creating the right precluded arbitration of that right.

[24] N.Y. Civ. Prac. Act §§ 1461-1462a (Clevenger 1952) (repealed 1962) governed va-

court's objection that arbitral awards of punitive damages would amount to "an unlimited draft upon judicial power"[25] suggests that other grounds may have prompted the decision. For example, the court may have felt that the public policy against contractual penalties allowed it to ignore statutory limits on judicial review of arbitration altogether.[26] Alternatively, the court may have been acting, *sub silentio*, under the provision in the arbitration statute requiring vacatur where "the arbitrators exceeded their powers."[27] The decision emphasized the court's inherent right to refuse to enforce agreements and arbitral awards that exceed the power of contract. Parties cannot grant, and arbitrators cannot exercise, such powers.[28] Thus, even though the Appellate Division claimed to find statutory authority for its action, the overall tenor of the opinion indicates that the court would have ignored the arbitration statute altogether had the "subject of an action" language not been available. *Publishers' Association* established a rule that endured for more than two decades: penalties were impermissible in arbitration and would be overturned whether or not the arbitration statute authorized vacatur.[29]

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catur and modification of an award until 1963. Moreover, the "subject of an action" language in § 1448 referred to submission of an existing dispute. Similiar language did not appear in the portion of the statute governing agreements to arbitrate future disputes:

> Except as otherwise prescribed in this section, two or more persons may submit to the arbitration of one or more arbitrators any controversy existing between them at the time of the submission which may be the subject of an action, *or they may contract to settle by arbitration a controversy thereafter arising between them and such submission or contract shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

Id. § 1448 (emphasis added).

[25] 280 App. Div. at 503, 114 N.Y.S.2d at 404.

[26] *See* Aimcee Wholesale Corp. v. Tomar Prods., Inc., 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968) (policy favoring consistent application of antitrust laws allows court to withdraw antitrust claim from arbitrator despite lack of authority in arbitration statute), discussed in notes 91-95 and accompanying text *infra*.

[27] N.Y. CIV. PRAC. ACT § 1462(4) (Clevenger 1952) (repealed 1962).

[28] 280 App. Div. at 507, 114 N.Y.S.2d at 407.

[29] *Publishers' Association* was one of several cases invoking public policy as a ground for vacatur without fully explaining the relationship between such an action and the arbitration statute. Courts invoke a number of theories to justify a public policy vacatur. One theory is that the policy against a given result (*e.g.*, punitive damages) outweighs the statutory policy of leaving all issues of fact and law to the arbitrator. This balancing of state policies characterized *Savin* and *Garrity*. When the balance tips against the arbitrator, courts using this balancing rationale admit that they are acting outside of or in direct contravention of the arbitration statute. The language used in such cases recognizes that the court's action is "judicial intervention dehors the provisions of [the arbitration statute]." Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 363, 353 N.E.2d 793, 799, 386 N.Y.S.2d 831, 836 (1976) (dissenting opinion, Gabrielli, J.) (quoting Aetna Life & Cas. Co. v. Stekardis, 34 N.Y.2d

B. *Savin: The Rule Revised*

The issue of punitive arbitration awards reached New York's appellate courts again in *Associated General Contractors v. Savin*

182, 186 n.*, 313 N.E.2d 53, 54 n.*, 356 N.Y.S.2d 587, 589 n.* (1974)). *See* National Equip. Rental Ltd. v. American Pecco Corp., 35 App. Div. 2d 132, 135, 314 N.Y.S.2d 838, 842 (1st Dep't 1970) (alleged violation of fire department rules did not raise public policy issue sufficient to override arbitration statute), *aff'd per curiam*, 28 N.Y.2d 639, 269 N.E.2d 37, 320 N.Y.S.2d 248 (1971); Meyers v. Kinney Motors, Inc., 32 App. Div. 2d 266, 268, 301 N.Y.S.2d 171, 172-73 (1st Dep't 1969) (arbitration award ordering employer to commit unfair labor practice vacated despite lack of statutory authority for vacatur). Courts also balance these policies when the issue submitted for arbitration (as opposed to the outcome) is imbued with a strong public interest. *See* notes 84-95 and accompanying text *infra*.

A second approach finds statutory grounds for vacatur if the arbitrator "exceeded his power." *See* N.Y. CIV. PRAC. LAW § 7511(b)(1)(iii) (McKinney 1963). A court invoking this language may be using either of two arguments. First, the result that contravenes public policy may lie beyond the power granted to the arbitrator by the agreement. A court might draw this conclusion from either the construction given or the remedy ordered. *See, e.g.*, Civil Serv. Employees Ass'n, Inc. v. County of Steuben, 50 App. Div. 2d 421, 425, 377 N.Y.S.2d 849, 853 (4th Dep't 1976) (arbitrator's construction of contract that disregards plain meaning of document exceeds his powers). This use of the statutory language amounts to judicial redetermination of the merits. *See* notes 170-73 and accompanying text *infra*. More aptly, some courts argue that punitive damages exceed the remedial power of the arbitrator impliedly contemplated by the parties when they agreed to arbitration. *E.g.*, Operating Engineers Local 450 v. Mid-Valley, Inc., 347 F. Supp. 1104, 1109 (S.D. Tex. 1972).

The alternative use of "exceeded his power" proceeds more directly. Rather than looking to the power consensually granted, a court might argue that an arbitrator simply does not have the power to violate state policy. Therefore, any award that is contrary to state policy "exceeds his power." Associated Teachers, Inc. v. Board of Educ., 40 App. Div. 2d 122, 125, 338 N.Y.S.2d 45, 49 (2d Dep't 1972), *rev'd on other grounds*, 33 N.Y.2d 229, 306 N.E.2d 791, 351 N.Y.S.2d 670 (1973). California courts employ the notion that no order contrary to public policy is within the power of the arbitrator when they hold that the arbitrator's action conflicts with the contract provisions of the Civil Code. Loving & Evans v. Blick, 33 Cal. 2d 603, 609-10, 204 P.2d 23, 27 (1949). *See* Frame v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 20 Cal. App. 3d 668, 673-74, 97 Cal. Rptr. 811, 815 (1971) (refusing to stay arbitration concerning restrictive covenant but stating that arbitral enforcement of its purely anticompetitive aspects would be vacated as violating Civil Code provision); California State Council of Carpenters v. Superior Ct., 11 Cal. App. 3d 144, 157, 89 Cal. Rptr. 625, 633 (1970) (arbitrator lacks power to enforce "illegal" contract provision but may decide legality initially, subject to judicial review).

Finally, there is a relationship, but not necessarily an exact congruence, between the "exceeded his power" approach to vacatur and the threshold question of arbitrability (*i.e.*, whether or not a given dispute falls within the agreement to arbitrate). The *Publishers' Association* court implicitly recognized this relationship when it looked to the arbitrability section of the statute during post-arbitration review. Under New York procedure, a party served with notice of demand for arbitration has 20 days in which to commence litigation on the question of arbitrability. If he fails to meet this deadline, he may not challenge the arbitrator's exclusive jurisdiction over the issues submitted. N.Y. CIV. PRAC. LAW § 7503(c) (McKinney Cum. Supp. 1976). Nevertheless, a court wishing to intrude upon the merits in an action for confirmation of an award may claim that the arbitrator's conclusions relate to matters outside the agreement and therefore "exceeded his power." Thus, a court may look to the statutory language concerning initial arbitrability when considering whether an ar-

Brothers.[30] Savin, a heavy construction firm, was bound by the terms of its membership in the contractors' association (AGC) to bargain with labor only through the association. Faced with a continuing Teamster strike in April and May of 1972, Savin reached independent agreement with the union. The AGC complained of the breacb and successfully sought an arbitral award based on the formula stipulated in Savin's "designation agreement" appointing the AGC as its sole bargaining representative:

> [I]f the arbitrators should find that a signatory to the agreement violated its obligations under the agreement, damages shall be awarded to the AGC "in an amount no less than three (3) times the daily liquidated damage amount [delay damages] provided for in each such heavy and highway construction contract to which the [signatory] is a party within the geographic area of the applicable labor contract . . . negotiated by AGC" for each day that it was found to be in violation of its obligations under the designation agreement . . . .[31]

The arbitrator awarded damages of $104,000, three times the maximum loss that Savin might have sustained by waiting out the strike with the rest of the AGC.

The trial court, confirming the arbitrator's award, held that the stipulated remedy was a valid liquidation of damages. The Appellate Division, however, concluded that the stipulation imposed a penalty,[32] and therefore violated the *Publishers' Association*

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bitrator has "exceeded his power" by deciding matters outside the scope of his jurisdiction. In this light, the arguments of the court in *Publishers' Association* make more sense. The court referred to the section of the arbitration statute dealing with the validity of agreements to arbitrate when the issue before it was confirmation or vacatur of an award. *See* note 24 *supra*. In so doing, the court implicitly argued that because only justiciable controversies could be forced to arbitration under the statute, an arbitrator had no power (jurisdiction) over nonjusticiable controversies such as demands for punitive damages. Nevertheless, the holding of *Publishers' Association* is not limited to this alleged statutory authorization. The court relied on cases vacating arbitration awards without reference to the language of the statute. *See* note 23 *supra*. Moreover, the "subject of an action" language was only arguably applicable to the prior agreement to arbitrate involved in the case, as opposed to submissions of existing disputes. *See* note 24 *supra*. Nor is it truly accurate to treat a claim for punitive damages as the subject of an action; punitive damages are the remedy sought in, not the subject of, some contract actions. Furthermore, the opinion as a whole relies more on the equitable power to refuse enforcement of inequitable sanctions than on the purported statutory limitation on arbitration.

[30] 45 App. Div. 2d 136, 356 N.Y.S.2d 374 (3d Dep't 1974), *aff'd per curiam*, 36 N.Y.2d 957, 335 N.E.2d 859, 373 N.Y.S.2d 555 (1975).

[31] 45 App. Div. 2d at 137, 356 N.Y.S.2d at 376.

[32] *Id.* at 140-41, 356 N.Y.S.2d at 379. The Appellate Division's conclusion that "the damage clause must be construed as imposing a penalty" (*id.* at 140, 356 N.Y.S.2d at 379)

rule.[33] Nevertheless, the award survived judicial review. The court pointed out that the revised arbitration statute made arbitration "enforceable 'without regard to the justiciable character of the controversy.' "[34] Therefore, reasoned the court, the elimination of the "subject of an action" language from the statute rendered *Publishers' Association* distinguishable.[35] By reading *Publishers' Association* as relying solely on the "subject of an action" language, the *Savin* court freed itself to balance the public policy favoring arbitration against the public policy voiding penalties without according precedential deference to the latter.[36] Although the distinction drawn by the *Savin* court was dubious, it cleared the way for a more sensible allocation of power between judge and arbitrator.[37] In finding that the stipulated remedy was a penalty, the *Savin* court relied heavily on the necessity of an *in terrorem* clause where breach is irremediable in monetary terms. In the group-bargaining context,[38] penalties functioning as "security for performance" are the only adequate means of protecting the parties' expectation interests.[39] Only performance, ensured by the threat of punishment, will make the parties whole. Recognizing that this punitive

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was technically dictum since the court held that public policy did not bar an arbitrator's enforcement of a penalty. Later decisions, however, have treated the award in *Savin* as clearly constituting a penalty. *See, e.g.*, Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 357, 353 N.E.2d 793, 795, 386 N.Y.S.2d 831, 833 (1976).

[33] 45 App. Div. 2d at 141, 356 N.Y.S.2d at 380.

