

# CPLR 7503(c): Failure to Apply for Stay Within Ten-Day Period Held To Concede Not Only Arbitrability But Also Adversary's Choice of Arbitrator

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*CPLR 7503(c): Failure to apply for stay within ten-day period held to concede not only arbitrability but also adversary's choice of arbitrator.*

CPLR 7503(c) was enacted to give stability to arbitration awards.<sup>159</sup> Until recently, it provided that, unless a party receiving a notice of intention to arbitrate moves to stay within ten days, he will be "precluded from objecting that a valid agreement was not made or has not been complied with."<sup>160</sup> Recognizing that the rigors of a ten-day time limit proved unduly harsh for the unwary party served, the Legislature, upon recommendation of the Judicial Conference,<sup>161</sup> has extended the moving time to twenty days.<sup>162</sup> Courts, too, have been attentive to the need for keeping in check attempts to abuse this provision.<sup>163</sup>

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<sup>159</sup> Formerly, a party could await the outcome of an arbitration proceeding and, if the award proved unfavorable, contest the arbitrability of the agreement before a court in a subsequent enforcement proceeding. See *Matter of Knickerbocker Ins. Co.*, 28 N.Y.2d 57, 268 N.E.2d 758, 320 N.Y.S.2d 12 (1971), discussed in *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 500, 531 (1971). Sturges, *Some General Standards for a State Arbitration Statute*, 7 ARB. J. (n.s.) 194, 197-98 (1957). Even so, the original draft of CPLR 7503 did not contain subdivision (c). A provision for speedy motion to compel arbitration was already available, and subd. (b) provided that only a party who had not participated in the arbitration and who had not been served with a motion to compel arbitration could move to stay on the ground that an agreement did not exist or had not been complied with. SECOND REP. 130. Apparently, the notice of intention provision was restored (former section 1458(2) of the CPA had a similar provision) because of criticism from the bar. Falls, *Arbitration*, 148 N.Y.L.J. 4, Aug. 15, 1962, at 4, col. 2.

<sup>160</sup> Subd. (c) of CPLR 7503 should be distinguished from subd. (a) of this section, which concerns an application to compel arbitration. The latter authorizes the court, before deciding whether to order arbitration to proceed, to make three threshold determinations: (1) whether there is a valid agreement to arbitrate; (2) whether it was complied with; and (3) whether the claim sought to be arbitrated is barred by the statute of limitations. Under subd. (c), however, it is for the adverse party to raise these objections, and to do so within the specified twenty days, or be denied the opportunity of having them raised in court.

<sup>161</sup> JUDICIAL CONFERENCE REPORT 59-63. The Judicial Conference reasoned that the twenty-day provision is short enough to permit expeditious settlement of disputes in commercial cases, but at the same time is now consistent with the time provisions of the CPLR relating to service of answers and motions.

<sup>162</sup> L. 1973, ch. 1028, at 1883, eff. Sept. 1, 1973. See text accompanying notes 155-58 *supra*.

<sup>163</sup> See 7B MCKINNEY'S CPLR 7503(c), *supp. commentary* at 168 (1972). Compare *Frame v. Am. Motorists Ins. Co.*, 31 App. Div. 2d 872, 297 N.Y.S.2d 247 (3rd Dep't 1969) (the question of whether insured's son was covered by a policy could be raised by the insurer although it had failed to move within ten days, because the disputed issue was not a threshold question to which the preclusion of subd. (c) applied) with *Schafran & Finkel, Inc. v. Lowenstein & Sons, Inc.*, 280 N.Y. 164, 19 N.E.2d 1005 (1939), discussed in *The Quarterly Survey*, 39 ST. JOHN'S L. REV. 180, 239 (1964) (a party who did not respond to a notice of intention to arbitrate was not precluded from raising the issue of a valid arbitrable agreement after ten days where the notice was insufficient to apprise him of the consequences of failure to so move; although statutory amendment of subd. (c) remedied this situation, the case points out that where a literal reading of 7503(c) would lead to patent injustice, the court can refuse to give homage to its literal phraseology, and look to its underlying intent) and *Matter of Hesslein & Co. v. Greenfield*, 281 N.Y. 26,

However, in the recent case of *Crawford v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*,<sup>164</sup> the Appellate Division, Fourth Department, gave a broad interpretation to the ten-day preclusionary rule. In this case, a salesman brought an action to recover commissions from his employer, Merrill, Lynch, a member of the New York Stock Exchange (NYSE). The employer moved under CPLR 7503(a) to stay the action and proceed to arbitration before the NYSE pursuant to an alleged agreement made between the employee and the Exchange.<sup>165</sup> Before this motion was acted upon by the court, the salesman served under CPLR 7503(c) a notice of intention to arbitrate, but named as arbitrator the American Arbitration Association (AAA). Although the appellant conceded that the underlying agreement specified that arbitration be before the NYSE,<sup>166</sup> the court, by a three to two decision, nevertheless held that, by failing to move to stay within ten days, Merrill, Lynch was barred from raising the objection to the arbitrator named in the notice of intention. It reversed Special Term's direction to arbitrate before the NYSE, and ordered that arbitration proceed before the AAA.

