

CPLR 7501: Court of Appeals Adopts Separability Approach Where a Broad Arbitration Clause Is Present

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cution sales, thus benefiting both creditors and debtors.¹⁴⁷ This benefit could be insured by amending CPLR 5236 to provide for greater court supervision.¹⁴⁸ Until the Legislature acts, courts should not hesitate to fashion remedies even after the sale when circumstances warrant relief.

ARTICLE 75 — ARBITRATION

CPLR 7501: Court of Appeals adopts separability approach where a broad arbitration clause is present.

New York has required that the issue of fraud in the inducement of a contract containing an arbitration clause be determined by the court and not the arbitrators. The law stems from a 1957 decision of the Court of Appeals in *Wrap-Vertiser Corp. v. Plotnick*.¹⁴⁹ Implicit in the Court's decision was the assumption that arbitration clauses were not separable from the principal contract; therefore, if the contract were tainted with fraud, the entire contract was invalid, including the arbitration clause.¹⁵⁰ The application of this approach affected the nature of the remedy sought: if the party's complaint prayed for damages under the contract, he was said to have ratified the contract rendering the arbitration clause therein enforceable; only if the party elected to rescind the contract could he avoid arbitration.¹⁵¹

¹⁴⁷ See generally 6 WK&M ¶ 5236.02. One rationale for the abolition of the right of redemption is that the purchaser at an execution sale will pay more for an absolute title than for a title which is subject to redemption. As one authority has noted, however, redemptive rights do have certain advantages.

The utility of these statutes [allowing redemption] arises out of the fact that the most frequent customer at a foreclosure sale is the mortgagee himself, being thereby the purchaser from whom redemption is to be made. . . . These statutes offer a strong inducement to the mortgagee to bid a price commensurate with the value of the land.

3A R. POWELL, *THE LAW OF REAL PROPERTY* § 470 (P. Rohan ed. 1973).

Just as the mortgagee is frequently the purchaser at a foreclosure sale, the judgment creditor is often the buyer at execution sales. When the creditor buys property at less than its market value, he receives a windfall unless the full fair market value of the property is credited against his judgment. While the CPLR makes no express provision for this, one New York court has held that CPLR 5240 gives the court power to grant such a credit. See *Wandschneider v. Bekeny*, 75 Misc. 2d 32, 346 N.Y.S.2d 925 (Sup. Ct. Westchester County 1973), discussed in *The Quarterly Survey*, 48 ST. JOHN'S L. REV. 159, 188 (1973); cf. RPAPL § 1371.

¹⁴⁸ See note 133 *supra*.

¹⁴⁹ 3 N.Y.2d 17, 143 N.E.2d 366, 163 N.Y.S.2d 639 (1957) (4-3).

¹⁵⁰ *Aksen, Prima Paint v. Flood & Conklin — What Does It Mean?* 43 ST. JOHN'S L. REV. 1, 10-11 (1968) [hereinafter cited as *Aksen*]. The traditional view is espoused by Professor Corbin: "It would seem that if the alleged defect exists, it effects the provision for arbitration just as much as it affects the other provisions." 6A A. CORBIN, *CONTRACTS* § 1444 at 449 (1962) [hereinafter cited as *CORBIN*].

¹⁵¹ *Wrap-Vertiser Corp. v. Plotnick*, 3 N.Y.2d 17, 19, 143 N.E.2d 366, 367, 163 N.Y.S.2d 639, 640 (1957).

Where an action for rescission is brought to recover the benefits conferred by the wronged party as a result of the transaction, and the court exercises its equitable powers to avoid the contract *ab initio*, there is no difficulty in reasoning that "[i]f there has never

The *Wrap-Vertiser* decision was based on the court's construction of CPA 1450, which called for arbitration where there was "no substantial issue as to the making of the contract or submission or the failure to comply therewith. . . ." ¹⁵² Almost identical language is employed in the Federal Arbitration Act, ¹⁵³ which was modeled upon the earlier New York law. An anomalous situation arose when the United States Supreme Court, in *Prima Paint v. Flood & Conklin Manufacturing Co.*, ¹⁵⁴ subsequently construed the Federal Act as requiring the question of fraudulent inducement to be decided by the arbitrators. ¹⁵⁵ The Court applied the separability doctrine in holding that where the question of

been a contract at all, there has never been as part of it an agreement to arbitrate; the greater includes the less." *Heyman v. Darwins*, [1942] 1 All E.R. 337, 345 (H.L.). *In re Coler*, 39 App. Div. 2d 656, 331 N.Y.S.2d 938 (1st Dep't 1972), circumvented this result on the dubious theory that

regardless of the possibility that the ultimate result of the arbitration might be vitiation of the very contract under which the arbitration will have taken place . . . the contract will have remained viable for a sufficient period of time to sustain the arbitration.