[34] *Id.* at 142, 356 N.Y.S.2d at 380 (quoting N.Y. CIV. PRAC. LAW § 7501 (McKinney 1963)).

[35] 45 App. Div. 2d at 141-42, 356 N.Y.S.2d at 380. *See* Publishers' Ass'n v. Newspaper & Mail Deliverers' Union, 280 App. Div. 500, 507, 114 N.Y.S.2d 401, 407 (1st Dep't 1952), quoted in text accompanying note 22 *supra*.

[36] Arguably, the change in the arbitration statute commanded the result in *Savin*. The revisers not only removed the "subject of an action" language but also emphasized the change by adding the language quoted in the text accompanying note 34 *supra*. The change amounts to a further command of "hands off the merits." *See* 1958 N.Y. LEG. DOC. No. 13, at 131 (second report on revision of Civil Practice Act). Nevertheless, the *Savin* court did not confront the full force of the rule in *Publishers' Association* and therefore did not decide just how much force should be read into the statutory change.

[37] *See* discussion of labor cases in notes 108-17 and accompanying text *infra*.

[38] The dispute in *Savin* did not involve "labor relations" in the traditional sense of agreements between employer and employee. The parties were nevertheless involved in a relationship requiring continuity of performance similar to that found in a collective bargaining agreement—a contract that is occasionally breached, but seldom terminated, prior to its expiration. Only by presenting a united front could the employers' association deal effectively with the unions. Only performance could remedy a breach. *See* Associated Gen. Contractors v. Savin Bros., Inc., 45 App. Div. 2d 136, 144, 356 N.Y.S.2d 374, 382 (3d Dep't 1974), *aff'd per curiam*, 36 N.Y.2d 957, 335 N.E.2d 859, 373 N.Y.S.2d 555 (1975).

[39] 45 App. Div. 2d at 139, 356 N.Y.S.2d at 378 (quoting Ward v. Hudson River Bldg. Co., 125 N.Y. 230, 235, 26 N.E. 256, 257 (1891)).

enforcement function was the parties' sole rationale for stipulating the remedy, the court nevertheless upheld the arbitrator's award. The very facts that proved it a penalty also demonstrated the need for such a contract term. Having distinguished *Publishers' Association*, the court perceived no public policy overriding the parties' need for private enforcement. Its decision thus established that arbitrators need not follow the liquidated damages versus penalties distinction, at least where the "volatile nature of labor conflicts"[40] requires judicial deference to the arbitrator's action.

The Court of Appeals, expressly adopting the majority and concurring opinions of the Appellate Division, affirmed the judgment in a per curiam decision.[41] The affirmance reiterated the notion that the goal of promoting labor peace outweighs the policy against penalties[42] and invoked the rule that an arbitrator's mistakes of law and fact are not subject to judicial review.[43] Chief

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[40] 45 App. Div. 2d at 144, 356 N.Y.S.2d at 382 (quoting 52 COLUM. L. REV. 943, 945 (1952)).

[41] 36 N.Y.2d 957, 335 N.E.2d 859, 373 N.Y.S.2d 555 (1975). The per curiam decision adopted a number of potentially contradictory justifications for affirming the Appellate Division. First, the court adopted the majority opinion below, an opinion resting chiefly on the necessity of punitive sanctions in continuing contractual relationships, *i.e.*, labor contracts. *See* text accompanying notes 38-40 *supra*. The Court of Appeals also stated that because the arbitrator had found that the award did not impose a penalty, and because an arbitrator's decisions of law were nonreviewable, no problem of public policy existed. This position not only conflicted with the rationale of the majority below (*see* note 32 *supra*) but also contradicted the very notion of a public policy review (*see* note 43 *infra*).

The Court of Appeals also adopted the concurring opinion of Justice Herlihy in the court below. His concurrence countenanced penalties so long as they were imposed pursuant to a previously agreed-upon formula, and distinguisbed *Publishers' Association* as not involving preformulated punishment. 45 App. Div. 2d at 145, 356 N.Y.S.2d at 383.

As explained below, Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976), answered some of the questions left open by the per curiam affirmance. In *Garrity*, the Court of Appeals confirmed that *Savin* did indeed involve a penalty. *See* note 32 *supra*. Moreover, *Garrity* belies any reliance upon Justice Herlihy's distinction between penalties based on formulas and those that are not. *See* 40 N.Y.2d at 356, 360, 353 N.E.2d at 794, 797, 386 N.Y.S.2d at 832, 834. Finally, this distinction, even if valid, would not have saved the *Savin* agreement, which called for damages of *"no less than"* triple the expected cost of performance. 45 App. Div. 2d at 137, 356 N.Y.S.2d at 376 (emphasis added).

[42] Arbitration here was in consequence of a broad arbitration clause in a field of collective bargaining. In that field public policy favors the peaceful resolutions of disputes through arbitration as contrariwise it looks with disfavor on the exaction of penalties. There are involved no interests of third persons which can be said to transcend the concerns of the parties to the arbitration. . . . [W]e conclude that there is in this case no question involving public policy of such maguitude as to call for judicial intrusion . . . .

36 N.Y.2d at 959, 335 N.E.2d at 859-60, 373 N.Y.S.2d at 556.

[43] *Id.* The reference to the nonreviewability rule was a red herring. As explained in

Judge Breitel dissented vigorously,[44] laying the groundwork for his eventual triumph in *Garrity v. Lyle Stuart, Inc.*[45]

C. *Garrity: The Rule Reinstated*

While the Appellate Division was striking a new balance between conflicting policies in *Savin*, author Joan Garrity was seeking $45,000 in allegedly overdue royalties from her publisher.[46] She also asked that the arbitrator impose punitive damages for "maliciously withholding royalties . . . for the unjustifiable and vindictive purpose of coercing plaintiff to withdraw" a prior suit for fraud.[47] The arbitrator awarded the back royalties and $7,500 in punitive damages. The trial court confirmed the award, and the Appellate Division affirmed without opinion.[48] However, Chief Judge Breitel, speaking for the Court of Appeals, vacated the award of punitive damages.

The high court, citing *Publishers' Association*, enunciated a sweeping rule: "An arbitrator has no power to award punitive damages, *even if agreed upon by the parties* . . . ."[49] Yet the court avoided overruling *Savin*:

> That case did not involve an award of punitive damages. Instead, the court permitted enforcement of an arbitration award of treble liquidated damages, amounting to a penalty, assessed however in accordance with the express terms of a trade association membership agreement. The court held that the public policy against permitting the awarding of penalties was not of "such magnitude as to call for judicial intrusion" . . . . In the instant case, however, there was no provision in the agreements permitting arbitrators to award liquidated damages or penalties. Indeed, the subject apparently had never ever been considered.[50]

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note 29 *supra*, a public policy vacatur is an exception to the rule that an arbitrator's mistakes of law are nonreviewable. *See* notes 170-73 and accompanying text *infra*.

[44] 36 N.Y.2d at 959, 335 N.E.2d at 860, 373 N.Y.S.2d at 556. Judges Jasen and Gabrielli joined the dissent.

[45] 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

[46] Garrity v. Lyle Stuart, Inc., 48 App. Div. 2d 814, 370 N.Y.S.2d 6 (1st Dep't 1975) (mem.), *modified*, 40 N.Y.2d 354, 353 N.E.2d 793, 386 N.Y.S.2d 831 (1976).

[47] 40 N.Y.2d at 361-62, 353 N.E.2d at 798, 386 N.Y.S.2d at 836 (dissenting opinion, Gabrielli, J.).

[48] Justice Capozzoli, in a brief dissent, argued that because the arbitration agreement did not grant authority to award punitive damages, the arbitrator had exceeded his authority, in addition to violating the rule of *Publishers' Association*. 48 App. Div. 2d at 814, 370 N.Y.S.2d at 7.

[49] 40 N.Y.2d at 356, 353 N.E.2d at 794, 386 N.Y.S.2d at 832 (emphasis added).

[50] *Id.* at 357, 353 N.E.2d at 795, 386 N.Y.S.2d at 833.

Here the court purported to distinguish *Savin* on three grounds. The prior case involved an express agreement to punish;[51] a formula provided guidance as to the amount of punishment;[52] and the arbitrator in *Savin* characterized the award as liquidated damages rather than punishment.[53] In addition, *Savin*'s labor context arguably distinguishes it from *Garrity*. Despite available factual distinctions, however, the rationale of *Garrity* renders the two cases irreconcilable.[54] At the root of the *Garrity* decision is the notion that freedom of contract does not include the freedom to impose penalties.[55] The remedial powers of arbitrators arise solely from

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[51] The dissent in *Garrity*, however, asserted that the contract's broad arbitration clause impliedly empowered the arbitrator to grant punitive awards. The agreement incorporated the Rules of the American Arbitration Association. *Id.* at 361, 353 N.E.2d at 798, 386 N.Y.S.2d at 835. The broad remedial provision provides: "The Arbitrator may grant any remedy he deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of the contract." AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULES § 42 (1964).

[52] *But see* note 41 *supra*. The formula in *Savin* was exact only insofar as it specified a minimum level of punishment.

[53] *But see* notes 29 & 43 *supra*. A violation of public policy eliminates the nonreviewability of an arbitrator's determinations of law.

[54] The three dissenting judges in *Garrity* recognized that the majority drew a distinction without a difference. The dissent stated:

> The majority would distingnish the *Associated Gen. Contrs.* case (*supra*) upon the thin ground that the enforcement of a treble liquidated damages clause which was applicable to numerous nationwide contracts that conceivably could have amounted to astronomical sums is not the equivalent of the enforcement of an award of penalty damages. However, as Mr. Justice Greenblott specifically stated for the majority below in that case, and in an opinion expressly approved by this court, the amount of damages therein computed in the arbitration bore "*no reasonable relationship to the amount of damages which may be sustained*" (emphasis added . . .); and a contract clause which is grossly disproportionate to the presumable damage or readily ascertainable loss is a penalty clause, irrespective of its label . . . . In short, *Associated Gen. Contrs.* is not only apposite but is controlling.

40 N.Y.2d at 363-64, 353 N.E.2d at 799-800, 386 N.Y.S.2d at 837.

[55] "The law does not and should not permit private persons to submit themselves to punitive sanctions of the order reserved to the State. The freedom of contract does not embrace the freedom to punish, even by contract." *Id.* at 360, 353 N.E.2d at 797, 386 N.Y.S.2d at 834.

Notably, Judge Gabrielli, who dissented in *Savin*, changed sides and drafted the strong dissent in *Garrity*. His argument was not limited to the obvious *stare decisis* problems. Rather, he espoused the *Savin* view that public policy does not deny the power to punish in the arbitral context:

> Controlling here, as [in *Savin*], is the fact that the arbitration clause is broad indeed; there are no third-party interests involved; and the public policy against punitive damages is not so commanding that the Legislature has found it necessary to embody that policy into law, especially one that would apply to all cases involving such damages irrespective of the amount sought, the relative size of the award, or the punishable actions of the parties.

