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CITY OF BRIDGEPORT *v.* THE KASPER GROUP, INC.
(SC 17470)

Sullivan, C. J., and Borden, Katz, Palmer and Vertefeuille, Js.*

Argued October 26, 2005—officially released June 6, 2006

Richard F. Wareing, with whom was *Gary F. Sheldon*, for the appellant (defendant).

Jason M. Kuselias, with whom, on the brief, were *Craig A. Raabe* and *Patrick J. Sweeney*, for the appellee (plaintiff).

Opinion

KATZ, J. The defendant, The Kasper Group, Inc., appeals from the judgment of the trial court granting the application of the plaintiff, the city of Bridgeport, to vacate an arbitration award under General Statutes § 52-418 (a) (3),[1] claiming that the trial court improperly determined that the arbitrator had committed misconduct in denying the plaintiff's motions to stay the proceedings and to submit additional evidence. We conclude that the trial court properly determined that the arbitrator had committed misconduct in refusing to consider pertinent and material evidence and, therefore, we affirm the trial court's judgment.

The record reveals the following facts and procedural history. In 1998, the Bridgeport city council, desiring to construct a new elementary school, adopted a resolution establishing a school building committee (committee) to develop plans and specifications for the construction of the new West Side School and to apply for state grants to defray the construction costs. The committee invited professional design firms, including the defendant, to present proposals for the design of the new school. About one month after the defendant had presented its proposal, the committee notified the defendant that it had been selected as the design firm for the West Side School. The plaintiff attached to the notification a draft contract. Over the next few months, the parties negotiated the terms of the contract. On February 24, 2000, the defendant signed the contract, but a representative of the plaintiff never subsequently signed the contract.

On December 19, 2000, the committee, acting through its construction manager, notified the defendant that the scope of the project had changed because the number of grades that the new school would serve was increased from kindergarten through sixth grade to kindergarten through eighth grade. Due to the magnitude of the change, the committee decided to repeat the proposal and selection process for a design firm. In response to the committee's decision, the defendant instituted an action seeking to enjoin the plaintiff from taking any further action to terminate the alleged contract and from soliciting new proposals. In addition, the defendant sought damages under theories of breach of express or implied contract, as well as breach of the implied covenant of good faith and fair dealing. The plaintiff subsequently filed a motion to stay the action on the basis of the alleged contract's arbitration provision, which requires the parties to arbitrate disputes that arise in connection with the contract. Before the trial court ruled on the plaintiff's motion to stay, the parties agreed to submit the dispute to the American Arbitration Association for resolution under the construction industry arbitration rules. In the submission, the parties agreed that the dispute to be resolved

included the claims raised by the defendant in its complaint, and, alternatively, a claim for unjust enrichment. In addition, the parties agreed in the submission that if a contract did exist, it was the one dated February 24, 2000, that the defendant had signed.

In accordance with the submission, the dispute was submitted to arbitration. The arbitration proceedings began in June, 2001, and consisted of twelve days of hearings spanning nearly nineteen months. During the arbitration, the plaintiff claimed that, if a contract existed, it was void ab initio because it had been procured by illegal means. The undisputed fact underpinning this defense was that, just prior to the start of the arbitration proceedings, Paul Pinto, who owned 99 percent of the shares of the defendant when it was awarded the West Side School project, had entered into a plea agreement with the United States Attorney for the District of Connecticut, admitting, in part, to having engaged in a bribery and kickback scheme with an elected official, then Bridgeport mayor Joseph Ganim, to obtain Bridgeport municipal contracts. In support of its defense that the contract was void ab initio, the defendant submitted into evidence copies of the information charging Pinto and his plea agreement, along with a copy of Ganim's criminal indictment. The plaintiff sought to compel Pinto to testify during the arbitration proceedings, but his attorney represented to both parties that Pinto would refuse to testify in accordance with his right to avoid self-incrimination under the fifth amendment to the United States constitution. In the absence of Pinto's testimony, the parties and the arbitrator agreed that the plaintiff would submit an offer of proof suggesting adverse inferences that the arbitrator could draw from Pinto's refusal to testify. On January 31, 2003, pursuant to that agreement, the plaintiff submitted its offer of proof, and on February 7, 2003, the defendant submitted a memorandum of law in opposition to that offer of proof.