Id. at 656, 331 N.Y.S.2d at 938-39. *But see* the dissenting opinion of Presiding Justice McGovern, adhering to the position enunciated in *Wrap-Vertiser*, that in a claim for rescission the contract tainted with fraud is void *ab initio*. *Id.* at 657, 331 N.Y.S.2d at 940.

However, an action at law seeking damages for fraud sounds in tort and can be regarded as leaving the entire contract intact with the arbitration clause as a component part thereof. This view was followed in *Amerotron Corp. v. Maxwell Shapiro Woolen Co.*, 3 App. Div. 2d 899, 162 N.Y.S.2d 214 (1st Dep't 1957) (mem.), *aff'd mem.*, 4 N.Y.2d 722, 148 N.E.2d 319, 171 N.Y.S.2d 111 (1958). *See generally* CORBIN, *supra* note 150, § 1444.

¹⁵² In 1963, CPA 1450 was superseded by CPLR 7503, which compels arbitration "[w]here there is no substantial question whether a valid agreement was made or complied with. . . ." No legislative change was intended; the "agreement" referred to is the agreement to arbitrate. SECOND REP. 135, *cited in* 8 WK&M ¶ 7503.02. *See also* *Durst v. Abrash*, 22 App. Div. 2d 39, 41, 253 N.Y.S.2d 351, 353 (1964), *aff'd*, 17 N.Y.2d 445, 213 N.E.2d 887, 266 N.Y.S.2d 806 (1965).

¹⁵³ 9 U.S.C. §§ 1-14 (1970), *formerly* 43 Stat. 883 (1925), *as amended*, 66 Stat. 669 (1947), provides for a court order directing arbitration "upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue. . . ." 9 U.S.C. § 4.

¹⁵⁴ 388 U.S. 395 (1967).

¹⁵⁵ *Id.* at 402-04. In *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402 (2d Cir. 1959), *cert. granted*, 362 U.S. 909, *dismissed under rule 60*, 364 U.S. 801 (1960), the Second Circuit Court of Appeals held that it was the intention of Congress in enacting the United States Arbitration Act to create a body of national substantive law under its maritime and commerce powers. While *Prima Paint* does not compel state courts to conform to its interpretation of the Federal Act, it has been the policy of the New York courts to adopt the separability approach in maritime and commercial transactions. *See A/S J. Ludwig Mowinckels Rederi v. Dow Chem. Co.*, 25 N.Y.2d 576, 255 N.E.2d 774, 307 N.Y.S.2d 660, *cert. denied*, 398 U.S. 939 (1970); *Aerojet-General Corp. v. Non-Ferrous Metal Refining, Ltd.*, 37 App. Div. 2d 531, 322 N.Y.S.2d 33 (1st Dep't 1971) (mem.). Such application had the commendable result of discouraging forum shopping and insuring uniformity in interstate commercial transactions. *See Aksen, supra* note 150, at 19-23. But the courts still refused to apply separability in purely intrastate transactions. Such a distinction disregarded the intent of the parties, whose decision to arbitrate is unlikely to have been made on the basis of whether or not their transaction embraced interstate commerce. *Weinrott v. Carp*, 32 N.Y.2d 190, 199-200 n.2, 298 N.E.2d 42, 48-49 n.2, 344 N.Y.S.2d 848, 856-57 n.2 (1973).

fraud did not relate to the arbitration clause itself, the clause could be severed from the contract in which it was embedded and enforced.¹⁵⁶

Though criticized,¹⁵⁷ *Wrap-Vertiser* continued as the law in New York. Several cases purported to limit the *Wrap-Vertiser* holding on the ground that the language of the arbitration clause under consideration there was too narrow to cover the issue of fraud;¹⁵⁸ indeed, some of the subsequent rulings attempted to declare *Wrap-Vertiser* sui generis.¹⁵⁹ A careful examination of the different clauses reveals the artificiality of the distinctions drawn.¹⁶⁰ In an effort to reconcile these various rulings, recent cases left the issue in a legal quagmire.¹⁶¹

¹⁵⁶ 388 U.S. at 404. This result has been sustained on the theory that "the mutual promises to arbitrate form the *quid pro quo* of one another and constitute a separable and enforceable part of the agreement." *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 411 (2d Cir. 1959), cert. granted, 362 U.S. 909 (1960), dismissed under rule 60, 364 U.S. 801 (1960).