Id. at 363, 353 N.E.2d at 799, 386 N.Y.S.2d at 837.

contract and are therefore limited to compensatory correction of actual harm.[56] According to the court, this rule necessarily follows from the fundamental principle that the power to punish, like the power to use force, is reserved to the state.[57] Granting arbitrators the power to punish would return society to economic barbarism and would open the door to unlimited oppression of the weak and unwary.[58] Even in cases where punitive damages might be available from a jury, punishment by an arbitrator is impermissible. Jury awards of punitive damages, unlike arbitral awards, are subject to the safeguard of judicial review for "reasonableness." To subject punitive arbitral awards to such review, however, would negate the salutary speed and economy of arbitration.[59]

In essence, then, the *Garrity* award failed because private parties may not contractually provide for any redress that goes beyond compensation for economic loss. This rule sweeps beyond factual distinctions to impugn the holding of *Savin*. Specifying a formula for calculating an agreed-upon penalty cannot eliminate the contracting parties' lack of power to agree on punishment in the first place. The syllogism is simple: Parties cannot agree to punish each other, even if they stipulate the exact measure of punishment.[60] The sole source of an arbitrator's power is the agreement of the parties. If parties may not agree to punish, then the arbitrator may not enforce a stipulated punishment.

Since *Savin* was not overruled, however, New York law on the issue of penalties in arbitration remains unclear. Moreover, as the

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[56] "It is also true that arbitrators generally are free to fashion the remedy appropriate to the wrong, if they find one, but an authentic remedy is *compensatory and measured by the harm caused and how it may be corrected* . . . ." *Id.* at 357, 353 N.E.2d at 794, 386 N.Y.S.2d at 832 (emphasis added).

[57] *Id.* at 358-60, 353 N.E.2d at 796-97, 386 N.Y.S.2d at 833-34.

[58] The court quoted at length from *Publishers' Association*, including the language refusing to countenance a grant of "an unlimited draft upon judicial power." *Id.* at 358-59, 353 N.E.2d at 796, 386 N.Y.S.2d at 834.

[59] *Id.* at 359, 353 N.E.2d at 796, 386 N.Y.S.2d at 834. This argument was intended to rebut the dissenters' points that the punitive amount was reasonable on the facts and that reasonable punitive amounts ought to be allowed where an arbitrator is empowered to "do justice." *Id.* at 365, 353 N.E.2d at 800, 386 N.Y.S.2d at 838 (dissenting opinion, Gabrielli, J.). *See* note 51 *supra*. The majority's contention that allowing punitive awards, subject to judicial review, would increase the level of judicial intrusion into arbitration underestimates the amount of "review" already involved in applying the "completely irrational" standard of vacatur to all arbitrator actions. *See* notes 170-73 and accompanying text *infra*.

[60] *E.g.*, Equitable Lumber Corp. v. IPA Land Dev. Corp., 38 N.Y.2d 516, 521-22, 344 N.E.2d 391, 395-96, 381 N.Y.S.2d 459, 463 (1976); Ward v. Hudson River Bldg. Co., 125 N.Y. 230, 235, 26 N.E. 256, 257 (1891). The rule stated in the text reflects the universal ban on stipulated remedies that exact penalties. *See* RESTATEMENT OF CONTRACTS § 339 (1932).

next section illustrates, the rule of *Garrity* conflicts with established principles regarding the relationship between arbitrators and courts. The fundamental nature of this conflict necessitates a search for a more workable rule.

II

Garrity IN THE BROADER CONTEXT OF ARBITRATION LAW

This section analyzes *Garrity* within the overall context of judicial review of arbitration. Against this backdrop, the decision's shortcomings are apparent. The principles of arbitral flexibility and judicial deference to an arbitrator's superior knowledge of a given business, the problems inherent in balancing statutory and common-law public policies, the remedial needs of parties in continuing contractual relationships, and the judicial intrusion required to characterize an award as "punitive" or "compensatory" all militate against applying the *Garrity* rule. Federal arbitration cases dealing with the issue of punishment provide an instructive contrast. The comparison is sound, both because the general principles of New York and federal arbitration law coincide and because the applicable statutory provisions are nearly identical.[61] The relevant federal statute—the United States Arbitration Act (U.S.A.A.)[62]—applies to all arbitration agreements involving "maritime transactions" or "commerce"[63] that come before the federal courts.[64] The Act was based on the New York Arbitration Law,[65] which has

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[61] Under the federal statute, a court may overturn an award "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(d) (1970). Under the New York statute, an award may be overturned if "an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made." N.Y. CIV. PRAC. LAW § 7511(b)(1)(iii) (McKinney 1963). The application of this language to the public policy issue is discussed in note 29 *supra*.

[62] 9 U.S.C. §§ 1-13 (1970).

[63] *Id.* §§ 1-2.

[64] Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404-05 (1966). *See* Robert Lawrence Co. v. Devonshire Fabrics, Inc., 271 F.2d 402 (2d Cir. 1959). For discussions of the peculiar federalism questions involved in a federal act that governs interstate contracts in federal courts but not necessarily in state courts, see 60 COLUM. L. REV. 227 (1960), 45 CORNELL L.Q. 795 (1960), and 73 HARV. L. REV. 1382 (1960). Enacted prior to Erie R.R. v. Tompkins, 304 U.S. 64 (1938), and operative as part of federal common law prior to *Erie*, the U.S.A.A. has since been reinterpreted as federal substantive law. Grand Bahama Petrol. Co. v. Asiatic Petrol. Corp., 550 F.2d 1320, 1324-26 (2d Cir. 1977).

[65] S. REP. No. 536, 68th Cong., 1st Sess. 3 (1924). *See* Weinrott v. Carp, 32 N.Y.2d 190, 198, 298 N.E.2d 42, 47, 344 N.Y.S.2d 848, 856 (1973).

since been revised and liberalized.[66] Nevertheless, federal courts applying the U.S.A.A. have had less difficulty than their New York counterparts in adopting a hands-off attitude toward judicial review.

A. *Arbitral Flexibility and Limited Judicial Review*

The Second Circuit case of *South East Atlantic Shipping Ltd. v. Garnac Grain Co.*[67] aptly illustrates the relationship between the rule enunciated in *Garrity* and the principle of arbitral flexibility. In *Garnac* the shipper (Garnac) appealed from confirmation of an arbitration decision awarding the carrier (Atlantic) the difference between contract price and resale price.[68] Garnac claimed that Atlantic had failed to take advantage of a clear opportunity to mitigate damages and that the arbitrators had excused Atlantic's failure to mitigate on moral rather than legal grounds. In Garnac's view the amount of the award demonstrated that the arbitrators' intent was to punish the breaching party rather than compensate the aggrieved party.[69] The Second Circuit explained:

> [A]lthough the [arbitration] panel majority's opinion indicates that they were *morally outraged* by Garnac's conduct . . . the award was not punitive. Moreover, *we think it within the arbitrators' power to consider such questions of business morality* in determining whether to award Atlantic the full extent of its loss regardless of whether some of that loss, in retrospect, might have been avoided. Such an award, however liberal, does not amount to an "unlawful" assessment of punitive damages.[70]

The court expressly declined to decide, however, whether arbitral damages could ever be so punitive as to require vacatur.[71] Other

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[66] Both 1937 N.Y. Laws ch. 341 (amending N.Y. CIV. PRAC. ACT §§ 1448-1469 (Clevenger 1936)) and N.Y. CIV. PRAC. LAW § 7501 (McKinney 1963) served to expand arbitrator jurisdiction and to limit judicial review.

[67] 356 F.2d 189 (2d Cir. 1966).

[68] *Id.* at 191. The contract had required Atlantic to nominate a vessel by January 1, 1964, to carry Garnac's grain later that year at a price of $15 per ton. Atlantic failed to meet the deadline for naming a specific ship. Without giving prior notice of any concern over the delay, Garnac repudiated the contract on January 2, claiming that failure to nominate justified rescission. On January 4, Garnac offered to re-enter the contract at the then current market rate of $12 per ton. Atlantic refused and some time later found other hire at $8 per ton, nearly 50% below the original contract rate. The arbitrators found that Atlantic's failure to nominate was a nonmaterial breach, and awarded the full difference between contract price ($15 per ton) and rehire rate ($8 per ton). *Id.* at 190-91.

[69] *Id.* at 191.

[70] *Id.* at 192 (emphasis added).

[71] [W]e [do not] find it necessary to determine whether an arbitrators' award could

federal courts have displayed a similar reluctance to intrude upon an arbitrator's method of calculating damages, stating that a mistake of law resulting in the imposition of legally unwarranted damages is nonreviewable.[72]

Underlying *Garnac* is the notion that parties invoke arbitration because an arbitrator steeped in the practice of a given trade is better equipped than a judge to decide issues of both liability (*i.e.*, what behavior transgressed the limits of acceptable practice in the trade) and compensation (*i.e.*, what losses are actually incurred by a businessman in the given situation). Applying this notion, some New York decisions have approved extra-legal remedies in the arbitration context.[73] If arbitrators are to maintain this flexibility, courts must limit their review of arbitration decisions. Both the federal and New York statutes promote this principle by severely limiting judicial review of the merits of an arbitrator's decision.[74] Courts have followed the spirit of the statutes, stating that arbitrators may calculate damages according to "justice,"[75] free from rules of law and modes of analysis traditionally applied by courts.[76]

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be so clearly punitive as to exceed their contractual powers or to be otherwise unenforceable. Under our limited scope of review of arbitration awards, we are bound by the arbitrators' factual findings and by their interpretation of the contract and of contract law.

Id. at 191-92 (footnote omitted).

[72] Gramling v. Food Mach. & Chem. Corp., 151 F. Supp. 853 (W.D.S.C. 1957) (refusing to review award allegedly in gross excess of agreed measure of damages). *Cf.* Harbor Island Spa, Inc. v. Norwegian America Lines A/S, 314 F. Supp. 471, 474 (S.D.N.Y. 1970) (confirming arbitrators' enforcement of forfeiture clause as valid liquidation of damages, even if award rested on "a misinterpretation of law or an insufficiency of supporting facts").

[73] *E.g.*, East India Trading Co. v. Halari, 280 App. Div. 420, 114 N.Y.S.2d 93 (1st Dep't 1952), *aff'd mem.*, 305 N.Y. 866, 114 N.E.2d 213 (1953). In *Halari*, faced with a stipulated remedy provision allowing assessment of 2% to 10% of the market price prevailing at breach in addition to the difference between market price and contract price, the same court that decided *Publishers' Association* affirmed an award of the 2% penalty. Pointing to the arbitrator's possible awareness that traditional damages might not reflect the full measure of injury, the court found the award to be within the boundaries of "compensation." "The limited additional authority and discretion given to the arbitrators, which presumably will be exercised conformally [*sic*] to the merits of a case, does not appear to have any improper purpose and at least is defensible." 280 App. Div. at 421, 114 N.Y.S.2d at 95. *See* cases cited in note 176 *infra*.

[74] 9 U.S.C. § 10 (1970); N.Y. CIV. PRAC. LAW § 7511 (McKinney 1963).

[75] Lentine v. Fundaro, 29 N.Y.2d 382, 386, 278 N.E.2d 633, 636, 328 N.Y.S.2d 418, 422 (1972).

[76] As the court stated in *Garnac*:

Here, the arbitrators were free to conclude that Garnac's repudiation of the contract was unjustified, that Atlantic's duty to mitigate did not require it to accept Garnac's offer of January 4, and that Atlantic's subsequent actions satisfied its duty to mitigate. Although as an original matter we might not agree with their resolution of particularly the latter two questions, the purposes behind the Arbi-

Even the arbitrator's misuse of legal labels does not justify overturning an award where the result is within the realm of arbitral flexibility.[77] However, if there really is a limitation requiring that awards be no more than compensatory,[78] traditional rules defining compensation must be applied in every case of post-arbitration review to determine whether or not the "punitive" line has been crossed. Whether this examination follows the statutory rubric by asking if the arbitrator has "exceeded his power,"[79] or proceeds without regard to the statute under the inherent power to enforce "public policy,"[80] the result is the very judicial intrusion and loss of arbitral flexibility that the *Garrity* court decried in refusing to give arbitrators the power to grant "reasonable" punitive damages.[81] In

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tration Act were to give arbitrators considerable latitude in resolving such contractual issues.