Ganim's criminal trial started after the arbitration proceedings at issue in the present case had begun. On February 11, 2003, approximately two weeks after the last day of hearings in the arbitration, the plaintiff filed with the arbitrator a motion to stay the posthearing briefing schedule until the conclusion of testimony in the Ganim trial. Specifically, the plaintiff sought to supplement the record before the arbitrator with the testimony from Ganim's trial of certain of the defendant's employees, most notably Pinto, who already had testified at length regarding many of his illegal activities. The arbitrator denied this motion.

By agreement, both parties submitted their posthearing briefs on March 10, 2003. At the same time, the plaintiff also filed a motion to submit additional evidence in the form of transcripts containing excerpts of Pinto's testimony in the Ganim criminal trial. The

transcripts, submitted with the motion, contained excerpts of Pinto's testimony on February 6, 7, 10 and 19, 2003. On March 19, 2003, the defendant filed an objection to the plaintiff's motion, and, on April 16, 2003, the parties were notified that the arbitrator had denied the plaintiff's motion and had refused to consider Pinto's testimony.

On May 14, 2003, the arbitrator rendered an award in favor of the defendant and ordered the plaintiff to pay the defendant $155,507.36.[2] The arbitrator did not set forth his reasoning underlying the award. Pursuant to § 52-418, the plaintiff filed an application with the Superior Court to vacate the arbitrator's award. The defendant responded by filing both an objection to the plaintiff's application to vacate and its own motion, pursuant to General Statutes § 52-417, to confirm the arbitrator's award. After a hearing, the trial court granted the plaintiff's application to vacate the arbitrator's award on the ground that the arbitrator had committed misconduct under § 52-418 (a) (3) by denying both the plaintiff's motion to stay the proceedings and its subsequent motion to admit additional evidence at the end of the proceedings. This appeal followed.[3]

On appeal, the defendant claims that the trial court improperly determined that the arbitrator's denial of the plaintiff's motions had constituted misconduct under § 52-418 (a) (3). Specifically, the defendant contends that it was not misconduct for the arbitrator to refuse to consider Pinto's testimony because it was irrelevant and, even if it were relevant, the testimony was cumulative of what had been proffered in the plaintiff's offer of proof. The defendant further contends that the arbitrator's refusal to consider Pinto's testimony was appropriate because its minimal probative value was outweighed by other considerations. Finally, the defendant contends that the exclusion of Pinto's testimony did not deprive the plaintiff of a full and fair opportunity to develop its defense that the contract was void because it was procured illegally.[4]

In response, the plaintiff claims that Pinto's testimony was relevant to its defense that the contract had been procured illegally. The plaintiff also claims that Pinto's testimony was relevant to rebut the defendant's argument that a prior course of dealing, namely, a long history between the parties of legally obtained contracts, had been established. In particular, the plaintiff contends that one of the prior contracts between the parties on which the defendant relies to establish the prior course of dealing was identified in Pinto's testimony as having been procured illegally. The plaintiff further claims that the arbitrator's denial of its motions deprived it of a full and fair hearing because Pinto had refused to testify in the arbitration proceedings and his testimony at the criminal trial was highly incriminating.[5]

Finally, the plaintiff asserts two alternate grounds on

which the trial court's judgment should be affirmed. First, the plaintiff contends that enforcing the arbitrator's award would violate the public policy against binding a municipality on the basis of the unauthorized acts of its agents. Second, the plaintiff contends that the award also violates the public policy against the enforcement of illegal contracts.[6] We agree with the plaintiff that it was deprived of a full and fair hearing because Pinto's testimony at the criminal trial was highly incriminating and instrumental to its defense that the contract was void because it had been procured illegally.