¹⁵⁷ See, e.g., *CORBIN*, supra note 150, § 1444, n.40.15 (1962).

¹⁵⁸ See *Amphenol Corp. v. Microlab*, 49 Misc. 2d 46, 266 N.Y.S.2d 768 (Sup. Ct. N.Y. County 1965), aff'd mem., 25 App. Div. 2d 497, 267 N.Y.S.2d 477 (1st Dep't 1966); *Fabrex Corp. v. Winard Sales Co.*, 23 Misc. 2d 26, 200 N.Y.S.2d 278 (Sup. Ct. N.Y. County 1960).

¹⁵⁹ See *In re Coler*, 39 App. Div. 2d 656, 331 N.Y.S.2d 938 (1st Dep't), aff'd mem., 31 N.Y.2d 775, 291 N.E.2d 385, 339 N.Y.S.2d 104 (1972); *Fabrex Corp. v. Winard Sales Co.*, 23 Misc. 2d 26, 200 N.Y.S.2d 278 (Sup. Ct. N.Y. County 1960).

¹⁶⁰ The parties in *Wrap-Vertiser* had agreed to submit any question "as to the validity, interpretation or performance of [the] agreement." 3 N.Y.2d at 20, 143 N.E.2d at 367, 163 N.Y.S.2d at 641. In *In re Coler*, 39 App. Div. 2d 656, 331 N.Y.S.2d 938 (1st Dep't 1972), they had agreed to settle by arbitration "[a]ny controversy or dispute which may arise between the parties and which shall not be adjusted by mutual agreement. . . ." *Id.* at 656, n.1, 331 N.Y.S.2d at 939, n.1. In *In re Fabrex Corp.*, 23 Misc. 2d 26, 200 N.Y.S.2d 278 (Sup. Ct. N.Y. County 1960), the agreement was to submit "[a]ny controversy arising under or in relation to this contract. . . ." *Id.* at 26, 200 N.Y.S.2d at 279.

¹⁶¹ The decision of *Housekeeper v. Lourie*, 39 App. Div. 2d 280, 333 N.Y.S.2d 932 (1st Dep't 1972), is in large measure responsible for the state of confusion, wavering between separability and the more traditional approach. See note 164 *infra*. The case is discussed in *The Quarterly Survey*, 47 *ST. JOHN'S L. REV.* 549, 550, 561-63 (1973). The author there urges a reconciliation of the New York and federal approaches.

In 1967, the United States Supreme Court recognized that it was "not entirely clear" whether a party seeking rescission of a contract in New York based on fraud in the inducement could obtain prior judicial resolution. *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400, n.3 (1967), comparing *Exercycle Corp. v. Maratta*, 9 N.Y.2d 329, 334, 174 N.E.2d 463, 465, 214 N.Y.S.2d 353 (1961), and *Amerotron Corp. v. Maxwell Shapiro Woolen Co.*, 3 App. Div. 2d 899, 162 N.Y.S.2d 214 (1st Dep't 1957) (mem.), aff'd mem., 4 N.Y.2d 722, 148 N.E.2d 319, 171 N.Y.S.2d 111 (1958), with *Fabrex Corp. v. Winard Sales Co.*, 23 Misc. 2d 26, 200 N.Y.S.2d 278 (Sup. Ct. N.Y. County 1960).

Exercycle involved a proceeding to stay arbitration on the ground that the principal contract of employment, containing a broad arbitration provision, was illusory and lacked mutuality of obligation. The Court ruled that the issue was a matter of interpretation and for the arbitrators, not the court:

Once it be ascertained that the parties broadly agree to arbitrate a dispute "arising out of or in connection with" the agreement, is for the arbitrators to decide what the agreement means and to enforce it according to the rules of law which they deem appropriate in the circumstances.

