Egol v. Egol: One Effect on Child Support Payments in a Separation Agreement to Arbitrate

I. INTRODUCTION

The American judicial system has historically viewed arbitration clauses in the commercial sector as creatures of contract law. In general, arbitration clauses are fully enforceable against all parties to the contract absent proof of fraud or other illegal conduct which would make the contract void or voidable as a matter of law.[1] It has been established that agreements to arbitrate controversies in the commercial setting preclude the parties from seeking judicial relief[2] and are common in today's business transactions.

Although arbitration agreements have been widely used in commercial contracts, this is not the case in the area of family law. Historically, domestic controversies arising in matters of divorce, separation, child support, and alimony and maintenance were settled through the traditional judicial process — adversarial confrontation — or another traditional mediating institution such as the family, the church, and the community.

> One response to these problems was a demand for more judges and more courtrooms; another was a search for alternatives to the courts. In part, this search was a product of disillusion with courts [due] to what many perceived to be unrestrained adversariness and the unreasonably high cost of adjudication; in part, it was a product of a growing mood of antiprofessionalism.[3]

Although matrimonial matters are often considered a matter of contract, such controversies have been handled as contractual disputes only recently. One reason for the differentiation between the use of arbitration in the commercial context and its use in the domestic context is the varied nature of domestic law from one state to the next.[4] This differentiation, however, has narrowed in recent years. Currently, actions to enforce provisions of a separation agreement are subject to the same general principles of law as actions to enforce other contracts.[5] This trend has grown out of the increasing use of alternative means of dispute

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1. G. GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION 5-6 (2d ed. 1983).

2. *Id.* at 5.

3. S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 4 (1985).

4. Family law is almost strictly a matter of state law. *See* H. KRAUSE, FAMILY LAW IN A NUTSHELL 2 (2d ed. 1986).

5. There is a multitude of case law involving separation agreements with provisions to submit matrimonial disputes arising out of such agreements to arbitration. These cases treat such provisions as contractual obligations and apply contract theories of law to settle

resolution in the judicial arena. With increasing frequency couples are using alternative methods such as mediation, negotiation, and conciliation to resolve their differences over property distribution, custody, visitation rights, alimony, and child support, while at the same time avoiding the disadvantages inherent in utilizing the traditional judicial process.[6]

One outgrowth of the use of arbitration clauses in separation agreements is the increase in the use of alternative dispute resolution forums.[7] These arbitration clauses typically provide that any controversies arising out of such agreements be submitted to arbitration.

This Note discusses the effect of one such arbitration clause contained in a separation agreement as it pertains to arrearages and modification of child support payments. The questions presented by this case, however, may also arise in subsequent litigation involving standard arbitration clauses.

In a recent 3-2 decision, the New York Supreme Court, First Department, held that an ex-wife was precluded from seeking traditional judicial relief for arrearages of child support payments because the issue was a matter to be determined by an arbitrator.[8] The critical issue and the focal point of this Note is the mandatory nature of the arbitration provision and the relationship between an action seeking modification of the separation agreement and one seeking payment of arrearages. This paper does not propose that arbitration clauses should not be included in separation agreements or that a substantial change of circumstances is not an appropriate arbitrable issue. The concern here is that the New York court has inappropriately expanded the parameters of a narrow arbitration provision to encompass subjects not necessarily contemplated by the parties to the arbitration agreement.

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the disputes. *See generally, e.g.*, Bowmer v. Bowmer, 50 N.Y.2d 288, 406 N.E.2d 760, 428 N.Y.S.2d 902 (1980); Iseman v. Iseman, 37 N.Y.2d 918, 340 N.E.2d 748, 369 N.Y.S.2d 413 (1975); Kleinerman v. Kleinerman, 118 A.D.2d 405, 499 N.Y.S.2d 415 (1986).

6. H. KRAUSE, FAMILY LAW CASES AND QUESTIONS 681-710 (2d ed. 1983).

7. The following have been advanced as reasons for mediation's immense popularity:

1. Avoidance of unnecessary hostility and artificial antagonism that can destroy all chances of cooperation in constructing a settlement.

2. A measure of client autonomy in constructing the solutions — which is generally agreed to increase the chances of voluntary adherence to the agreement in future years.

3. Avoiding the traditional two-attorney fight in the settlement process (to say nothing of litigation) — which holds out much promise of reducing costs.

Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L. Q. 219, 219-20 (1982).

8. Egol v. Egol, 118 A.D.2d 76, 503 N.Y.S.2d 726 (1986), *aff'd*, 68 N.Y.2d 893, 501 N.E.2d 584, 508 N.Y.S.2d 935 (1986).

II. LEGAL SIGNIFICANCE OF *EGOL v. EGOL*

This case presented two major procedural questions which were addressed by the court: (1) whether the provision in the agreement to arbitrate was compulsory, and (2) whether the defendant's omission of the preclusion notice in his demand for arbitration rendered the demand invalid on its face.[9] As for the former issue, this Note will take the position that the arbitration provision contained in the Egols' separation agreement was not mandatory, but permissive. Further, even if the provision was mandatory, the matter to be arbitrated was the modification of the initial amount of support payments, not arrearages, since modification was the only subject explicitly made subject to arbitration in the divorce agreement. Given that the arbitration provision was permissive, however, plaintiff should not have been precluded from seeking recovery of the arrearages through litigation.