We begin with a restatement of the principles that guide our review of a trial court's judgment vacating an arbitration award. "This court has for many years wholeheartedly endorsed arbitration as an effective alternative method of settling disputes intended to avoid the formalities, delay, expense and vexation of ordinary litigation. . . . When arbitration is created by contract, we recognize that its autonomy can only be preserved by minimal judicial intervention. . . . Because the parties themselves, by virtue of the submission, frame the issues to be resolved and define the scope of the arbitrator's powers, the parties are generally bound by the resulting award. . . . Since the parties consent to arbitration, and have full control over the issues to be arbitrated, a court will make every reasonable presumption in favor of the arbitration award and the arbitrator's acts and proceedings. . . . The party challenging the award bears the burden of producing evidence sufficient to invalidate or avoid it . . . ." (Citations omitted; internal quotation marks omitted.) *O & G/O'Connell Joint Venture* v. *Chase Family Ltd. Partnership No. 3*, 203 Conn. 133, 145–46, 523 A.2d 1271 (1987). "[W]e have . . . recognized three grounds for vacating an [arbitrator's] award: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . . or (3) the award contravenes one or more of the statutory proscriptions of § 52-418." (Citations omitted.) *Garrity* v. *McCaskey*, 223 Conn. 1, 6, 612 A.2d 742 (1992).

"[A]rbitrators are accorded substantial discretion in determining the admissibility of evidence, particularly in the case of an unrestricted submission, which relieve[s] the arbitrators of the obligation to follow strict rules of law and evidence in reaching their decision. . . . Indeed, it is within the broad discretion of arbitrators to decide whether additional evidence is required or would merely prolong the proceedings unnecessarily. . . . This relaxation of strict evidentiary rules is both necessary and desirable because arbitration is an informal proceeding designed, in part, to avoid the complexities of litigation. Moreover, arbitrators generally are laypersons who bring to these proceedings their technical expertise and professional skills, but who are not expected to have extensive

knowledge of substantive law or the subtleties of evidentiary rules.'' (Citations omitted; internal quotation marks omitted.) *O & G/O'Connell Joint Venture* v. *Chase Family Ltd. Partnership No. 3*, supra, 203 Conn. 148–49.

A trial court's decision to vacate an arbitrator's award under § 52-418 involves questions of law and, thus, we review them de novo. *State* v. *AFSCME, Council 4, Local 1565*, 49 Conn. App. 33, 35, 713 A.2d 869 (1998), aff'd, 249 Conn. 474, 732 A.2d 762 (1999). General Statutes § 52-418 (a) (3) provides in relevant part that a trial court shall vacate an arbitrator's award ''if the arbitrators have been guilty of misconduct . . . in refusing to hear evidence pertinent and material to the controversy . . . .'' In light of the well settled principles discussed previously, this court has stated that § 52-418 (a) (3) does not mandate ''that every failure or refusal to receive evidence, even relevant evidence, constitutes misconduct. . . . To establish that an evidentiary ruling, or lack thereof, rises to the level of misconduct prohibited by § 52-418 (a) (3) requires more than a showing that an arbitrator committed an error of law. . . . Rather, a party challenging an arbitration award on the ground that the arbitrator refused to receive material evidence must prove that, by virtue of an evidentiary ruling, he was in fact deprived of a full and fair hearing before the arbitration panel.'' (Citations omitted.) *O & G/O'Connell Joint Venture* v. *Chase Family Ltd. Partnership No. 3*, supra, 203 Conn. 149. The federal courts, in construing the nearly identical grounds for vacating an arbitration award under 9 U.S.C. § 10 (a) (3),[7] have held that an arbitration hearing is fair if the arbitrator gives ''each of the parties to the dispute an adequate opportunity to present its evidence and argument.'' (Internal quotation marks omitted.) *Tempo Shain Corp.* v. *Bertek, Inc.*, 120 F.3d 16, 20 (2d Cir. 1997), quoting *Hoteles Condado Beach* v. *Union De Tronquistas Local 901*, 763 F.2d 34, 39 (1st Cir. 1985); see also *Nationwide Mutual Ins. Co.* v. *Home Ins. Co.*, 278 F.3d 621, 625 (6th Cir. 2002). If the evidence at issue is merely cumulative or irrelevant, the arbitrator's refusal to consider it does not deprive the proffering party of a full and fair hearing. See *O & G/O'Connell Joint Venture* v. *Chase Family Ltd. Partnership No. 3*, supra, 152; *Scott* v. *Prudential Securities, Inc.*, 141 F.3d 1007, 1017 (11th Cir. 1998), cert. denied, 525 U.S. 1068, 119 S. Ct. 798, 142 L. Ed. 2d 660 (1999); *Tempo Shain Corp.* v. *Bertek, Inc.*, supra, 20.