356 F.2d at 192. *See* Orion Ship & Trading Co. v. Eastern States Petrol. Corp., 284 F.2d 419, 421 (2d Cir. 1960) (refusing to instruct arbitrators as to proper measure of damages); Orion Ship & Trading Co. v. Eastern States Petrol. Corp., 206 F. Supp. 777 (S.D.N.Y. 1962) (same case on remand), *aff'd*, 312 F.2d 299 (2d Cir. 1963). "At the very most the arbitrator's method of computation was an error of interpretation of law and it is well settled that this is insufficient ground for refusing to confirm his Award." 206 F. Supp. at 781. The New York Court of Appeals is in accord:

> Arbitrators may do justice. It has been said that, short of "complete irrationality", "they may fashion the law to fit the facts before them" . . . .
>
> . . . Given the power of arbitrators to decide without being bound by the substantive rules of law, their award may not be said to be either an excess of power or an act of misconduct under the limited statutory grounds for undoing an award . . . .

Lentine v. Fundaro, 29 N.Y.2d 382, 386, 278 N.E.2d 633, 636, 328 N.Y.S.2d 418, 422-23 (1972) (quoting Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 336, 174 N.E.2d 463, 466, 214 N.Y.S.2d 353, 357-58 (1961)). *See* United Buying Serv. Int'l Corp. v. United Buying Serv., Inc., 38 App. Div. 2d 75, 80-81, 327 N.Y.S.2d 7, 14 (1st Dep't 1971), *aff'd mem.*, 30 N.Y.2d 822, 286 N.E.2d 284, 334 N.Y.S.2d 911 (1972). Notably, the court in *Publishers' Association* thought otherwise:

> [A] compelling inference must be drawn [from New York case law] that on the question of the scope of their powers in respect of the measure of damage, arbitrators are held closely, not only to the language of the contract under which they function, but to a *consistency with general legal rules in respect of damage*.

280 App. Div. at 506, 114 N.Y.S.2d at 407 (emphasis added). The language of *Lentine*, quoted above, repudiates this assertion and lends support to the Appellate Division's approval of a penalty in *Savin*.

[77] Schine Enterprises, Inc. v. Real Estate Portfolio, Inc., 26 N.Y.2d 799, 801, 257 N.E.2d 665, 665-66, 309 N.Y.S.2d 222, 223 (1970). *See* East India Trading Co. v. Halari, 280 App. Div. 420, 114 N.Y.S.2d 93 (1st Dep't 1952) (allowing assessment of damages labeled a penalty on theory that they were conceivably compensatory), *aff'd mem.*, 305 N.Y. 866, 114 N.E.2d 213 (1953).

[78] *See* note 56 and accompanying text *supra*.

[79] N.Y. CIV. PRAC. LAW § 7511(b)(1)(iii) (McKinney 1963). *See* 9 U.S.C. § 10(d) (1970).

[80] *See* note 29 *supra*.

[81] 40 N.Y.2d at 359, 353 N.E.2d at 796, 386 N.Y.S.2d at 834. *See* note 59 and accompanying text *supra*.

sum, the unbending rule of *Garrity* conflicts with the flexible nature of the arbitrator's remedial power and requires a level of judicial intervention contrary to established law.

B. *Statutory Versus Common-Law Public Policies*

The *Garrity* rule elevates a principle of contract law to the status of a "public policy," justifying disregard of the arbitration statute's limitations on judicial review.[82] No other New York or federal case so exalts a nonstatutory policy.[83] In the federal courts, even statutory policies generally bow to the commands of the U.S.A.A. Normally, federal courts must stay judicial action when one party invokes a valid arbitration agreement covering the subject of litigation,[84] and must compel a recalcitrant party to submit to arbitration.[85] Only disputes involving federal securities regulation[86] and antitrust law[87] implicate public policies of sufficient im-

[82] *See* note 29 *supra*.

[83] Admittedly, federal public policies are more likely than state policies to be embodied in statutory commands. The state judiciary has a wider scope of supervision of society—*e.g.*, supervision of state contract law. This distinction, however, does not reduce the need for limiting an apparently boundless tool of judicial intrusion to the most clearly defined public concerns. More important, absent a need for judicial enforcement of a statutory command (*cf.* Wilko v. Swan, 346 U.S. 427 (1953) (securities claim withdrawn from arbitrator on ground that only judiciary should enforce securities laws)), courts sbould recognize the arbitrator's ability both to determine the extent of an invasion of a publicly protected interest and to decide the legal question of the applicability of a policy's protection. Hirsch v. Hirsch, 37 N.Y.2d 312, 333 N.E.2d 371, 372 N.Y.S.2d 71 (1975), which recognized an arbitrator's ability to determine factually that a divorcee had no need for statutorily guaranteed support, illustrates the former point. The *Hirsch* court refused to hold that arbitrators are incapable of deciding alimony claims, despite the public policy implications of the issues involved. The appellant spouse's ability to support herself, however, was not at issue on appeal in *Hirsch*. Therefore, the weight given to an arbitrator's finding of fact, as opposed to his ability to find the fact in the first place, was not decided in *Hirsch*.

To the extent that respect for the arbitrator's determination of law (*i.e.*, his finding that the stipulated remedy was not a penalty) is part of the rationale of *Savin*, there is authority for deferring to an arbitrator's mistake of law despite serious public policy implications. *See* note 43 and accompanying text *supra*.

[84] 9 U.S.C. § 3 (1970).

[85] *Id.* § 4.

[86] Wilko v. Swan, 346 U.S. 427 (1953). *But cf.* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) (allowing arbitration of securities claim in substantially international transaction subject to International Cbamber of Commerce arbitration and Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *done* June 10, 1958, [1970] 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *implemented by* 9 U.S.C. §§ 201-208 (1970)). One recent case, Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier, 508 F.2d 969 (2d Cir. 1974), demonstrates the extreme liberality of judicial review under the U.S.A.A. and the Convention. (The U.S.A.A. provides the rule of decision, except when it conflicts with the Convention's less exhaustive provisions. 9 U.S.C. § 208 (1970).) In *Parsons*, the court upheld an arbitral award of consequential damages expressly prohibited by the contract and incurred as a result of the six-day Arab-Israeli war.

[87] American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968).

portance to override the commands of the U.S.A.A. An agreement to arbitrate future disputes involving federal securities regulation is deemed an attempt to waive a nonwaivable right to judicial protection.[88] Similarly, otherwise arbitrable disputes requiring construction of antitrust laws may not be forced to arbitration because any decision under the antitrust statutes involves a "pervasive public interest."[89] These public policy exceptions to the U.S.A.A. apply only to agreements to arbitrate future disputes; agreements submitting preexisting disputes to arbitration do not transgress public policy.[90] In sum, only the most explicitly protective statutory schemes provide grounds for evading binding arbitration.

Judge Gabrielli's dissent in *Garrity* emphasized this distinction between statutory and nonstatutory policies. A statutory policy may be so important as to preclude arbitration of an issue; the impact of a wrong decision would be too great. In contrast, an error of contract law does not affect a concern singled out by the legislature for special judicial attention.[91] A seminal New York "public policy" case involving arbitration of statutory interests, *Aimcee Wholesale Corp. v. Tomar Products, Inc.*,[92] drew the same distinction. Although it withdrew an antitrust claim from arbitral jurisdiction, the Court of Appeals clearly distinguished claims involving private contract law from claims requiring construction of a statute designed to protect the public.[93] The court pointed out that antitrust violations have an economic impact on the public at large; breaches of contract seldom do.[94] Moreover, unlike antitrust cases, contract actions

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[88] Wilko v. Swan, 346 U.S. 427, 434-35 (1953).

[89] American Safety Equip. Corp. v. J.P. Maguire & Co., 391 F.2d 821, 827-28 (2d Cir. 1968). *See* Lawson Fabrics, Inc. v. Akzona, Inc., 355 F. Supp. 1146, 1149 (S.D.N.Y.), *aff'd mem.*, 486 F.2d 1394 (2d Cir. 1973).

[90] Lawson Fabrics, Inc. v. Akzona, Inc., 355 F. Supp. 1146, 1149-50 (S.D.N.Y.), *aff'd mem.*, 486 F.2d 1394 (2d Cir. 1973). Moreover, some "public" statutory interests are not so great as to preclude arbitration. Coenen v. R.W. Pressprich & Co., 453 F.2d 1209, 1213-14 (2d Cir.) (ban on arbitration of securities act claims not available to protect brokers), *cert. denied*, 406 U.S. 949 (1972); Fallick v. Kehr, 369 F.2d 899, 904-05 (2d Cir. 1966) (arbitrator allowed to determine effect of discharge in bankruptcy); Local 1115, Nursing Home Union v. Hialeah Convalescent Home, Inc., 348 F. Supp. 405, 413-15 (S.D. Fla. 1972) (arbitrator allowed to determine application of wage-price freeze).

[91] 40 N.Y.2d at 363, 353 N.E.2d at 799, 386 N.Y.S.2d at 837.

[92] 21 N.Y.2d 621, 237 N.E.2d 223, 289 N.Y.S.2d 968 (1968).

[93] If the arbitrators here should decide wrongly that the goods were or were not defective, the injustice done is essentially only to the parties concerned. If, however, they should proceed to decide erroneously that there was or was not a violation of the Donnelly Act, the injury extends to the people of the State as a whole.

Id. at 627, 237 N.E.2d at 225, 289 N.Y.S.2d at 971.

[94] *Id.*

rarely present unsettled questions of law.[95] An arbitrator's interpretation of contract law has little or no precedential value; its impact is limited to the parties. In contrast, an arbitrator's decision on a novel point of antitrust law may have an unintended impact beyond the parties, precisely because the law is unclear.

In sum, the public policy protected in *Publishers' Association* and *Garrity*, a policy derived from the common law of contracts, is strange company for the clear statutory policies protected in *Aimcee* and the federal cases. The principle of arbitral flexibility is a statutory policy; traditional limits on consensual power are not. Courts should therefore be slow to invoke a policy against punitive damages to limit arbitrator action.

C. *Arbitration Remedies in Continuing Contracts*

Garrity arose out of a distinctly commercial setting,[96] yet it purports to establish a test applicable to all arbitration awards.[97] By failing to consider possible differences in the contractual context, *Garrity* again misses an important mark. The wealth of federal cases involving labor arbitration awards illustrates the importance of contractual context in shaping arbitral remedies. Although the standards governing review of the arbitrator[98] and the express goals of federal labor law[99] distinguish such cases from the commercial context, federal courts, confronted with commercial cases, have been willing to take lessons from labor law.[100] Courts should

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[95] *Id.* at 628-29, 237 N.E.2d at 226-27, 289 N.Y.S.2d at 973. The antitrust claim in *Aimcee* raised novel questions of law. *Id.*

[96] *See* text accompanying notes 46-48 *supra*.

[97] *See* notes 49-59 and accompanying text *supra*.

[98] [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960).

[99] In the commercial case, arbitration is the substitute for litigation. Here arbitration is the substitute for industrial strife. Since arbitration of labor disputes has quite different functions from arbitration under an ordinary commercial agreement, the hostility evinced by courts toward arbitration of commercial agreements has no place bere.

United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960).