III. THE FACTS OF *EGOL v. EGOL*

In February 1984, Maria and David Egol's 10-year marriage ended in divorce. The divorce settlement included a provision for maintenance

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9. *Id.* at 79, 503 N.Y.S.2d at 728. The demand for arbitration under Civil Practice Law and Rules section 7503(c) (1980), [hereinafter CPLR] did not come until February 12, 1985, long after defendant's initial section 7503(a) invocation of arbitration was erroneously rejected. It is thus unnecessary for us to reach the question of failure to include a preclusion notice in the demand for arbitration. Moreover, omission of such a notice merely renders open-ended the period within which a party served has to seek a stay of arbitration. Such omission precludes the party seeking arbitration from relying upon the time limitation on seeking a stay. The demand for arbitration is not thereby rendered ineffective. [citations omitted].

CPLR section 7503(c) states in relevant part:

> (c) Notice of intention to arbitrate. A party may serve upon another party a demand for arbitration or a notice of intention to arbitrate, specifying the agreement pursuant to which arbitration is sought and the name and address of the party serving the notice, or of an officer or agent thereof if such party is an association or corporation, and stating that unless the party served applies to stay the arbitration within twenty days after such service he shall thereafter be precluded from objecting that a valid agreement was not made or has not been complied with and from asserting in court the bar of a limitation of time. Such notice or demand shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. An application to stay arbitration must be made by the party served within twenty days after service upon him of the notice or demand, or he shall be so precluded. Notice of such application shall be served in the same manner as a summons or by registered or certified mail, return receipt requested. Service of the application may be made upon the adverse party, or upon his attorney if the attorney's name appears on the demand for arbitration or the notice of intention to arbitrate. Service of the application by mail shall be timely if such application is posted within the prescribed period....

CPLR § 7503(c) (1980).

and child support in the amount of $115,000 per year plus an additional $30,000 for medical, educational and summer camp expenses to be paid by David Egol for their two children.[10] Their divorce agreement included an arbitration provision stating:

> Should the husband suffer a substantial, adverse and involuntarily [sic] change in his financial circumstances, making his support obligations under this Agreement inequitable or a substantial hardship for him, the parties shall negotiate a modification of his obligations, consistent with their then financial circumstances. On a failure of the parties to agree upon such a modification, either party may submit such dispute to arbitration in New York City, in accordance with the Rules of the American Arbitration Association, and judgment upon any award rendered in such arbitration may be entered in any court of competent jurisdiction.[11]

In late January 1984, before judgment on the divorce settlement was entered, defendant, Mr. Egol, lost his job. In May 1984, he obtained other employment with a salary of $250,000, half of his prior salary.[12] On February 15, 1984, defendant's attorney wrote to plaintiff's attorney that as of March 1, defendant would be unable to make the agreed upon payments in the future because of his change in employment status.[13] Beginning in March, defendant began paying plaintiff $2,500 per month and plaintiff accepted, without prejudice.[14] Defendant requested that plaintiff refrain from initiating any action against him until the litigation between himself and his previous employer had been completed. In correspondence and meetings, the parties agreed to refrain from instituting arbitration at that time.[15]

When defendant's payments had fallen more than $54,000 short of the amount stated in the agreement, plaintiff commenced suit for arrears.[16] Defendant cross-moved pursuant to Civil Practice Laws and Rules section 7503(a) to compel arbitration. The Special Term interpreted the provision for arbitration as permissive, rather than compulsory, and ruled that defendant had waived his right to arbitration by failing to give notice of the dispute for such resolution. The Special Term denied defendant's application to compel arbitration and granted plaintiff judgment for eight months of arrearages.[17]

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10. Egol v. Egol, 118 A.D.2d 76, 77, 503 N.Y.S.2d 726, 727 (1986), *aff'd*, 68 N.Y.2d 893, 501 N.E.2d 584, 508 N.Y.S.2d 935 (1986).

11. *Id.*

12. *Id.*

13. *Id.* at 78, 503 N.Y.S.2d at 728.

14. *Id.*

15. *Id.* At this point there was no negotiation to modify the payments. It appears to be a mutual postponement agreement.

16. *Id.*

17. *Id.* Arrearages were granted for March, 1984, the first month that Mr. Egol did not remit the appropriate amount and for each additional month preceding the filing of the action in the trial court by Mrs. Egol in October, 1984.