Additionally, to vacate an arbitrator's award on the ground of misconduct under § 52-418 (a) (3), the moving party must establish that it was substantially prejudiced by the improper ruling. *South Windsor* v. *South Windsor Police Union Local 1480, Council 15, AFSCME, AFL-CIO*, 57 Conn. App. 490, 506, 750 A.2d 465 (2000), rev'd on other grounds, 255 Conn. 800, 770 A.2d 14 (2001). This requirement that the moving party establish

substantial prejudice is consistent with the showing that this court requires to order a new trial when a trial court makes an improper evidentiary ruling in a civil trial. See *Daley* v. *McClintock*, 267 Conn. 399, 403, 838 A.2d 972 (2004). In such cases, a new trial will be ordered only when the improper evidentiary ''ruling [likely] would [have] affect[ed] the result.'' (Internal quotation marks omitted.) Id.

Federal case law considering whether an arbitrator's evidentiary ruling deprived a party of a fair hearing is consistent with requiring the moving party to demonstrate substantial prejudice to vacate an award on this ground. One federal court analogized to the standard of review accorded trial courts' evidentiary rulings and declined to vacate an arbitrator's award because ''it cannot be said as a matter of law that [the excluded evidence] was decisive or that its exclusion was seriously harmful in the light of the other evidence in the case.'' *Newark Stereotypers' Union No. 18* v. *Newark Morning Ledger Co.*, 397 F.2d 594, 599 (3d Cir.), cert. denied, 393 U.S. 954, 89 S. Ct. 378, 21 L. Ed. 2d 365 (1968); see also *Steiner* v. *Glenn*, United States District Court for the Northern District of Illinois, Docket No. 00C7645 (September 24, 2002) (refusing to vacate arbitrator's award because moving party did not establish that excluded evidence was central and decisive to disputed issue). Indeed, in the few instances in which federal courts have vacated an arbitrator's award on this ground, the arbitrator's evidentiary ruling had precluded the moving party from presenting evidence that was decisive and central to a disputed claim or defense. See, e.g., *Tempo Shain Corp.* v. *Bertek, Inc.*, supra, 120 F.3d 20–21; *Hoteles Condado Beach* v. *Union De Tronquistas Local 901*, supra, 763 F.2d 40.

For example, in *Hoteles Condado Beach* v. *Union De Tronquistas Local 901*, supra, 763 F.2d 36, a union filed a grievance challenging an employee's dismissal and the dispute subsequently was referred to arbitration. During the arbitration, the employer's sole witness to the act that had caused the employee's dismissal refused to testify. Id., 37. The employer therefore attempted to substitute the witness' live testimony with the transcript of the employee's criminal trial for the same underlying conduct, at which the witness had testified. Id. The arbitrator, in rendering the award, refused to consider the transcript testimony. Id. The First Circuit Court of Appeals, in affirming the District Court's decision to vacate the arbitrator's award, noted that, other than the transcript, ''no other evidence was available to substantiate or to refute the [employer's] charges that [the employee] had violated the rules regarding employment.'' Id., 40. Accordingly, the court determined that the ''evidence effectively excluded by the arbitrator was both central and decisive to the [employer's] position; therefore, the arbitrator's refusal to consider this evidence was . . . so destructive of

[the employer's] right to present [its] case, that it warrants the setting aside of the arbitration award.'' (Internal quotation marks omitted.) Id.; see also *Tempo Shain Corp.* v. *Bertek, Inc.*, supra, 120 F.3d 20–21 (vacating award because arbitrator refused to delay proceedings to allow testimony of party's sole witness with direct knowledge of disputed claim); *Hall* v. *Eastern Air Lines, Inc.*, 511 F.2d 663, 664 (5th Cir. 1975) (affirming District Court's judgment remanding case to arbitration because panel's refusal to consider evidence was not harmless as it would, if true, constitute complete defense to moving party's discharge); *Gallagher* v. *Schernecker*, 60 Wis. 2d 143, 145, 150–51, 208 N.W.2d 437 (1973) (affirming trial court's order vacating award because arbitrators prevented party from calling any witnesses).