[100] [T]he principles governing labor and commercial arbitration cases are similar, and we therefore consider the principles of *Honold* [a labor case] with respect to the authority of the arbitrator to fasbion an award and the scope of judicial review

not ignore doctrines developed in the labor context when asked to enforce "commercial" arbitration awards. Labor relations are contractual relations. Admittedly, courts must respond to the distinguishing themes in the labor arbitration context: the importance of avoiding disruptions in production[101] and the parties' need to continue to deal with each other under the collective bargaining agreement. Thus, in the labor context, New York courts accept a presumption of arbitrability[102] and a broad implied remedial power[103] not applicable in the commercial context.

Nevertheless, by extending labor rules to employer bargaining associations, *Savin* recognizes that the rationale of labor cases extends beyond traditional employer-employee disputes. Furthermore, *all* contracts are characterized by some degree of continuity, need for cooperation during disputes, and flexibility in performance.[104] Remedies in a continuing contractual relationship necessarily differ from traditional legal damages tailored to a defunct transaction. The more continuing and cooperative a commercial contract is, the more the parties need the initial flexibility provided by an arbitrator[105] and the breadth of privately enforced remedies

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to be applicable in commercial arbitration cases as well. However, even though the principles are similar, there are differences in the rigor of judicial review . . . .

Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1130 (3d Cir. 1972). *See* M. DOMKE, *supra* note 1, § 1.02, at 4-5.

[101] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960), quoted in note 99 *supra*.

[102] G.E. Howard & Co. v. Daley, 27 N.Y.2d 285, 265 N.E.2d 747, 317 N.Y.S.2d 326 (1970).

[103] BOAC v. International Ass'n of Machinists, 32 N.Y.2d 823, 299 N.E.2d 258, 345 N.Y.S.2d 1014 (1973), *rev'g mem.* 39 App. Div. 2d 900, 334 N.Y.S.2d 261 (1972) (dissenting opinion adopted on reversal).

[104] *See* Macneil, *The Many Futures of Contracts*, 47 S. CAL. L. REV. 691, 737-44 (1974). These characteristics of continuing contracts are but three of the more obvious elements involved in long-term relations. Above all, the relational contract is unlike the pre-planned, short-term exchange, which is the model transaction of traditional contract law. Because the parties cannot completely map out a relational contract at its inception, they are likely to use an arbitrator to fill inevitable gaps in planning. Where the parties foresee the need for dispute resolution during performance, an arbitrator can undertake gap-filling that a court would eschew. *See* notes 157-60 and accompanying text *infra*.

Ironically, judicial hostility towards arbitration (*see* note 1 *supra*) obstructs this private development of contract law. The old notion that parties may not " 'oust the jurisdiction' of the courts" (Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942)) by invoking arbitration has been legislatively overruled. The parties' need to oust inapplicable contract law, however, is frustrated by judicial insistence that an arbitration award be explicable in terms of traditional contract theories. *See* notes 170-73 and accompanying text *infra*.

[105] For example, the use of arbitrators promotes continuity in construction contracts. *See* American Institute of Architects, AIA Document A201 § 7.10 (1970) (standard form agreement containing arbitration clause).

allowed in the labor context.[106] Thus, commerical arbitration may be more than a "substitute for litigation"[107] and should not be limited to the remedies of litigation. If the goals of a remedy permitted in the labor context are applicable to a particular commercial contract, a commercial arbitrator should have the discretion to use that remedy.

In this light, federal labor cases are instructive both in their rationale for approving punitive remedies and in the distinctions they draw between different remedial theories, many of which would be labeled "punitive" in the commercial context. One group of federal cases holds that neither a court nor an arbitrator functioning under federal labor law may award punitive damages.[108] A number of recent cases, however, have cast doubt on this limitation. Some courts have confirmed arbitral awards that closely resemble punitive damages by finding the awards sufficiently "compensatory."[109] In *Operating Engineers Local 450 v. Mid-Valley, Inc.*,[110] the court denied an arbitrator the power to impose punitive damages absent an express contractual provision authorizing such a remedy,[111] yet permitted the use of conditional future punishment to force compliance with the collective bargaining agreement. In *Mid-Valley* the arbitrator awarded the union salaries that would have been earned by union members had the employer complied

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[106] This remedial flexibility is legally recognized in other consensual arrangements. In the professional baseball leagues, for example, the Uniform Player's Contract provides for assessment of fines (contractual penalties) against players by the league or the Commissioner. *See* Note, *Arbitration of Grievance and Salary Disputes in Professional Baseball: Evolution of a System of Private Law*, 60 CORNELL L. REV. 1049, 1059 (1975). Moreover, the contractual relationship between team and league empowers the Commissioner to impose punitive sanctions. Atlanta Nat'l Leagne Baseball Club, Inc. v. Kuhn, 432 F. Supp. 1213, 1219-26 (N.D. Ga. 1977).

[107] *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578 (1960), quoted in note 99 *supra*.

[108] Williams v. Pacific Maritime Ass'n, 421 F.2d 1287 (9th Cir. 1970); Local 127, United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277 (3d Cir. 1962). *But see* Local 416, Sheetmetal Workers v. Helgesteel Corp., 335 F. Supp. 812, 815-16 (W.D. Wis. 1971) (ban on judicial and NLRB assessment of punitive damages not necessarily applicable to arbitrators), *rev'd on other grounds*, 507 F.2d 1053 (7th Cir. 1974).

[109] *See* cases cited in note 130 *infra*.

[110] 347 F. Supp. 1104 (S.D. Tex. 1972).

[111] The court explained:

> Contracting parties do not normally agree to assess exemplary damages for a breach of contract. Such damages being punitive in nature are rare in contract law. Contractual consent to so drastic a "remedy" for simple breach cannot be implied. Therefore, an arbitrator's assessment of punitive damages must be grounded in express langnage. In this case, neither the contract clause nor the simple question submitted suggest [*sic*] authority for exemplary damages.

Id. at 1109.

with the collective bargaining agreement by maintaining the prescribed crew to operate its machinery. Citing the lack of causation (the union lost only dues, not full salaries) and the possibility that a nonunion crew might have been hired, the court held that the assessment of unpaid salaries up to the time of arbitration was not compensatory and therefore was void as punitive.[112] Notably, the lack of contractual authorization to assess penalties, and not the punitive nature of the award, was the basis of vacatur.[113]

More important, however, is the precedent the *Mid-Valley* court established in confirming a portion of the award. The arbitrator assessed additional conditional damages of future unearned salaries, payable to the union each week that Mid-Valley continued to refuse to hire the required crew. The court held that such an award is enforceable "[a]s a reasonable means of effectuating the contractual intent."[114] In other words, an arbitrator may use damages that are not reimbursement for a provable injury to coerce the employer into compliance with the collective bargaining agreement. The court in *Savin* employed similar logic in upholding the stipulated penalty assessed in that group-bargaining situation. Three elements of *Savin* and *Mid-Valley* coincide: (1) actual injury to the plaintiff could not be calculated in monetary terms; (2) performance was essential to fulfillment of the parties' expectations —money damages, even if calculable, could not remedy the loss to the plaintiff; and (3) the court perceived a public interest in continuing the contractual relationship sufficient to justify private coercion. Given these factors, penalties may be not only permissible but desirable. This view highlights the distinctions between *Savin* and *Garrity*,[115] and suggests an additional factor to include in the judicial analysis of arbitration remedies: Courts may distinguish between continuing and discrete contractual relationships when setting limits on arbitral coercion-by-agreement.[116] Precedent in

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[112] *Id.* at 1109-10.

[113] "[A]n arbitrator's error of law in assessing punitive damages is not sufficient reason to reverse his decision." *Id.* at 1110. *See also* Hotel & Restaurant Employees v. Michelson's Food Servs., Inc., 545 F.2d 1248, 1254 (9th Cir. 1976) (although not theoretically precluded in arbitration, punitive damages represent demand so unusual that employees must raise demand at beginning of grievance procedure).

[114] 347 F. Supp. at 1109.

[115] Recall that the penalties in *Savin* were necessary to force AGC members to ride out the Teamsters strike together. Loss of unity in the AGC threatened the construction industry with labor strife. *See* notes 38-40 and accompanying text *supra*. In contrast, author Garrity had easily calculable lost royalties to protect, and her loss due to Lyle Stuart's breach was of little public consequence.

[116] This suggestion rests on the notion presented at the beginning of this section: Con-

federal labor cases supports this distinction, not only under the *Mid-Valley* rationale, but also in those cases enforcing penalty-wage awards payable to the union where the employer fails to hire workers required by the collective bargaining agreement.[117]

D. *Problems of Characterization: What Is Punitive?*

Perhaps the most significant problem posed by the *Garrity* rule is its requirement that a court characterize every challenged award as either "compensatory" or "punitive." To do so, a court must identify both the legal theory of liability and the remedial theory applied by the arbitrator. Because arbitrators need not explain their awards,[118] the court must reconstruct the arbitrator's rationale in the dark. Further, the arbitrator may draw upon any mode of analysis that is not "completely irrational."[119] Assuming that a rule of law followed in another state is at least arguably rational, the court must acquiesce even in the face of a theory of liability imported from some distant jurisdiction.[120] The following discussion identifies the theoretical complexities involved in characterizing an award. The problems revealed both impugn the wisdom of *Garrity* and suggest the basis for a more workable system.

Federal labor cases dealing with punitive awards suggest a variety of remedial theories, any one of which may form the basis of an arbitration award. Federal trial courts have had only limited success in using *Mid-Valley*'s notion of coercing the employer into

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tracts, and the appropriate remedies for their breach, fall along a spectrum from the continuing relations of collective bargaining to the relatively discrete sale of goods. *See* Macneil, *supra* note 104, at 737-44. The court in *Savin* recognized this idea, sub silentio, by invoking the public policy in favor of labor arbitration even though the contract involved collective bargaining only indirectly. *See* text accompanying note 40 *supra*.

[117] *E.g.*, Local 369, Bakery & Confectionery Workers v. Cotton Baking Co., 514 F.2d 1235 (5th Cir. 1975) (award of unearned wages to union), *cert. denied*, 423 U.S. 1055 (1976); Brotherhood of R.R. Trainmen v. Central of Ga. Ry., 415 F.2d 403 (5th Cir. 1969), *cert. denied*, 396 U.S. 1008 (1970).

[118] United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); Bernhardt v. Polygraphic Co., 350 U.S. 198 (1956); Wilko v. Swan, 346 U.S. 427 (1953).

[119] National Cash Register Co. v. Wilson, 8 N.Y.2d 377, 383, 171 N.E.2d 302, 305, 208 N.Y.S.2d 951, 955 (1960). *See* Lentine v. Fundaro, 29 N.Y.2d 382, 385, 278 N.E.2d 633, 635, 328 N.Y.S.2d 418, 422 (1972); Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 25 N.Y.2d 451, 458, 255 N.E.2d 168, 171-72, 306 N.Y.S.2d 934, 940 (1969) (dissenting opinion, Breitel, J.); notes 170-73 and accompanying text *infra*. The Third Circuit has adopted the "completely irrational" standard (Swift Indus., Inc. v. Botany Indus., Inc., 466 F.2d 1125, 1131 (3d Cir. 1972)), perhaps giving some substance to the "manifest disregard" test of Wilko v. Swan, 346 U.S. 427, 436 (1953).