Within one week, before Special Term's order was settled, defendant served a demand for arbitration under CPLR section 7503(c), and moved to reargue the prior decision.[18] Plaintiff moved for an additional money judgment and to stay arbitration. The court adhered to its prior decision, granted plaintiff's motion to stay arbitration under CPLR section 7503(b) on the ground that it lacked compulsory preclusion notice required by CPLR section 7503(c), and granted plaintiff an additional money judgment covering four more months of arrears.[19] Defendant appealed both orders. The New York Supreme Court, First Department, decided, as a matter of law, to vacate the judgment in favor of the plaintiff and granted the defendant's cross motion to compel arbitration.[20]

IV. NEW YORK STATUTORY LAW ON ARBITRATION

A. *Arbitration Law in General v. Arbitration of Matrimonial Disputes*

The Civil Practice Law Rules[21] delineate New York law in the area of arbitration. The rules provide that:

> 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.[22]

The use of arbitration in matrimonial disputes is codified in section C7501:7,[23] which is titled "Arbitration of Matrimonial Disputes." It does not provide for arbitration rules different from those stated for arbitration in general. Instead, section 7501:7 merely provides a synopsis of the case law which addresses the issues affecting arbitration provisions of matrimonial disputes. There appears to be "no analytical difference between matrimonial and commercial arbitration."[24] Therefore, the same types of problems result from arbitration agreements in matrimonial disputes as result from commercial disputes — problems of construction, reformation, and interpretation.

Judge Fein, writing for the majority in *Egol*, states that the Egols' agreement to arbitrate is compulsory and, "[t]he only permissive as-

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18. *Id.*
19. *Id.* at 78-79, 503 N.Y.S.2d at 728.
20. *Id.* at 82-83, 503 N.Y.S.2d at 731. The notice requirement will not be discussed in this Note.
21. CPLR § 7501 (1980).
22. *Id.*
23. *See id.* at § C7501:7.
24. CPLR § C7501:7 (1980), Cumulative Annual Pocket Part at 24. *See also* Bowmer v. Bowmer, 50 N.Y.2d 288, 293-94, 406 N.E.2d 760, 762-63, 428 N.Y.S.2d 902 (1980).

pect...is that which affords either party the opportunity to initiate arbitration."[25] On the other hand, Judge Ellerin posits in a dissenting opinion — focusing on that part of the agreement which provides that, "[e]ither party *may* submit such dispute to arbitration"[26] — that the issue of arrears was properly before the court because the arbitration provision was permissive in nature. This is a classic case of conflict between reformation, modification, and interpretation.

It has been explained that:

> In reformation, the arbitrator rewrites the contract to correct a mistake in the language so that the written contract accurately reflects what the parties agreed upon. In modification, however, there is no mistake in the drafting of the contract, but the circumstances have changed since the contract was written and the arbitrator, in effect, writes a new agreement for the parties. To assure the sanctity of contract and to enable the parties to order their affairs in reliance upon their agreements, it may well be that the Court of Appeals will simply refuse to find that the parties have conferred upon the arbitrator the power to modify a contract in the absence of express arbitration language to that effect.[27]

Under the terms of the Egol agreement, Mr. Egol was ordered by the court to pay a total of $145,000 per month based on a $500,000 salary. A short time after the order was made, Mr. Egol's change in employment resulted in his salary being reduced by half. Instead of requesting negotiation or arbitration to get the amount of the payment reduced, however, Mr. Egol fell behind in payments. Had Mr. Egol initiated action immediately, there would be no controversy over whether the arbitrator could modify the payments due to the substantial change in his financial circumstances because the agreement explicitly contemplates such action. Only a one month payment period had elapsed. Instead, Mr. Egol only requested that Mrs. Egol refrain from instituting any action against him until he could work out his legal problem with his former employer. Thus, the court order granting the settlement went undisturbed. Mr. Egol was still obligated to pay the support as it accrued.

Hence, when Mr. Egol fell behind in his obligation to pay, the sum accrued was due and owing to the plaintiff and their children. Therefore, the amount in arrears is subject to the terms of the initial court order

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25. Egol v. Egol, 118 A.D.2d 76, 79, 503 N.Y.S.2d 726, 729 (1986).

26. *Id.* at 84, 503 N.Y.S.2d at 732 (Ellerin, J., dissenting in part).

27. CPLR § C7501:7, Supplementary Practice Commentaries, by Joseph M. McLaughlin 28 (1980). *See In re* Arbitration Between SCM Corp. v. Fisher Park Lane Co., 40 N.Y.2d 788, 358 N.E.2d 1024, 390 N.Y.S.2d 398 (1976) (the court held that under a broad arbitration clause, arbitrators have complete power to fashion appropriate remedies including the power to reform a contract. An expansive reading of the Bowmer case, however, might suggest that even under a broad arbitration clause arbitrators lack the power to *modify* a contract).

to pay and should not be treated as part and parcel of any subsequent order for modification. In short, under the Egol agreement, only prospective modification of terms, not arrearages, is an arbitrable issue.

The majority position in *Egol*, in effect, allows the arbitrator to modify the agreement between the parties by encompassing the issue of arrearages within the parameters of the stated arbitrable issue of modification. In essence, the contract between the parties would be rewritten. Only, in this case, it would be rewritten not just to reflect a change in circumstances, but to add a provision not previously agreed upon by the parties. It is clear that this is not a matter of reformation because the parties did not incorporate arrearages in the arbitration clause for future modification of payments. Indeed, had they done so, there would be no debate over the compulsory nature of the clause. There is no evidence in the record to show that there was mutual assent or a "meeting of minds"[28] over this aspect of the child support payments. The purpose of the child support payments is to support the Egol children in a manner to which they are accustomed (i.e. to protect their best interests). It would be stretching the truth, if not the imagination, to say that at the time of the initial agreement Mrs. Egol gave her consent — absent a specific grant of authority — to allow Mr. Egol to avoid or default on child support payments and not be held judicially accountable. Moreover, such a broad interpretation of separation agreements like the one in question here, which does not clearly and unequivocally address arrearages, will, in fact, have the inevitable effect of making agreements and court orders in this area easily avoidable. Such treatment will render an already troubled area of the law even more troublesome given the difficulty which currently exists in effectively enforcing child support and maintenance payments.