Requiring the moving party to establish substantial prejudice by demonstrating that the decision excluded evidence that was decisive or likely to have altered the outcome of a claim is consistent with the principles underlying arbitration. ''A party's choice to accept arbitration entails a trade-off. A party can gain a quicker, less structured way of resolving disputes; and it may also gain the benefit of submitting its quarrels to a specialized arbiter . . . . Parties lose something, too: the right to seek redress from the courts for all but the most exceptional errors at arbitration.'' (Citation omitted.) *Dean* v. *Sullivan*, 118 F.3d 1170, 1173 (7th Cir. 1997).

We begin our analysis, of whether, in the present case, the arbitrator's exclusion of the transcript of Pinto's testimony constituted misconduct, with a review of the evidence that was admitted into evidence in support of the plaintiff's defense that the West Side School contract had been procured illegally. First, the plaintiff submitted into evidence copies of the information charging Pinto along with his written plea agreement, in which he admitted that he had engaged in the conduct alleged in the information. The information charged Pinto with participating in a racketeering conspiracy involving the payment of kickbacks and bribes to an elected official to enrich himself and to obtain preferential treatment of his business interests. Specifically, the information alleged that Pinto had paid bribes and kickbacks to obtain municipal contracts relating to a wastewater treatment facility, a sports complex located in Bridgeport, and asbestos removal from municipal properties. In addition, Ganim's criminal indictment was admitted into evidence. In relevant part, the indictment alleged that Ganim, in exchange for money and gifts, had directed that contracts be awarded to the defendant for the construction of an arena and a baseball stadium in Bridgeport. The final piece of evidence before the arbitrator on this issue was Pinto's refusal to testify during the arbitration. As we have noted previously, pursuant to the agreement of the parties and the arbitra-

tor, the plaintiff submitted an offer of proof suggesting specific adverse inferences that could be drawn from Pinto's refusal to testify, including the inference that Pinto's illegal activities in procuring municipal contracts had extended to the West Side School contract.

Thus, although the evidence produced during the arbitration proceedings did not directly identify the West Side School contract as being procured illegally, the evidence clearly was sufficient to prove that the defendant had received a number of municipal contracts as part of an illegal conspiracy. In addition, the arbitrator could have inferred from Pinto's invocation of his fifth amendment right not to testify in the arbitration that any such testimony would have been incriminating generally as well as with regard to the subject matter of the arbitration—the West Side School contract.[8] See *Olin Corp.* v. *Castells*, 180 Conn. 49, 53–54, 428 A.2d 319 (1980) (party's invocation of fifth amendment does not preclude drawing adverse inference from party's refusal to testify in civil trial); *Brink's, Inc.* v. *New York*, 717 F.2d 700, 707–10 (2d Cir. 1983) (concluding that trier of fact may draw adverse inference from refusal of party's employees to testify under fifth amendment). Nevertheless, as the arbitrator's award makes clear, he declined to infer from Pinto's refusal to testify that the West Side School contract was procured as part of the bribery and kickback scheme.

We now review Pinto's testimony at the Ganim trial, which the arbitrator refused to admit into evidence. In the most relevant parts, Pinto testified that, although he had had no experience or training as an architect, surveyor or engineer, he joined the defendant's firm, whose largest paying client at the time was the plaintiff. Pinto's main responsibility with the defendant was ''just to interact with [Ganim], continue to get whatever city jobs the [defendant] was going after, and make sure that work continued to flow and do whatever is necessary to take care of [Ganim] in various ways.'' He explained that ''tak[ing] care'' of Ganim meant ''to spend money on, wine, dine, take out to dinner, buy merchandise, clothing, whatever needs he had, I was to take care of him.'' In return for taking care of Ganim, Pinto testified that he obtained the major municipal contracts for ''the minor league baseball stadium, the indoor hockey arena . . . *and some school jobs*.'' (Emphasis added.) Pinto's ''job was to do whatever [he] had to do to take care of [Ganim] in order to continue the flow of work to the [the defendant].'' In addition to ''tak[ing] care'' of Ganim, Pinto also testified that he had raised more than $100,000 for Ganim through a political action committee. In return for raising this money, Pinto testified that he got ''any job contract or outcome that I needed to get and I was successful in all of them.'' Finally, Pinto testified that, during the time period in which he was ''tak[ing] care'' of the mayor, ''there was not a contract that we wanted or actively sought that we did not get.''