[120] *See* note 138 *infra*.

compliance to justify awards that are openly labeled "punitive."[121] Federal courts have, however, approved of jury awards, exceeding the amount of lost wages, that either compensate the employee for mental distress[122] or punish the malicious aspect of a breach that is also tortious.[123] Should an arbitrator take the same approach in calculating damages, both of these theories would present problems to a court undertaking a *Garrity* characterization, as *Garrity* itself shows. Plaintiff Garrity alleged both breach of contract and tort claims before the arbitrator. The legal label "tort" does not remove a dispute from an arbitrator's jurisdiction.[124] Thus, the

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[121] *E.g.*, Local 416, Sheetmetal Workers v. Helgesteel Corp., 335 F. Supp. 812, 816 (W.D. Wis. 1971), *rev'd on other grounds*, 507 F.2d 1053 (7th Cir. 1974). The district court held that punitive damages are not necessarily barred as a matter of law. Rather, said the court, the proper test is whether or not the award is "reasonable" and "draws its essence" from the collective bargaining agreement. 335 F. Supp. at 815-16. *See* Butler v. Yellow Freight Sys., Inc., 374 F. Supp. 747 (W.D. Mo. 1974), *rev'd sub nom.* Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975). In *Butler*, the district court had allowed punitive damages under a theory of necessary coercion:

> [W]here the award is uniquely effective in changing or deterring particular arbitrary misconduct or a specific pattern of bad faith misconduct which has persisted stubbornly, then an individual remedy must be appropriately fashioned in the form of an award of exemplary or punitive damages.

374 F. Supp. at 754.

[122] Richardson v. Communications Workers, 443 F.2d 974, 982-85 (8th Cir. 1971), *cert. denied*, 414 U.S. 818 (1973).

[123] Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975). In reversing the district court's award of punitive damages (*see* note 121 *supra*), the Eighth Circuit recognized the rationale of coercing the employer into compliance, and also acknowledged the possibility of a moral justification for a punitive award:

> The Local's conduct was not the type of outrageous or extraordinary conduct for which extraordinary remedies are needed . . . . Butler was not subjected to threats of violence, harassment, physical abuse, or the scorn and ridicule of his co-workers, and there was no showing that the Local acted with any *malice* directed specifically at him. . . . The plaintiff did not establish that punitive damages were needed to deter future misconduct . . . .

514 F.2d at 454 (emphasis added).

[124] Paver & Wildfoerster v. Catholic High School Ass'n, 38 N.Y.2d 669, 676, 345 N.E.2d 565, 569, 382 N.Y.S.2d 22, 25 (1976). Speaking for the court, Chief Judge Breitel stated:

> At the root of the problem in assessing the boundary line between arbitration and dispute determination in courts of law is that in arbitration . . . the parties submit to arbitration a complex of facts, however arranged, and not facts organized in the form of elements of causes of action at law. . . .
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> It is also evident that a complex of facts in legal analysis may present a facet of contract law, or tort law, of quasi-contracts, or equity jurisprudence. These are legal concerns and legal definitional boundaries which prescribe the mode of judicial dispute determination. These are not the concerns or the boundaries of arbi-

arbitrator might have awarded damages for the emotional injury involved, since intentional infliction of mental suffering is compensable in tort.[125] The arbitrator might also have decided that, in a publisher-author relationship, emotional injury is a sufficiently foreseeable result of breach to be compensable in contract.[126] Finally, the arbitrator might have based his award on the desire to punish reprehensible conduct. Only this last theory is impermissible under *Garrity*. But the three theories produce the same result. Without an exhaustive opinion by the arbitrator, a court's characterization of such an award must be purely arbitrary. If a legally correct explanation of an award is conceivable, the award should stand.[127] The principle of flexibility and limited judicial review

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trational dispute determination, nor should they be made so indirectly. *Id.* at 677, 345 N.E.2d at 569-70, 382 N.Y.S.2d at 26.

[125] W. PROSSER, TORTS §12 (4th ed. 1971).

[126] *See* Hadley v. Baxendale, 156 Eng. Rep. 145 (1854); RESTATEMENT OF CONTRACTS § 341 (1932). In California, the civil code limitation of contract damages to compensation (CAL. CIV. CODE § 3294 (West 1970)) saddles the courts with their own *Garrity* rule. As a result, they have overcome the foreseeability problem in cases involving a strong personal element in the contractual relationship, thereby permitting quasi-punitive recovery for emotional distress under the guise of consequential damages in contract. In Crisci v. Security Ins. Co., 66 Cal. 2d 425, 433-34, 426 P.2d 173, 178-79, 58 Cal. Rptr. 13, 18-19 (1967), the court awarded the insured damages for mental distress caused by her liability insurer's failure to accept a reasonable settlement offer from a tort victim. The court pointed out that the insured buys peace of mind as part of the insurance contract, and that mental distress is therefore a foreseeable result of a breach of the contractual duty to accept reasonable settlements within policy limits.

The insurance context is complicated, however, by the doctrine that breach of the duty to settle is both a breach of contract and a tort. The *Crisci* decision stands, in part, on this dual nature of the injury to the insured. Yet the court's reliance on the tort aspect of the injury to justify compensation for mental distress is problematic—the insurer's actions did not constitute bad faith, dishonesty, fraud, or concealment. *Id.* at 430, 426 P.2d at 176, 58 Cal. Rptr. at 16. Nevertheless, the court held that liability exists whenever the decision not to settle is objectively unreasonable, no matter how genuine the insurer's good faith. Liability arises out of "the implied *covenant* of good and fair dealing," not out of the "bad faith" of the breach. *Id.*, 426 P.2d at 177, 58 Cal. Rptr. at 17 (emphasis added). The duty to reasonably protect the interests of the insured in settlement negotiations results from an implied promise. The standards for breach of that duty are those of contract, *i.e.*, performance or nonperformance. Absent fraud or bad faith, the label "tort" does little to distinguish the insurer's conduct from any other breach of contract.

Notably, the Restatement countenances damages for mental suffering only in cases of "wanton or reckless" breach of a personal contract. RESTATEMENT OF CONTRACTS § 341 (1932). The *Crisci* decision thus breaks with traditional limits on damages both by finding insurance contracts sufficiently personal and by compensating for mental distress where the breach was unintentional.

[127] *See* Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 25 N.Y.2d 451, 457-60, 255 N.E.2d 168, 171-73, 306 N.Y.S.2d 934, 939-41 (1969) (dissenting opinion, Breitel, J.); note 142 *infra*.

demands no less respect for the judgment of an arbitrator empowered to "do justice."[128]

The distinction between tort and contract theories is not the only hurdle complicating the characterization process. The cases discussed in this section illustrate at least five theoretical bases supporting confirmation of an ostensibly punitive award. First, *Garnac* suggests that arbitrators may freely modify the traditional expectation calculation of economic loss.[129] Like *Garnac*, federal labor cases often ignore problems of causation and uncertainty where the wrong complained of is significant, such as an employer's breach of a collective bargaining agreement that succeeds in driving a union out of business.[130] Second, expectation may involve noneconomic consequential losses.[131] Both as a nonreviewable error of law and as a part of the power to do justice, an arbitrator may award consequential damages unavailable in a court.[132] Third, punishment (*i.e.*, an award unrelated to compensation) at the hands of an arbitrator may amount to coercion to perform an agreement whose breach is irremediable in monetary terms.[133] Such punishment is exemplary, but only as between the parties. It provides only individual deterrence and does not usurp the state's power of general deterrence. Fourth, arbitral punishment may merely remove unjust enrichment from the pockets of the defendant, awarding the plaintiff an extra-compensatory amount to deny the defendant the benefit of his breach. This theory may justify *Mid-Valley*, as well as the many cases enforcing stipulated penalty wages.[134] In each case, the union received the labor costs that the employer had unjustly saved by

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[128] *See* notes 73-77 and accompanying text *supra*.

[129] *See* notes 67-72 and accompanying text *supra*.

[130] *See, e.g.*, Schlesinger v. Building Serv. Employees Local 252, 367 F. Supp. 760 (E.D. Pa. 1973) (confirming award of 50% of 20 years' estimated lost dues based on arbitrator's calculation that, but for employer's breach, decertified union would have had 50% probability of survival). *See also* Local 369, Bakery & Confectionery Workers v. Cotton Baking Co., 514 F.2d 1235 (5th Cir. 1975) (award of unearned wages to union), *cert. denied*, 423 U.S. 1055 (1976); Mogge v. District 8, Int'l Ass'n of Machinists, 454 F.2d 510 (7th Cir. 1971) (court would not disturb arbitrator's rough estimate of wages lost after wrongful firing and elimination of position); College Hall Fashions, Inc. v. Philadelphia Joint Bd., 408 F. Supp. 722 (E.D. Pa. 1976) (award of unearned wages to union for disbursement to members upheld as compensatory, even though arbitrator termed award "penalty").

[131] Arbitrators in New York have an implied power to award consequential damages. United Buying Serv. Int'l Corp. v. United Buying Serv., Inc., 38 App. Div. 2d 75, 78-79, 327 N.Y.S.2d 7, 12 (1st Dep't 1971), *aff'd mem.*, 30 N.Y.2d 822, 286 N.E.2d 284, 334 N.Y.S.2d 911 (1972).

[132] *See* note 76 *supra*.

[133] *See* notes 114-17 and accompanying text *supra*.

[134] *See, e.g.*, cases cited in note 117 *supra*.

failing to abide by the collective bargaining agreement. Finally, punishment may be predicated upon the defendant's *mens rea*. Federal labor cases that look to the defendant's malice envision this type of award,[135] which is available only where the breach involved is also a tortious act. Although an arbitrator may have jurisdiction over a wrong justiciable in either tort or contract,[136] the *Garrity* court's declaration that pure retribution is reserved to the state[137] precludes an award that looks only to the defendant's state of mind. Where tort and contract claims are mixed,[138] however, this rule requires a separate judicial trial on essentially the same facts —an obviously wasteful exercise. This result is particularly ironic given the *Garrity* court's espoused aim of preserving economy in dispute resolution.[139]

To do justice to the dispute-resolution mechanism chosen by the parties, a court must consider this spectrum of theoretical bases for "punitive" awards. Yet, as noted above, such detailed analysis conflicts with the notions of flexibility and limited judicial review that suffuse arbitration law.[140] Fundamental problems in characterizing an award lurk beneath the ostensibly simple rule of *Garrity*. A rule more sensitive to these conceptual tangles would provide a more appropriate method of limiting arbitral action.

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[135] *E.g.*, Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 454 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975), discussed in note 123 *supra*.

[136] *See* note 124 and accompanying text *supra*.

[137] 40 N.Y.2d at 359-60, 353 N.E.2d at 796-97, 386 N.Y.S.2d at 834.

[138] The commingling of tort and contract claims is especially intimate in insurance fraud and other consumer fraud cases. *See, e.g.*, Schroeder v. Auto Driveway Co., 11 Cal. 3d 908, 523 P.2d 662, 114 Cal. Rptr. 622 (1974); Miller v. National Am. Life Ins. Co., 54 Cal. App. 3d 331, 126 Cal. Rptr. 731 (1976); Wetherbee v. United Ins. Co. of America, 265 Cal. App. 2d 921, 71 Cal. Rptr. 764 (1968). These and other California cases have allowed both contractual recovery and punitive damages for fraudulent inducement. Because an arbitrator in New York is not bound to follow New York law, he might well apply the rationale of these cases to an arbitration brought in New York. It would be difficult to claim that following the logic of the California courts is "completely irrational." *See* notes 170-73 and accompanying text *infra*. Under the New York rule on punitive damages, however, an insurer may confine the contract claim to arbitration while forcing a separate court suit on the claim for punitive damages for fraud. The plaintiff in *Garrity* was forced to fragment her claim in this fashion. The net result is often to insulate those engaging in fraudulent practices from adequate supervision by either court or arbitrator, both because the likelihood of succeeding on a claim for fraud seldom justifies a separate lawsuit and because the proceedings before the arbitrator might render the fraud claim res judicata. *Cf.* Rochester Coca-Cola Bottling Corp. v. Rios, 68 Misc. 2d 520, 522, 327 N.Y.S.2d 285, 287 (Rochester City Ct. 1971) (res judicata principles apply to arbitration decisions).