Given that there is nothing in the *Egol* case to indicate that arrearages were discussed as a part of the agreement, the majority is inappropriately expanding the parameters of the agreement as well as the arbitrator's actual authority.

> [T]he power to formulate flexible solutions cannot be used as a bootstrap for an unpredictable expansion of the parameters of arbitral authority. 'By relegating the issue of arrears to the arbitrator in this case, the majority is "unpredictably" expanding the parameters of the arbitrator's authority and submitting a dispute which the parties themselves did not agree was subject to arbitration.'[29]

In expanding arbitral authority, the court is ignoring the best interest

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28. Egol v. Egol, 118 A.D.2d 76, 84, 503 N.Y.S.2d 726, 732 (1986) (Mr. Egol asserted that there was a meeting of the minds over the question of the arrearages).

29. Egol v. Egol, 118 A.D.2d 76, 84, 503 N.Y.S.2d 726, 732 (1986) (quoting Bowmer v. Bowmer, 50 N.Y.2d 288, 296 (1980)).

of the child by overlooking the possible adverse effect of such an expansive application in the present case. If the arbitrator totally disregards the arrearages, and it may, coupled with the possibility that a sum less than the initially agreed upon amount will be awarded, the standard of living of the Egol children will be directly and materially affected. Mrs. Egol is not merely seeking to recover alimony payments for herself, but payments owed to their minor children. The defendant did not comply with the agreement. Therefore, the plaintiff should have been allowed to proceed through the traditional judicial process to seek redress of her grievance.

Because Mr. Egol did not make his motion to compel until the action was decided adversely to him, the amount of arrearages prayed for in the initial suit and the appeal was due and owing under a valid settlement agreement which had not been modified. Although there was an agreement made for Mrs. Egol not to force arbitration until Mr. Egol settled his legal problem with his previous employer, there is no evidence in the record to suggest that Mr. Egol requested a modification at the time the agreement was made to postpone arbitration. At best, the record suggests that the agreement was merely a temporary reprieve or postponement, not a modification or a grant of immunity. If anything, this suggests that Mr. Egol's intention was to pay the amounts owed. He did not indicate otherwise until Mrs. Egol initiated the suit for the backpayments.

B. *A Systematic Approach in Determining the Applicability Of Arbitration Agreements*

Under New York statutory law, there are three crucial questions which must be addressed in determining whether arbitration clauses may be invoked. There must be a determination that: (1) the agreement in question is valid, (2) any and all conditions precedent are met prior to arbitration, and (3) the arbitration is sought within the time stated by the statute of limitations.[30]

Whether an agreement is in fact valid is a question of judicial determination. "If the court determines that the parties had not made an agreement to arbitrate, that concludes the matter and a stay of arbitration will be granted or the application to compel arbitration will be denied."[31] In *Egol*, there is no question that the parties have entered

30. CPLR §§ 7503, C7503:1, C7503:2, C7503:3, C7503:4 (1980).

31. County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 7, 409 N.E.2d 951, 953, 431 N.Y.S.2d 478, 481 (1980). *See also In re* Marlene Inds. Corp. [Carnac Textiles], 45 N.Y.2d 327, 380 N.E.2d 239, 408 N.Y.S.2d 410 (1978); *In re* Riverdale Fabrics Corp. [Tillinghast-Stiles Co.], 306 N.Y. 288, 118 N.E.2d 104 (1954); *In re* Doughboy, Ind. [Pantasote Co.], 17 A.D.2d 216, 233 N.Y.S.2d 488 (1962).

into a valid agreement, however, the inquiry does not end here. Once the court determines that a valid agreement exists, it must also determine whether "the particular agreement that [the parties] made was of limited or restricted scope and the particular claim sought to be arbitrated is outside that scope."[32] If the latter is determined, there will be a stay of arbitration or a denial of the motion to compel arbitration.

It is regarding whether the particular claim sought to be arbitrated is outside the scope of the parties' agreement that the majority opinion in *Egol* and the dissent begin to differ. It is the contention of the majority that the arrearages indeed came within the scope of the arbitration agreement;[33] however, the dissent takes the contrary position.[34] Although not expressly stated, it is evident that the majority is of the opinion that modification of child support payments encompasses the dispute over arrearages. This being the case, the majority states that Mrs. Egol could not bypass arbitration and recover the delinquent payments through litigation.[35] Hence, Mrs. Egol's only alternative is to submit her claim to arbitration and comply with the arbitrator's decision. Given the proper context, this would be consistent with the enforcement functions of the arbitration process. It is inconsistent with the enforcement function, however, to restrict the question of arrearages under the Egol agreement to arbitration absent an unequivocal agreement to do so. This does not mean that arbitration is the wrong procedure in every case where arrearages and modification are at issue; however, when the parties have not unequivocally provided for it in the agreement, arbitration is not appropriate. Nevertheless, the court took the position that arbitration was Mrs. Egol's only recourse, stating that:

> This is not a case where the arbitrator is asked to reform the instrument. The arbitrator is called upon only to interpret it. The subject matter is plainly covered by the language of the agreement....It is the function of the arbitrator to resolve questions of interpretation of the contract once it is determined that the arbitration clause is, by its terms, applicable to the dispute in issue..., unless the issue is one of compliance with express conditions precedent to arbitration.[36]

C. *Does An Agreement to Arbitrate Modification of Support Payments Incorporate Arrearages Under New York Statutory Law?*

It is necessary at this point to examine the appropriateness of the

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32. County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 7, 409 N.E.2d 951, 953 (1980). *See* Gangel v. De Groot, 41 N.Y.2d 840, 362 N.E.2d 249, 393 N.Y.S.2d 698 (1977).

33. Egol v. Egol, 118 A.D.2d 76, 81, 503 N.Y.S.2d 726, 730 (1986).

34. *Id.* at 84, 503 N.Y.S.2d at 732 (Ellerin, J., dissenting in part).

35. *Id.* at 82, 503 N.Y.S.2d at 730.

36. *Id.* at 81, 503 N.Y.S.2d at 730.

position taken by the majority. Similar to the *Egol* dissent, this author takes the position that modification and arrearages are two separate issues; therefore, the express provision to arbitrate modification of payments does not, per se, mandate that a dispute over arrearages is an arbitrable matter. Such an argument necessitates an examination of New York law. New York Domestic Relations Law provides that "[t]he purposes of [Article 3-A] is to secure support in civil proceedings for dependent spouses and children from persons legally responsible for their support."[37] However, nowhere in Article 3-A or the relevant commentaries is there an express or implicit statement to suggest that, in light of the underlying premise of this provision, arrearages of child support payments are encompassed in the modification of such payments. In fact, none of the statutory provisions address this point at all.

In further support of the proposition that the majority in *Egol* inappropriately meshed the question of arrears and modification, the commentary to CPLR section 7501:7, Arbitration of Matrimonial Disputes[38] posits that "[a]lthough the question of how much support should be given to a spouse is arbitrable..., the Court of Appeals has demonstrated a disinclination to find that the parties have agreed to confer such power upon arbitrators unless the arbitration language is absolutely clear."[39] Hence, "[a]bsent a clear, unequivocal agreement to the contrary, it must be taken for granted that the [parties] did not intend to refer a particular matter to arbitration."[40]

D. *What Constitutes a Condition Precedent within the Meaning of CPLR Section 7503?*

This brings the discussion to the second question presented by CPLR section 7503. Here, the requirement is that after determining that the agreement to arbitrate is valid and drawing the conclusion that the claim sought to be arbitrated comes within the scope of the agreement, the court must then determine, (1) whether there are any conditions precedent, and (2) whether the parties have complied with such conditions.[41]

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37. N.Y. DOM. REL. LAW § 30 (McKinney 1984).

38. CPLR § 7501:7, Supplementary Practice Commentaries by Joseph M. McLaughlin 27 (1980).

39. *Id.* at 27 (citing Bowmer v. Bowmer, 50 N.Y.2d 288, 406 N.E.2d 760, 428 N.Y.S.2d 902 (1980)).

40. *Id.* at 27 n.31. *See* City of Plattsburgh v. Local 788 and American Federation of State, County and Municipal Employees, AFL-CIO, 108 A.D.2d 1045, 485 N.Y.S.2d 618 (1985); Just In—Material Designs v. I.T.A.D. Associates, 94 A.D.2d 103, 463 N.Y.S.2d 202 (1983), *aff'd* 61 N.Y.2d 882, 462 N.E.2d 1188, 474 N.Y.S.2d 470 (1984); Willink v. Webster Teachers Ass'n, 81 A.D.2d 1008, 440 N.Y.S.2d 100 (1981).

41. County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 5, 409 N.E.2d 951, 952 (1980); CPLR § C7503:3 (1980).

The concept of what constitutes a condition precedent has created a number of controversies.[42] The court in *N.Y. Plaza Bldg. Co. v. Oppenheim, Appel. Co.* held that:

> In distinguishing between conditions precedent to be passed upon by the court and procedural stipulations to be resolved by the arbitrators the guiding principal is: "Whether the particular requirement falls within the jurisdiction of the courts or of the arbitrators depends on...whether it is in essence prerequisite to entry into the arbitration process or a procedural prescription for the management of that process."[43]

Hence, when the conditions precedent have not been met the court will bar/stay arbitration. This determination depends largely upon the breadth of the arbitration provision. If the arbitration clause is narrow, "[t]he court is to determine issues of timeliness and notice."[44] If the provision is broad, timeliness and notice should be resolved by the arbitrator.[45]

The *Egol* court concluded that there were no conditions precedent incorporated into the Egols' separation agreement.[46] In other words, the provisions of the Egols' agreement involved matters of procedural prescription, not elements of essential prerequisites.