On the basis of a comparison of Pinto's trial testimony with the evidence admitted at the arbitration, we conclude that Pinto's trial testimony was both relevant and not cumulative on the issue of whether the West Side School contract had been procured illegally. Evidence is relevant if it has ''any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence.'' Conn. Code Evid. § 4-1. In the present case, Pinto's testimony, while not direct evidence that the West Side School contract was procured illegally, made it more likely that the arbitrator would have found that the contract had been procured illegally than without the testimony. Significantly, Pinto testified that, in return for bribes, the defendant had obtained ''some school jobs'' and any contract that Pinto actively sought or needed to acquire.

Evidence is not necessarily cumulative if it overlaps with evidence previously received and it obviously is not cumulative if it presents new information. See *State* v. *Parris*, 219 Conn. 283, 293, 592 A.2d 943 (1991); see also *O & G/O'Connell Joint Venture* v. *Chase Family Ltd. Partnership No. 3*, supra, 203 Conn. 152 (evidence was cumulative because it did not provide arbitrator with any new information). Pinto's testimony was not cumulative because it provided the arbitrator with two new significant pieces of information supporting the plaintiff's defense that the contract was void.[9] First, Pinto testified that among the municipal contracts he had obtained in exchange for his bribes were ''some school jobs.'' Second, Pinto testified that, in exchange for such bribes, he got ''any job contract or outcome that I needed to get and I was successful in all of them,'' and that ''there was not a contract that we wanted or actively sought that we did not get.'' Thus, contrary to the defendant's argument, Pinto's testimony was not cumulative of the offer of proof because the offer of proof was merely a *suggestion* of adverse inferences that could be drawn from Pinto's refusal to testify; it was not itself evidence of illegality. Therefore, the transcript excerpts provided evidence that was relevant and not cumulative.

We next must determine whether the plaintiff substantially was prejudiced by the arbitrator's failure to consider Pinto's testimony. We conclude, upon a thorough review of the proffered transcript excerpts of Pinto's testimony, that the plaintiff was substantially prejudiced by the arbitrator's refusal to consider the testimony because it was highly probative and very likely would have altered the outcome of the arbitration had it been introduced. See *Hoteles Condado Beach* v. *Union De Tronquistas Local 901*, supra, 763 F.2d 40 (vacating arbitrator's award because evidence excluded was '' 'central and decisive' '' to proffering party's claim).

Although Pinto's refusal to testify in the arbitration coupled with the documentary evidence, including Pinto's information and plea agreement and Ganim's indictment, *could* have provided a basis for drawing an inference that the West Side School contract was awarded as part of a kickback and bribery scheme between Pinto and Ganim, the arbitrator also reasonably could have rejected such an inference because only certain specific contracts that had been procured illegally were identified in those documents, none of which were related to school contracts. Conversely, Pinto's testimony would have made the conclusion that he illegally had procured the West Side School contract very likely. At the very least, his testimony very ''[likely] would [have] affect[ed] the result'' of the arbitration had it been introduced. (Internal quotation marks omitted.) *Daley* v. *McClintock*, supra, 267 Conn. 403. Indeed, to consider the testimony and conclude otherwise, an arbitrator would have to find that, although Pinto's job was to do whatever he had to do in order to continue the flow of work to the defendant, that Pinto had engaged in a widespread corruption scheme that resulted in him getting *every* contract he wanted, and that Pinto had procured major municipal contracts, including ''some school jobs,''[10] the scheme nevertheless did not extend to the one contract at issue in this case. Such a conclusion, however, contravenes both logic and common sense. Accordingly, we conclude that the trial transcript was so central to the plaintiff's case that the arbitrator's failure to consider it was misconduct.[11]

We recognize that, if the arbitrator had admitted Pinto's testimony, the arbitrator would have been required to allow the defendant additional time to examine and respond to this new evidence,[12] with the potential for reopening these already protracted proceedings.[13] In light of the strong probative value of Pinto's testimony and the fact that the plaintiff consistently sought to bring this testimony to the arbitrator's attention over a period of several months, first by seeking a continuance and thereafter by attempting to submit a transcript months before the arbitrator's decision actually was reached, we cannot conclude that an additional delay beyond the arbitrator's May, 2003 decision was a proper reason to ignore the transcript, particularly in the absence of any significant prejudice to the defendant's ability to rebut the testimony. See *Tempo Shain Corp.* v. *Bertek, Inc.*, supra, 120 F.3d 18 (concluding that arbitral panel committed misconduct by declining to hold proceedings open to allow testimony of crucial witness who was willing to testify but unavailable for indeterminate period); cf. *Alexander Julian, Inc.* v. *Mimco, Inc.*, 29 Fed. Appx. 700, 703 (2d Cir. 2002) (concluding that arbitrator did not commit misconduct in denying adjournment because opposing party may have been prejudiced by delay in concluding proceedings); *Riddle* v. *Wachovia Securities, LLC*, United States District