[139] *See* note 59 and accompanying text *supra*.

[140] *See* notes 73-77 and accompanying text *supra*.

III

A Proposed Analysis: Workable Limits on the Remedial Power of Arbitrators

The issues identified in the preceding section teach two lessons: The *Garrity* rule is unworkable, and the policy it promotes—purely compensatory arbitral awards—is undesirable. *Garrity* is unworkable both because arbitral flexibility makes it impossible to distinguish compensation from punishment, and because the ad hoc process of balancing the arbitration statute's policies against common-law rules of contract leads to unpredictable results.[141] Moreover, a rigid rule against private punishment actually reduces the efficacy of judicial review; an arbitrator may disguise his award by giving no reasons for his decision.[142] Had the arbitrator in *Garrity* awarded damages without explanation, he would have made, at worst, a nonreviewable mistake of fact.[143] Paradoxically, absolutely prohibiting arbitral punishment actually increases the judicial effort necessary to ferret out those awards that are impermissibly punitive, thereby defeating the very economies that *Garrity* sought to promote.[144]

Nevertheless, courts called upon to give the force of a judgment to a private arrangement must draw a line to avoid "an unlimited draft upon judicial power."[145] This line may really be a variable standard, as is suggested by the notions that some contractual relationships do require private coercion and that arbitrators familiar with an industry are often more able than judges to identify the

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[141] One need merely compare the results in *Savin* and *Garrity* to reach this conclusion. *See* note 83 and accompanying text *supra*; notes 171 & 176 and accompanying text *infra*.

[142] The court's demand for explanations in Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 25 N.Y.2d 451, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969), seems to have dissipated in the wake of Lentine v. Fundaro, 29 N.Y.2d 382, 278 N.E.2d 633, 328 N.Y.S.2d 418 (1972). In both cases, the court could conceive of a rational explanation for an unusual award. In the latter case, the court did not ask the arbitrator to explain his decision. *See* Torano v. Motor Vehicle Accident Indem. Corp., 19 App. Div. 2d 356, 243 N.Y.S.2d 434 (1st Dep't 1963) (unusually small award confirmed without arbitrator's explanation of rationale). The "no opinion" rule is firmly established in the federal courts. Sobel v. Hertz, Warner & Co., 469 F.2d 1211 (2d Cir. 1972). *See* note 118 and accompanying text *supra*.

[143] *See* Lentine v. Fundaro, 29 N.Y.2d 382, 383, 278 N.E.2d 633, 634, 328 N.Y.S.2d 418, 419-20 (1972); Exercycle Corp. v. Maratta, 9 N.Y.2d 329, 336-37, 174 N.E.2d 463, 466, 214 N.Y.S.2d 353, 359 (1961).

[144] *See* note 59 and accompanying text *supra*.

[145] Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 358, 353 N.E.2d 793, 796, 386 N.Y.S.2d 831, 834 (1976) (quoting Publishers' Ass'n v. Newspaper & Mail Deliverers' Union, 280 App. Div. 500, 503, 114 N.Y.S.2d 401, 404 (1st Dep't 1952)).

need for coercion. This section will suggest such a standard based upon fundamental precepts of contract law. Because an arbitrator functions as an extra-judicial means of protecting promise, he is in many ways like any other stipulated remedy; courts should therefore impose limits on his powers analogous to the limits imposed on other agreed remedies. This approach would fit the arbitrator into the overall scheme of contract remedies, while requiring little change in the present system of judicial review of arbitration.

A. *The Purpose and Limits of Stipulated Remedies*

Traditional contract rules limiting stipulated remedies to compensation are often justified on two grounds. First, notions of fairness dictate that parties should be protected from overreaching and unfair dealing.[146] Second, contract theory tells us that penalties are "not of the essence of the agreement" but are "in the nature of a security for performance."[147] The first argument depicts the rule against penalties as an extraordinary intrusion into freedom of contract.[148] The second argument, however, suggests a different analysis.

A number of scholars have suggested that an underlying justification for contract as a legal institution is the promotion of economic exchange.[149] Exchange is essential in any society where different men produce different goods and services for future trading. A traditional expectation remedy has its base in this notion of promoting exchange. In effect, traditional compensatory contract remedies seek to complete the exchange for the aggrieved party,[150] thereby promoting reliance on promises of future exchange. A stipulated penalty is "not of the essence of the agree-

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[146] " 'To allow of the use of penalties as damages, at the unlimited discretion of the parties, would lead to the most terrible oppression in pecuniary dealings.' " Associated Gen. Contractors v. Savin Bros., Inc., 36 N.Y.2d 957, 962, 335 N.E.2d 859, 861, 373 N.Y.S.2d 555, 559 (1975) (dissenting opinion, Breitel, C.J.) (quoting Hoag v. McGinnis, 22 Wend. 163, 166 (N.Y. 1839)). *See* C. MCCORMICK, DAMAGES §147 (1935); RESTATEMENT OF CONTRACTS § 339 (1932).

[147] Ward v. Hudson River Bldg. Co., 125 N.Y. 230, 235, 26 N.E. 256, 257 (1891). *See* 5 A. CORBIN, CONTRACTS § 1057 (1964); 5 S. WILLISTON, CONTRACTS § 776 (3d ed. 1961).

[148] Macneil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 495 (1962).

[149] *See, e.g.*, J. MURRAY, CONTRACTS § 1 (1974); Macneil, *supra* note 104, at 700-01.

[150] A contract is a promise given legal sanctions adequate (1) to protect proven reliance on the promise by the promisee; (2) to prevent gain by default on the promise, and (3) to effectuate expectancies created by the promise (a) where there may be hidden or unprovable reliance or (b) where socially desired reliance may thereby be promoted.

Macneil, *supra* note 148, at 497 (footnotes omitted). *See* note 104 *supra*.

ment" because societally, and therefore legally, significant agreements encompass exchange and no more. Society's only interest in promoting reliance is to encourage continued specialization of labor through exchange. Thus, the public policy against penalties does not intrude upon freedom of contract; it is merely another facet of the description of societally encouraged promise.

Traditional approval of liquidated damages also follows this analysis. Broadly phrased, an enforceable stipulated remedy arises when the parties foresee that damages at breach would be difficult to calculate (or perhaps to prove), and the amount stipulated is a reasonable estimate viewed from the time of contract formation.[151] When we look to the difficulty of calculation or proof of damages to justify the use of a stipulated remedy, we expressly recognize the power of the parties to shore up inadequate legal protection of their expectation interests. This power to improve upon legal protection of promise, however, is limited. Under the requirement of "reasonableness," the agreement must not deviate excessively from the calculation of economic loss that contract law would have dictated. Herein lies a paradox: The parties may shore up legal protection of promise, but their extra-legal remedy will be judged by reference to the very contract law whose inadequacy forced them to stipulate a remedy in the first place. The result is a tension between freedom to prescribe remedies that stretch the law of contract and contract law's limit on that freedom. The limit demands that the agreed remedy reasonably approximate what society has deemed necessary to promote reliance on promise.[152] Thus, a court might ask of any stipulated remedy: Does this agreement protect those societally useful expectation interests that legal remedies seek to protect, even though such protection might not be available in court?

B. *The Arbitrator as a Stipulated Remedy*

Modern arbitration statutes[153] provide legislative authorization for supplementing the protection of promise available in court. Just as a valid liquidation of damages allows the parties to provide a remedy,[154] an arbitration clause allows the parties to provide an entire dispute-resolution mechanism. As a stipulated remedy,

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[151] U.C.C. § 2-718(1); RESTATEMENT OF CONTRACTS § 339 (1932).

[152] Macneil, *supra* note 148, at 496-98.

[153] *See* note 1 *supra*.

[154] 5 A. CORBIN, CONTRACTS § 1062 (1964). *See* 5 S. WILLISTON, CONTRACTS § 783 (3d ed. 1961).

arbitration adds to the protection of promise in a number of ways. Courts commonly laud arbitration as a way to avoid the time, expense, and difficulty of litigation,[155] all of which detract from judicial protection of promise. Similarly, the merchant-arbitrator brings extra-judicial, specialized understanding to a dispute in his business.[156] Most important, the use of arbitration allows the creation of a binding, but less than fully specified, continuing contractual relationship.[157] Courts explicitly approve of this function in the labor context when they speak of the arbitrator's role in developing the "common law of the shop."[158] The arbitrator is the medium through which a private, contract-created society develops its own law.[159] The arbitrator can add previously unspecified content to promise, giving the parties an ability to create a binding agreement whose terms can be specified in the future. Thus, the arbitrator stretches traditional notions of consent and exceeds the protection of promise available in court.[160] Arbitrators may stretch traditional notions of consent as long as their conclusions are not "completely irrational."[161] Thus, compared to simple stipulated remedies,[162] arbitration provides contracting parties with far more than the traditional protection of promise. To be "completely irrational," the arbitrator must stray a long way from traditional contract law, which provides the standard of rationality.[163]

Finally, because the ability to fill gaps in promise is often valuable only insofar as it serves to guarantee the continuity of a contractual relationship, the arbitrator must have some means of enforcing compliance with the terms he has specified. Conceivable means include the individual deterrence of coercion-to-perform approved in *Mid-Valley*[164] and the general deterrence of punishing

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[155] *See, e.g.*, Garrity v. Lyle Stuart, Inc., 40 N.Y.2d 354, 359, 353 N.E.2d 793, 796, 386 N.Y.S.2d 831, 834 (1976). *See generally* M. DOMKE, *supra* note 1, § 2.01, at 10-11.

[156] *See* South East Atl. Shipping Ltd. v. Garnac Grain Co., 356 F.2d 189, 192 (2d Cir. 1966); East India Trading Co. v. Halari, 280 App. Div. 420, 421, 114 N.Y.S.2d 93, 94-95 (1st Dep't 1952), *aff'd mem.*, 305 N.Y. 866, 114 N.E.2d 213 (1953). *See also* note 176 and accompanying text *infra*.

[157] *See* note 104 *supra*.

[158] United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580 (1960) (quoting Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1499 (1959)).

[159] *See* Note, *supra* note 106, at 1054-65.

[160] Arbitration is not the only area of the law in which traditional notions of consensuality are changing. *See, e.g.*, U.C.C. § 2-207 (formation of contract).

[161] *See* cases cited in note 119 *supra*.

[162] *See* text accompanying notes 151-52 *supra*.

[163] *See* notes 170-73 and accompanying text *infra*.