On the contrary, the dissent postulates that the language of the agreement clearly indicates that the provision to negotiate is the condition precedent.[47] Moreover, since the defendant failed to meet this condition, his motion to compel arbitration should have been denied.[48] The dissent pointed out that Mr. Egol evaded his obligation for support by manipulating the arbitration procedure. He did not comply with the agreement and unilaterally reduced the support payments absent arbitration. Mr. Egol did not try to initiate negotiations or action to modify his obligation. Consequently, the plaintiff's motion to stay arbitration should have been granted and the plaintiff should not have been precluded from seeking recovery of the stated arrearages from March through October 1984 by way of litigation.[49] While the majority conceded the fact that the defendant unilaterally modified the payments and did not cooperate by

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42. CPLR § C7503:3 (1980).

43. N.Y. Plaza Bldg. Co. v. Oppenheim, Appel. Co., 103 A.D.2d 203, 207, 479 N.Y.S.2d 217, 220 (1984) (quoting County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 9, 109 N.E.2d 951, 958, 431 N.Y.S.2d 478, 485 (1980). *See In re* United Nations Dev. Corp. v. Norkin Plumbing Co., 45 N.Y.2d 358, 363-64, 380 N.E.2d 253, 408 N.Y.S.2d 424 (1978); Teplitsky v. Douglaston Golf Practice Range, Inc., 64 A.D.2d 578, 407 N.Y.S.2d 46 (1978).

44. N.Y. Plaza Bldg. Co. v. Oppenheim, Appel. Co., 103 A.D.2d 203, 207, 479 N.Y.S.2d 217, 220 (1981).

45. County of Rockland v. Primiano Constr. Co., 51 N.Y.2d 1, 6, 409 N.E.2d 951, 952 (1980).

46. Egol v. Egol, 118 A.D.2d 76, 81-82, 503 N.Y.S.2d 726, 730 (1986).

47. *Id.* at 84, 503 N.Y.S.2d at 732.

48. *Id.* at 85, 503 N.Y.S.2d at 732-33.

49. *Id.*

participating in the negotiation process, Judge Fein went on to say that defendant's action did not affect his right to compel arbitration just as it did not effect a waiver of the plaintiff's rights.[50] In holding there was no failure to meet a condition precedent, it was necessary to submit the matter to the arbitrator for disposition.

Regarding whether the defendant, in fact, failed to meet the conditions precedent contained in the agreement, this author agrees with the majority that the agreement in question does not present a question of condition precedent. The provision to negotiate any disagreement prior to arbitration, even if it is a condition precedent, was complied with even though the defendant later refused to continue with the procedure. The requirement was not that a mutual agreement had to evolve from the negotiation process, it was only that it be initiated prior to challenging the controversy through arbitration. In fact, the provision expressly states that, "[o]n a failure of the parties to agree upon such a modification [due to a breakdown of negotiations], either party may submit such dispute to arbitration...."[51] Indeed there was a breakdown in negotiations when the defendant refused to continue with negotiations over arrears and modification of payments. Therefore, the question again becomes whether arrearages are part and parcel of modification or whether they are two separate obligations which should be handled separately. It is true that both arise out of the primary obligation of support. However, arrearages are default payments due under the initial agreement and should be valid until collected. This is not in opposition to the position taken by New York and other jurisdictions which allow for the modification of support payments in cases of significant changes in circumstances — whether this is done by court order or by the arbitrator. But until such a procedure is initiated, any amounts accrued under the initial order should be enforceable in a court of law.

V. New York Case Law on Arbitration in Matrimonial Disputes

It is necessary at this juncture to consider available New York precedent in the area of matrimonial disputes. In particular, the focal point will be the effects of separation agreements with provisions to submit disputes pertaining to support and maintenance to arbitration. In *Matter of Hill*[52] and *Arbitration Between Michelman and Michel-*

50. *Id.* at 80, 503 N.Y.S.2d at 729.

51. *Id.* at 77, 503 N.Y.S.2d at 728.

52. 199 Misc. 1035, 104 N.Y.S.2d 755 (N.Y. Sup. Ct. 1951) (the parties entered into a separation agreement which, *inter alia*, provided that if either should relocate to another city or state, upon the failure of the parties to agree to new custody or visitation rights, the matter was to be arbitrated. The wife notified the husband of her plans to relocate

man,[53] the New York Supreme Court held that matters of custody and visitation so basically affect a child's welfare that a court may not, in disregard of its traditional role as *parens patriae*, relegate the question to arbitration.[54] However, in *Sheets v. Sheets*,[55] which overruled both *Hill* and *Michelman*, the court held that although the courts should retain ultimate responsibility for the welfare of the child, the informality and economy of arbitration could well serve as an initial forum in bringing the parties together.[56] Today, there remains no question that matrimonial disputes affecting support as well as custody may be submitted to arbitration upon agreement of the parties in marriage dissolution cases. So long as the matter in controversy has been expressly and unequivocally set out in the agreement, the issue should not be subject to judicial determination.