Court for the District of Nebraska, Docket No. 8:05CV87 (December 12, 2005) (determining that arbitrator did not commit misconduct in refusing to grant party's motion for continuance when arbitrator possibly could have concluded that opposing party would be unfairly prejudiced because arbitration already pending for one year).

In reviewing the arbitrator's refusal to consider Pinto's testimony, we are mindful of the primary goal of arbitration, which is to provide "the efficient, economical and expeditious resolution of private disputes." *Wu* v. *Chang*, 264 Conn. 307, 313, 823 A.2d 1197 (2003). Undue judicial intervention inevitably could judicialize the arbitration process and thereby defeat the objective of providing an alternative to judicial dispute resolution. Therefore, we do not superintend arbitration proceedings. We also are mindful, however, that the arbitration under review is complicated by the fact that it involves public funds and the question of whether the city had a full and fair opportunity to contest the use of such funds for purposes of illegal dealings. Although we do not advocate different rules to govern such arbitrations, we must remain vigilant in ensuring that the efficiency and economics generally associated with arbitrations do not swallow the public interest that has been compromised as a result of the arbitrator's misconduct. We therefore conclude that the trial court properly determined that the arbitrator's refusal to consider Pinto's testimony was misconduct requiring that it vacate the arbitrator's award under § 52-418 (a) (3).

The judgment is affirmed.

In this opinion SULLIVAN, C. J., and BORDEN and PALMER, Js., concurred.

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

[1] General Statutes § 52-418 (a) provides in relevant part: "Upon the application of any party to an arbitration, the superior court for the judicial district in which one of the parties resides or, in a controversy concerning land, for the judicial district in which the land is situated or, when the court is not in session, any judge thereof, shall make an order vacating the award . . . (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced . . . ."

[2] The arbitrator broke down the award as follows: $60,535.72 in contract damages; $53,512.79 in employee carrying costs; $37,500 in attorney's fees; and $3958.85 in collection costs.

[3] The defendant appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[4] The defendant also claims that the trial court improperly vacated the award because the arbitrator properly could have resolved the dispute in its favor without referring to Pinto's testimony based on its counts of either breach of an implied in fact contract or unjust enrichment. It is well established, however, that "an express contract between the parties precludes recognition of an implied-in-law contract governing the same subject matter"; (internal quotation marks omitted) *Meaney* v. *Connecticut Hospital Assn.*, 250 Conn. 500, 517, 735 A.2d 813 (1999); and that "lack of a remedy under the contract is a precondition for recovery based upon unjust enrichment"; *Gagne* v. *Vaccaro*, 255 Conn. 390, 401, 766 A.2d 416 (2001), on appeal after remand, 80 Conn. App. 436, 835 A.2d 491 (2003), cert. denied, 268

Conn. 920, 846 A.2d 881 (2004). Because the trial court's decision vacating the award, which was based on a finding of an operative contract and which we affirm, creates another opportunity for a determination on the contract, we do not address these additional claims.

[5] We note that the plaintiff contends that the arbitrator's denials of its motion to stay the proceedings and its motion to admit additional evidence were each separate acts of misconduct requiring the vacation of the award. The plaintiff does not contend, however, that it was prejudiced in any way by the arbitrator's denial of its motion to stay other than by the arbitrator's refusal to consider Pinto's testimony. We, therefore, need not address separately the claim that the arbitrator's denial of the plaintiff's motion to stay was misconduct because the purpose of the stay was to provide the plaintiff with time to obtain Pinto's testimony from the Ganim trial for inclusion in the arbitration record, but in fact the plaintiff was able to do so prior to the close of the hearings.