[164] *See* notes 110-14 and accompanying text *supra*.

one member of a contractual society approved in *Savin*.[165] Yet *Garrity* tells us that even though the arbitrator may deviate from traditional contract law in other situations, he is bound to uncompromising compliance with the "no punishment" rule when formulating remedies. Applying the analogue of the limits on traditional stipulated remedies, however, one might ask instead whether the outcome of a stipulated dispute-resolution mechanism reasonably approximates the protection of societally useful reliance on promise that would have been provided in court.[166] As with judicial review of the reasonableness of a stipulated monetary remedy, this question ultimately focuses on whether the award is reasonably necessary to the promotion of exchange, since promotion of exchange is the goal of contract remedies.[167]

C. *The Traditional Language of Judicial Review*

This view of an arbitrator's remedial power, a power larger than that countenanced by traditional contract law but limited by reasonableness, does not fit neatly within the language of review used by New York courts. The *Garrity* court decried judicial review of the reasonableness or justness of an award.[168] Moreover, New York's arbitration statute says nothing about reasonableness of awards.[169] Nevertheless, courts review for reasonableness any

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[165] *See* notes 38-40, 115-17 and accompanying text *supra*.

[166] *See* text accompanying notes 151-52 *supra*. This argument accords with Judge Gabrielli's dissent in *Garrity*. He argued that the award of punitive damages should be affirmed because the arbitrator's action was far from "irrational." 40 N.Y.2d at 365, 353 N.E.2d at 800, 386 N.Y.S.2d at 838.

[167] *See* text accompanying notes 149-50 *supra*.

[168] 40 N.Y.2d at 359, 353 N.E.2d at 796, 386 N.Y.S.2d at 834.

[169] N.Y. CIV. PRAC. LAW § 7511(b) (McKinney 1963) formulates the only statutory grounds for vacatur of an award:

> 1. The award shall be vacated on the application of a party who either participated in the arbitration or was served with a notice of intention to arbitrate if the court finds that the rights of that party were prejudiced by:
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> (i) corruption, fraud or misconduct in procuring the award; or
>
> (ii) partiality of an arbitrator appointed as a neutral, except where the award was by confession; or
>
> (iii) an arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made; or
>
> (iv) failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.
>
> 2. The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a notice of intention to arbitrate if the court finds that:

award opposed by the losing party in arbitration. The courts begin with the proposition that "arbitrators are not bound by principles of substantive law or rules of evidence."[170] This does not signify, however, that a mysterious process producing justice takes place without reference to contract law once the court finds that the parties entered into an enforceable arbitration agreement. In every case in which arbitral freedom is propounded, the court still performs a *contract* analysis—considering the merits without "reviewing" them.[171] The pronounced standard of vacatur is "complete irrationality."[172] The touchstone of rationality is contract law; there is no other standard to apply. Thus, despite declarations to the contrary,[173] courts in fact review arbitration awards for reasonableness; they simply apply a very loose standard of how much unreasonableness is permissible. The analogy between review of stipulated remedies for reasonableness in relation to contract law and review of arbitration awards for complete irrationality in relation to contract law correctly reflects what the courts *do*, if not what they *say*.

(i) the rights of that party were prejudiced by one of the grounds specified in paragraph one; or

(ii) a valid agreement to arbitrate was not made; or

(iii) the agreement to arbitrate had not been complied with; or

(iv) the arbitrated claim was barred by limitation under subdivision (b) of section 7502.

[170] Lentine v. Fundaro, 29 N.Y.2d 382, 385, 278 N.E.2d 633, 635, 328 N.Y.S.2d 418, 421 (1972).

[171] *See* Lentine v. Fundaro, 29 N.Y.2d 382, 278 N.E.2d 633, 328 N.Y.S.2d 418 (1972); Granite Worsted Mills, Inc. v. Aaronson Cowen, Ltd., 25 N.Y.2d 451, 255 N.E.2d 168, 306 N.Y.S.2d 934 (1969); Civil Serv. Employees Ass'n v. County of Steuben, 50 App. Div. 2d 421, 377 N.Y.S.2d 849 (4th Dep't 1976); Riccardi v. Modern Silver Linen Supply Co., 45 App. Div. 2d 191, 356 N.Y.S.2d 872 (1st Dep't 1974), *aff'd mem.*, 36 N.Y.2d 945, 335 N.E.2d 856, 373 N.Y.S.2d 551 (1975). *Riccardi* illustrates another difficulty with arbitral involvement in matters of puhlic policy. The petitioner in that case moved for a stay of arbitration on the ground that the restrictive covenants in an employment contract violated both the public policy embodied in the antitrust laws (N.Y. GEN. BUS. LAW § 340(1) (McKinney 1968) and the common-law public policy against unreasonable restraints. In refusing to stay arbitration the Appellate Division was careful to distinguish the issues: "[T]o the extent that the petition rests upon claims of common-law unconscionability, such does not raise issues to be preliminarily determined by a court, but rather, those issues are for the arbitrators to decide." 45 App. Div. 2d at 196, 356 N.Y.S.2d at 878. Only the alleged antitrust violations concerned the court. The Court of Appeals, however, confused the issues when it affirmed: "The contention of illegality here is insubstantial since on its face the restrictive covenant does not violate the common-law rules applicahle to restraints in employment opportunities . . . ." 36 N.Y.2d at 947, 335 N.E.2d at 856, 373 N.Y.S.2d at 552.

[172] *See* note 119 and accompanying text *supra*.

[173] *See* text accompanying note 168 *supra*.

D. *Proposed Analysis of Punitive Awards*

On the strength of this analogy, a reviewing court should ask whether an arbitral award that goes far beyond traditional contract remedies is still reasonably necessary to protect the societally useful exchange aspects of the promise involved. Because traditional contract remedies are, by definition, those aimed at protecting exchange, the same standard might be phrased: Is the award reasonable, viewed from the perspective of contract law? The answer to this question requires recognition of the varying kinds of contracts in which arbitration may be invoked[174] and of the evolution of contract remedies in other judicial forums.[175] In support of this proposed standard, one may look to the deference that New York courts have shown in the past for the arbitrator's superior knowledge of the type of remedy reasonably necessary to protect exchange.[176] Moreover, the current draft of the Uniform Arbitration Act reflects this deference in its proviso 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."[177]

Admittedly, this intensive review will require judicial effort. Given the arbitrator's freedom to disgnise the grounds for his decision,[178] however, the flexible rule is the only way to insure that noncompensatory awards will be labeled as such and their justifications explained. Moreover, a court might devise a systematic analysis for apparently noncompensatory awards that would speed review and guide arbitrators. The following might serve as a model for such an analysis:

(1) Did the parties agree to an expanded remedial power? The agreement may be express, in the form of a specified formula or simple authorization of "punishment," or may be implied from circumstances where continuity of the contractual relationship was clearly within the parties' expectation. Absent such an agreed ex-

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[174] *See* notes 104 & 116 and accompanying text *supra*.

[175] *See* notes 126 & 138 *supra* (development of remedies in California insurance and consumer fraud cases).

[176] *See* 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) (arbitrator's order of specific performance of construction contract confirmed); Staklinski v. Pyramid Elec. Co., 6 N.Y.2d 159, 160 N.E.2d 78, 188 N.Y.S.2d 541 (1959) (arbitrator's order of specific performance of personal service contract confirmed); Ruppert v. Egelhofer, 3 N.Y.2d 576, 148 N.E.2d 129, 170 N.Y.S.2d 785 (1958) (arbitrator allowed to enjoin strike where statute banned such action by courts).

[177] UNIFORM ARBITRATION ACT § 12.

[178] *See* notes 142-43 and accompanying text *supra*.

pansion, the award exceeds the powers of the arbitrator,[179] and should therefore be vacated.

(2) Is there any basis for characterizing the award as compensatory? As explained above, awards that are apparently punitive may represent: (a) unusual calculations aimed at compensating loss of economic expectation;[180] (b) compensation for such imponderables as mental distress and for the cost of litigation;[181] or (c) compensation for a breach that is also a tort.[182] An award that fits one of these categories should not be vacated.

(3) If the award is truly noncompensatory, does it: (a) remove a benefit from the breaching party and transfer it to the aggrieved party even though the latter's loss is less than the former's gain;[183] or (b) coerce a party to perform where performance is the only alternative to irreparable harm?[184] If the answer to either of these questions is "yes," the court arguably should allow the award to stand. Meeting either standard suggests that the award passes the fundamental test of contract remedies—it is reasonably necessary to protect societally useful exchange.[185] A court applying this test must evaluate both the public and the private need for continuity in the exchange relationship. If either is sufficiently strong, the award should stand. Thus, where continuity of the union-management relationship is important to the public, as well as to the union member, the arbitrator may assess penalty wages under standard (3)(a).[186] Similarly, the Appellate Division in *Savin* approved the punitive award because it met standard (3)(b).[187] Moreover, New York courts should recognize standard (3)(b) as a valid way to reconcile *Savin* and *Garrity*. The continuity of the

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[179] *See* note 29 *supra*.

[180] *See* notes 75-76 and accompanying text *supra*.

[181] *See* notes 73, 126, 131-32, and accompanying text *supra*.

[182] *See* notes 122-25 and accompanying text *supra*.

[183] *See* note 117 and accompanying text *supra*.

[184] *See* notes 114-17 and accompanying text *supra*.

[185] *See* text accompanying notes 150-52, 166-67 *supra*. Removing unjust enrichment (standard 3(a)) is the first cousin of pure coercion (standard 3(b)). Both remedies promote societally useful exchange insofar as they induce continuing performance. Removing unjust enrichment is merely a fine-tuned form of coercion, in that it eliminates the possibility of profiting from breach. It does, however, have the additional justification found in traditional notions of fairness. Although such moral grounds for the remedy are unrelated to the utilitarian model of contract remedies propounded in the text, they may reinforce a court's willingness to confirm an award that fits standard 3(a).

[186] *See* notes 117 & 130 and accompanying text *supra*.

[187] " '[T]here may be a positive need for power in the arbitrator to impose and enforce a penalty.' " 45 App. Div. 2d at 144, 356 N.Y.S.2d at 382 (quoting 52 COLUM. L. REV. 943, 945 (1952)).

relationship between author and publisher in *Garrity* is arguably less important to the public, and its breach less irremediable in monetary terms, than is the relationship of the members of an employers' bargaining association, where private coercion may be necessary to achieve social goals.

This analytical framework should replace the all-or-nothing rule of *Garrity*. As with other applications of the "completely irrational" standard, this approach would reflect the impossibility of applying a rigid rule of law to a flexible process free from rules of law. Moreover, the nearly impossible burden of disproving in court all rational explanations for an award would encourage the parties to rely on the forum they chose originally: arbitration.

CONCLUSION

Two recent cases in New York's highest court, *Associated General Contractors v. Savin Brothers* and *Garrity v. Lyle Stuart, Inc.*, reached conflicting results concerning an arbitrator's power to punish a breaching party. *Savin* allowed an arbitrator to enforce a stipulated remedy amounting to a penalty. *Garrity*, however, vacated an award of punitive damages and announced a sweeping rule banning any punishment by contract. The rule is a line drawn upon water. It is often impossible to distinguish between compensation and punishment at the hands of an arbitrator. More important, the law of arbitration must recoguize both the remedial flexibility of the arbitrator in determining the subject and the amount of compensation, and the need of the parties in a continuing contractual relationship to invoke greater protection than that provided by traditional legal remedies. An arbitrator is more than a convenient and efficient combination of court and jury. In many cases, arbitration functions like a stipulated remedy, protecting contract interests in ways the traditional law of contracts cannot or will not do. Therefore, a rigid rule against punitive damages in arbitration cannot and should not guide judicial review of arbitral action. Instead, in cases where the parties have empowered the arbitrator to impose noncompensatory awards, courts should look to the fundamental purpose of contract remedies—the protection of societally useful exchange—and should test an arbitral remedy by asking whether it is reasonably necessary to protect the exchange relationship in question.

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