One of the leading cases in New York on arbitration provisions in separation agreements is *Bowmer v. Bowmer*.[57] This case involved a separation agreement which provided that the husband pay alimony and support for three minor children. The husband informed his wife that due to a change in his financial circumstances, he would, *inter alia*, reduce his support payment obligation.[58] The separation agreement contained a provison that read in pertinent part: "Any claim, dispute or misunderstanding arising out of or in connection with this Agreement...or any matter herein made the subject matter of arbitration, shall be arbitrated."[59] When the husband unilaterally reduced the support payments, the wife invoked arbitration to recover the arrears. The husband then made a motion to stay the arbitration and simultaneously moved to compel arbitration on the issue of whether he was entitled to downward modification of his obligation.[60] This case reached the New York Court of Appeals which postulated that:

> Arbitration clauses are by now familiar provisos in separation agreements. Indeed, aside from expressing the parties preference for a means of dispute

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so that new arrangements could be made. Upon his failure to answer, she initiated arbitration. The court held that regardless of agreement of the parties, determination of custody of children was the prerogative of the court).

53. 5 Misc.2d 570, 135 N.Y.S.2d 608 (N.Y. Sup. Ct. 1954) (the court denied motion to compel arbitration that visitation rights cannot be made the subject of arbitration).

54. *In re* Hill, 199 Misc. 1035 (N.Y. Sup. Ct. 1951); Arbitration Between Michelman and Michelman, 5 Misc.2d 570 (N.Y. Sup. Ct. 1954); CPLR § 7501 (1980).

55. 22 A.D.2d 176, 254 N.Y.S.2d 320 (1964) (the husband and wife entered into a separation agreement giving the wife custody of the children. The wife subsequently moved to Florida and obtained a divorce. The husband demanded arbitration on grounds, *inter alia*, of alienation of affection and violation of visitation rights).

56. CPLR § 7501 (1980).

57. Bowmer v. Bowmer, 50 N.Y.2d 288, 406 N.E.2d 760, 428 N.Y.S.2d 902 (1980).

58. *Id.* at 292, 406 N.E.2d at 761.

59. *Id.*

60. *Id.*

> resolution more informal, more expedient and possibly less costly than litigation..., an arbitration provision may well have been intended to furnish insulation from the potential for notoriety and other stresses that so often accompanies the airing of marital disputes in court.... Moreover, resort to the arbitral forum may afford the spouses an opportunity to have their grievances heard by someone who they think may be especially well qualified in matrimonial matters.[61]

Because the agreement was not clear and unequivocal, the court held that Mrs. Bowmer was entitled to the arrearages and could not be compelled to arbitrate the issue of arrearages since she never agreed to do so.

The following year, the New York Supreme Court, Second Department, decided the case of *Avery v. Avery*,[62] which involved a separation agreement wherein the husband was to pay child support in a specified amount and subsequently failed to keep up with the payments. The wife sought recovery of the arrearages and upward modification.[63] Their agreement contained language to the effect that "any dispute or misunderstanding arising out of, or in connection with this Agreement," is to be submitted to arbitration.[64] The court found that this provision encompassed the issue of arrearages because it was in connection with the agreement.[65] Hence, the court held that the wife's causes of action seeking judgment for arrearages and an upward modification in the amount of child support would be stayed on condition that the husband brought a motion to compel arbitration.[66]

A clear distinction can be drawn between the agreement in *Avery* and the one in *Egol*. In *Avery*, it was the broad "catch-all" phrase which the court utilized to include arrears as an inseparable by-product of modification. Conversely, the Egol's agreement as stated by the court does not include this broad language. The Egol agreement is more specific and limited in scope such that the question of arrears would have to be "bootstrapped" into the modification provision. As the dissent in *Egol* states, "[i]mplicit in the language of the provision is the requirement that the originally agreed upon amount be continued until a reduction be affected....[I]t nowhere makes arbitration mandatory or indicates that the question of reduction prior to arbitration be submitted to that forum."[67] Because the clause in *Egol* is more limited in scope,

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61. *Id.* at 293, 406 N.E.2d at 761.
62. 81 A.D.2d 849, 438 N.Y.S.2d 853 (1981).
63. *Id.* at 850, 438 N.Y.S.2d 855.
64. *Id.* at 851, 438 N.Y.S.2d 856.
65. *Id.*
66. *Id.*
67. Egol v. Egol, 118 A.D.2d 76, 84, 503 N.Y.S.2d 726, 732 (1986) (Ellerin, J., dissenting in part).

it was inappropriate for the court in this case to include arrears as a component of modification. "[A]s with such provisions in the commercial context generally, the rule is clear that unless the agreement to arbitrate expressly and unequivocally encompasses the subject matter of the particular dispute, a party cannot be compelled to forego the right to seek judicial relief and instead submit to arbitration."[68]

This author further agrees with the dissent in *Egol* that the arrearages were a fixed obligation[69] and could not be unilaterally modified without first submitting the matter to arbitration. Regardless of the fact that the negotiations failed — indeed because negotiations failed — the arrears had already been fixed and the duty of the court to enforce the payments had emerged. The fact that the defendant did not invoke the arbitration clause on his own behalf to modify the payments should not be allowed to infringe upon the rights of the plaintiff. "[T]he plaintiff has a vested right to accrued default payments [even] where the defendant has slept on his rights."[70] In a situation such as this, the obligee is entitled to seek further judicial determination against the obligor as a matter of right; denying such recourse flies directly in the face of equity and justice. Defendants in default of support payments should not be allowed to renege on their obligation while the plaintiffs, more accurately, their children, are denied their rights to seek judicial enforcement of an award that has already been assessed, and unchanged through judicial intervention, prior to the time at which such right is invoked.[71] This is especially true in this case where the majority conceded that the plaintiff had not waived any of her rights to relief by agreeing to delay judicial determination or arbitration when the defendant unilaterally reduced the support payments.