Surely, it is straining statutory purpose to absurdity to require a party to move to stay arbitration of an agreement when he, himself, has pending before a court a motion, under an alternative provision of article 75, to compel arbitration of that very same matter.<sup>167</sup>

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22 N.E.2d 149 (1939) and *Glasser v. Price*, 35 App. Div. 2d 98, 313 N.Y.S.2d 1 (2nd Dep't 1970), discussed in *The Quarterly Survey*, 45 ST. JOHN'S L. REV. 501, 528 (1971) (a stranger to the underlying contract could not be held to a ten-day limitation imposed by 7503(c)) and *Ledo Realty Corp. v. Continental Cas. Co.*, 43 Misc. 2d 380, 251 N.Y.S.2d 99 (Sup. Ct. Schenectady County 1964), discussed in *The Quarterly Survey*, 39 ST. JOHN'S L. REV. 180, 239 (1964) (where a motion was made under CPLR 7503(a) to compel arbitration, a party could raise the question of the validity of the underlying agreement, even though he had failed to respond within 10 days to a notice of intention previously served under subd. (c) regarding the same agreement).

<sup>164</sup> 41 App. Div. 2d 112, 341 N.Y.S.2d 673 (4th Dep't 1973).

<sup>165</sup> Although the respondent, Merrill, Lynch was not a party to it, the contract did provide that controversies between Crawford and any member of the Exchange would be settled pursuant to rules of the Exchange, which in turn specified that a non-member could compel a member to arbitrate a dispute before the NYSE, although apparently the member could not compel a non-member to do so. *Id.* at 114, 341 N.Y.S.2d at 675. In any event, the terms of the contract did not ostensibly affect the legal outcome, both majority and dissent asserted, although they both construed the agreement to lend support to their viewpoint. *Id.* at 114, 116, 341 N.Y.S.2d at 675, 677 (dissent).

<sup>166</sup> *Id.* at 115, 341 N.Y.S.2d at 676 (dissent). The appellant did, however, offer reasons (ignored by the majority) to justify avoidance.

<sup>167</sup> The appellant's position was untenable on other grounds. The fact that he originally commenced an action at law would normally act as a waiver of any future right to seek arbitration. *Matter of Zimmerman v. Cohen*, 235 N.Y. 15, 139 N.E.2d 764 (1923); *Sussman v. Goldberg*, 28 Misc. 2d 1070, 210 N.Y.S.2d 912 (Sup. Ct. Queens County 1960) (plaintiff brought an action at law and while it was still pending served a demand for arbitration, which the court refused to grant); *Nagy v. Arcas Brass & Iron Co.*, 213 App. Div. 830, 208 N.Y.S. 906 (2nd Dep't 1925), *aff'd*, 242 N.Y. 97, 150 N.E. 614 (1926) (a refusal to arbitrate upon demand by adverse party constitutes such a waiver).

As the dissent pointed out, the issue in this case was not whether an arbitrable agreement existed, but rather who was to conduct the arbitration. This issue was not the sort of threshold determination intended by the drafters to fall within the preclusions of CPLR 7503(c).<sup>168</sup> By including objection to choice of arbitrator within the caveat of this provision<sup>169</sup> the court has created a precedent open to abuse. A party might now not only force arbitration of an issue with no valid arbitrable basis, but choose his own arbitrator to determine the outcome as well. This is an unwarranted extension of an already stringent procedural obstacle.

#### JUDICIARY LAW

*Judiciary Law § 217-a: Legislature sanctions administrative vacatur of default judgments.*

Section 217-a has been added to the Judiciary Law,<sup>170</sup> giving an administrative judge, a presiding justice or a judge in charge of the administration of any court of record the power to bring a proceeding to set aside default judgments which appear to have been obtained by "fraud, misrepresentation, illegality, unconscionability, lack of due service, violation of law, or other illegalities. . . ."<sup>171</sup> The remedies available in the proceeding include (1) a vacatur or stay of execution of such judgments (2) a vacatur of summonses and complaints from which illegal judgments may result (3) a decree of restitution of any payments collected from judgment debtors, and (4) any other relief deemed to be just and proper. The proceeding may be initiated when the judge or justice has satisfied himself that default judgments were illegally obtained in "a number of instances."<sup>172</sup> Notice must be given to the parties or their attorneys and the proceeding must be determined by a judge other than the initiating judge or justice. This provision gives approval to a practice initiated in 1971 by Justice Edward Thompson, Administrative Judge of the New York City Civil Court, which has already resulted in the vacating of thousands of default judgments.<sup>173</sup>

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<sup>168</sup> See note 160 *supra*.

<sup>169</sup> CPLR 7504 provides that upon application of either party, the court may appoint an arbitrator where an agreement has failed to name one or where a dispute has arisen on this point. The facts of this case justify application of this provision, and the mere fact that the provision exists offers some support for the argument that choosing an arbitrator is an issue independent of the determination of the threshold issues of section 7503.

<sup>170</sup> L. 1973, ch. 138, at 163, eff. Jan. 1, 1974.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> See McLaughlin, *New York Trial Practice*, 169 N.Y.L.J. 111, June 8, 1973, at 4, col. 2.