[6] In response to these claims, the defendant asserts that, even if we conclude that the arbitrator committed misconduct or that the award violated public policy, the trial court nevertheless improperly vacated the arbitrator's award with respect to attorney's fees, arbitration fees, and costs of collection. We disagree, in the absence of anything in the trial court's decision that would suggest that these fees and costs were anything other than damages flowing from the contract award, which we conclude properly was vacated. With respect to the plaintiff's public policy claims, because we conclude that the trial court properly granted the plaintiff's application to vacate the arbitration award, we need not address the alternate grounds for affirmance.

[7] Under 9 U.S.C. § 10 (a) (3), a District Court ''may make an order vacating the award upon the application of any party to the arbitration . . . [w]here the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.'' This court previously has recognized that federal case law applying this statute is instructive because of the substantial similarity between the language of this statute and § 52-418 (a) (3). *O & G/O'Connell Joint Venture* v. *Chase Family Ltd. Partnership No. 3*, supra, 203 Conn. 150 n.12.

[8] In February 1999, prior to the award of the West Side School contract, Pinto became a 99 percent shareholder of the defendant. In September, 1999, the plaintiff invited the defendant to make a presentation regarding the school and, in October, 1999, selected the defendant as the design firm for the West Side School project. In 2001, Pinto sold his interest in the defendant, but remained an employee.

[9] As we have noted previously herein, the plaintiff argues, alternatively, that Pinto's testimony was relevant to counter the defendant's argument that a prior course of dealing, namely, a history of legally obtained contracts, had been established between the parties. Specifically, the plaintiff observes that the defendant relies on its prior contract to build an arena in Bridgeport as establishing part of that prior course of dealing, but that Pinto's testimony identified that arena contract as having been awarded in exchange for bribes. Pinto's testimony, however, was not the only evidence that the arena contract had been procured through illegal means. In his plea agreement that the arbitrator did consider, Pinto admitted to having engaged in the conduct alleged in the information, which included the payment of bribes and kickbacks specifically in connection with the award of the arena contract. Accordingly, Pinto's testimony regarding the illegal means by which the arena contract had been procured was cumulative of previously received evidence. We, therefore, conclude that the arbitrator did not deprive the plaintiff of a fair hearing by refusing to consider the testimony on that issue.

[10] Patrick M. Rose, the defendant's senior vice president, testified during the arbitration hearing that, in addition to the West Side School, the defendant had worked on both the Marin School and the Madison School in Bridgeport as well as a regional vocational agricultural school.

[11] The adverse inference that the arbitrator permissibly could have drawn from Pinto's refusal to testify in this case does not undermine our conclusion and, indeed, adds very little to the picture when compared with his trial testimony. Because Pinto had not yet either been sentenced pursuant to his guilty plea or testified in Ganim's trial, he had every incentive not to testify in this case and thereby potentially risk jeopardizing his plea deal. Nor does the absence of any evidence of Ganim's involvement in the selection of the defendant for the West Side School project eliminate the likelihood that Pinto's testimony would have altered the outcome, or undermine our deter-

mination that the exclusion of Pinto's testimony was ''seriously harmful in the light of the other evidence in the case.'' *Newark Stereotypers' Union No. 18* v. *Newark Morning Ledger Co.*, supra, 397 F.2d 599. Everything else considered by the arbitrator merely suggested that adverse inferences could be drawn regarding the contract at issue; *only* Pinto's testimony was itself direct evidence of illegality regarding school contracts.

[12] Arbitration is a creature of contract and in that contract the parties can agree to the rules under which an arbitrator will decide the dispute. See *Stratford* v. *International Assn. of Firefighters, AFL-CIO, Local 998*, 248 Conn. 108, 121, 728 A.2d 1063 (1999). In the present case, the parties' submission to arbitration included a provision under which the parties had agreed to arbitrate the dispute in accordance with the construction industry arbitration rules of the American Arbitration Association. Under those rules, if evidence is submitted after the conclusion of the hearing, ''[a]ll parties *shall* be afforded an opportunity to examine and respond to such documents or other evidence.'' (Emphasis added.) American Arbitration Association, Construction Industry Dispute Resolution Procedures (1999 Ed.) rule R-32, pp. 28–29.

[13] We question, however, in light of Pinto's refusal to testify in the first instance, the extent, if at all, to which he would have responded to that evidence.