It appears that what the court gave with one hand, it took away with the other. The majority conceded that Mrs. Egol's consent to accept the initial reduced payment was without prejudice to her rights for the full amount. Ignoring this concession, however, the court further holds that the only way plaintiff can recover is to submit to arbitration because

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68. Bowmer v. Bowmer, 50 N.Y.2d 288, 293-94, 406 N.E.2d 760, 762, 428 N.Y.S.2d 902, 905 (1980).

69. Egol v. Egol, 118 A.D.2d 76, 84, 503 N.Y.S.2d 726, 732 (1980) (Ellerin, J., dissenting in part).

70. Warner v. Warner, 44 A.D.2d 904, 905, 357 N.Y.S.2d 556, 557 (1974) (citing Torns v. Torns, 188 Misc. 451, 68 N.Y.S.2d 718 (1946).

71. In an effort to alleviate and control the continuous problem of enforcing child support payments, the Minnesota legislature recently passed a statute which will greatly enhance, though not fully resolve, a number of the basic problems associated with this subject matter. The statute is a very detailed one, as a whole. However, the most progressive aspect is Chapter 403, Article 3, section 89, 518.613, entitled Automatic Withholding, which provides that:

> whenever an obligation for child support or maintenance is initially determined and ordered or modified by the court in a county in which this section applies, the amount

that is what she agreed to in the separation agreement. "The agreement to arbitrate must be express, direct, and unequivocal as to the issue or disputes to be submitted to arbitration...[and the] clause must be read conservatively if it is subject to an equivocal reading."[72] This being the case, it is clear that the plaintiff still has the right to recover the remaining amount owed.

The distinguishing factor in *Egol* is the treatment of the payment of arrearages as if encompassed in the issue of modification of the initially prescribed support payments. On this point, this author is in agreement with the dissenting opinion in *Egol.* "The agreement does *not* say that during negotiations or prior to arbitration the husband may, as was here done, unilaterally reduce his monthly payments...it nowhere makes arbitration mandatory or indicates that the question of reduction prior to arbitration be submitted to that forum."[73] Therefore, plaintiff's decision to recover the amount of payments in arrears through the litigation process is not precluded by any provision in the agreement.

It is clear that the Egols' agreement did not directly and unequivocally express that if the payments were to fall in arrears, the issue would be one for arbitration. Thus, the arbitration clause in question should have been read conservatively by the court. Had the court read the arbitration

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of child support or maintenance ordered by the court must be withheld from the income, regardless of source, of the person obligated to pay the support. For purposes of this section, "modified" does not mean a cost-of-living adjustment without any other modification of the support order.

1987 Minn. Sess. Law Serv. 403 (West).

Such legislation will not allow for unilateral reduction of payments by the spouse who is ordered to pay. Section 90, Modification, further provides that:

> The terms of a decree respecting maintenance or support may be modified upon a showing of one or more of the following: (1) substantially increased or decreased earnings of a party; (2) substantially increased or decreased need of a party; (3) receipt of assistance under sections 256.72 to 256.87, or (4) a change in the cost-of-living for either party as measured by the federal bureau of statistics, any of which makes the terms unreasonable and unfair....On a motion for modification of support, the court shall take into consideration the needs of the children and shall not consider the financial circumstances of each party's spouse, if any. A modification which decreases support or maintenance may be made retroactive only with respect to any period during which the support obligor has pending a motion for modification but only from the date that notice of the motion has been given to the obligee and to the court or other entity which issued each support order. A modification which increases support or maintenance shall not be made retroactive if the obligor has substantially complied with the previous order.

1987 Minn. Sess. Law Serv. 403 (West).

72. Gangel v. De Groot, 41 N.Y.2d 840, 841, 362 N.E.2d 249, 250, 393 N.Y.S.2d 698, 699 (1977).

73. Egol v. Egol, 118 A.D.2d 76, 84, 503 N.Y.S.2d 726, 732 (1980) (Ellerin, J., dissenting in part) (emphasis in original).

clause conservatively in light of the existing facts, it would not have abrogated a right which it earlier recognized as having vested in the plaintiff.

VI. Conclusion

The decision by the majority in *Egol v. Egol* is inappropriate in that it compels the plaintiff to submit to arbitration an issue which is not incorporated in the arbitration clause of the separation agreement. There is nothing in the record which supports the position that Mrs. Egol unequivocally agreed to have a dispute over arrearages included in the agreement. Moreover, the record is void of any concrete evidence offered by the defendant to indicate otherwise. Plaintiff's cause of action to recover the arrearages was properly before the court and should have been ruled upon accordingly.

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