9 N.Y.2d at 334, 174 N.E.2d at 464, 214 N.Y.S.2d at 355. The majority then enumerated four well-established exceptions to this broad rule:

- (1) where fraud or duress results in a voidable agreement;
- (2) where the claim is frivolous;

In view of this situation, the Court of Appeals in a recent case, *Weinrott v. Carp*,¹⁶² undertook to consider "whether [its] determination in *Matter of Wrap-Vertiser Corp. (Plotnick)* [had] retained its vitality in the light of subsequent experience and contemporary attitudes concerning the role of arbitration in the settlement of commercial disputes. . . ."¹⁶³ The Court proceeded to overrule *Wrap-Vertiser*, holding that fraud in the inducement of a contract containing a broad arbitration clause should be an issue for the arbitrators.¹⁶⁴

The very circumstances which brought the case before the Court for ultimate determination demonstrate the urgency compelling the Court to its decision on policy as well as legal grounds. The respondents allegedly had rights and patents in a construction process to which they purported to grant the appellants a license. The process involved the construction of single and double story buildings with panels of ply-

(3) where the subject matter of the agreement sought to be enforced by the arbitration is illegal;

(4) where a condition precedent to a demand for arbitration has not been satisfied.

Id. at 334-35, 174 N.E.2d at 465, 214 N.Y.S.2d at 356. But principles of contract law preclude the existence of a valid underlying contract for want of mutuality just as much as for any of these reasons. See CORBIN, *supra* note 150, at 449-55. In pointing up the inconsistency, concurring Judge Froessel noted that the majority position could only be justified on the basis of separability. 9 N.Y.2d at 340, 174 N.E.2d at 468, 214 N.Y.S.2d at 360. This view is supported by Gerald Asken of the American Arbitration Association:

Indeed, *Exercycle v. Maratta*, the very case which contained dictum to the effect that arbitration would not lie where the plaintiff seeks rescission for fraud, can itself be cited for the proposition that arbitration clauses are separable in New York It is difficult in logic to explain how an arbitrator can void such an agreement unless, in fact, his authority stems from a "separate" contract.

Asken, *supra* note 150, at 10. But see CORBIN, *supra* note 150, § 1444, n.40.5; Collins, *Arbitration and the Uniform Commercial Code*, 41 N.Y.U.L. Rev. 736 (1966).

¹⁶² 32 N.Y.2d 190, 298 N.E.2d 42, 344 N.Y.S.2d 848 (1973).

¹⁶³ *Id.* at 193, 298 N.E.2d at 43, 344 N.Y.S.2d at 851.

¹⁶⁴ *Id.* at 199, 298 N.E.2d at 48, 344 N.Y.S.2d at 856. The Court relied on *Housekeeper v. Lourie*, 39 App. Div. 2d 280, 333 N.Y.S.2d 932 (1st Dep't 1972), as support for its decision. This case reiterates the principle that a contract induced through fraud is not a nullity but results in a voidable contract; therefore, if the arbitration clause is sufficiently broad to encompass the issue of fraud in the inducement and such fraud does not run to the arbitration clause itself, the issue may properly be decided by the arbitrators.

The *Housekeeper* decision does contain contradictory language. After enunciating the above principles, the *Housekeeper* court proceeded to declare the arbitration clause under consideration an inextricable part of an entire agreement alleged to have been procured through fraud. The court's result obtained not from its rejection of the separability doctrine but from its refusal to apply it in the circumstances before it where an alleged breach of a fiduciary relationship precluded "arm's length negotiations" between the parties. The party charged with fraud was not only the petitioner's attorney but a former partner as well. The court cited *Prima Paint* for the proposition that the separability rule should apply where "the dominant intention of the parties was to settle their disputes by arbitration." *Id.* at 285, 333 N.Y.S.2d at 938. Thus *Housekeeper* provides support for *Weinrott's* holding that a broad arbitration clause encompasses the submission of fraud in the inducement. *Id.* at 283-84, 333 N.Y.S.2d at 936-37. As Judge Wachtler noted in *Weinrott*, it is only where the alleged fraud relates to the procurement of the arbitration clause or agreement itself that the fraud question is to be decided preliminarily by the court. 32 N.Y.2d at 198, 298 N.E.2d at 46, 344 N.Y.S.2d at 855.

wood and polyurethane filler, sufficient in strength to make conventional framing of each structure unnecessary.¹⁶⁵ The appellants contended that they were induced into the agreement through false and material misrepresentations of the respondents with regard to the efficacy of the process, the extent of their ownership in it and its approval by public officials.

The Supreme Court, New York County, entered an order granting petitioner's application to stay the arbitration demanded by the respondents.¹⁶⁶ The appellate division reversed on the ground that the amended petition was "insufficient to demonstrate that there [was] a 'substantial question of the existence of a 'valid agreement' to arbitrate.'" ¹⁶⁷ Thus, the court determined preliminarily that the evidence did not support a claim of fraudulent inducement and directed the parties to arbitrate. The Court of Appeals affirmed¹⁶⁸ and the parties proceeded to arbitration, resulting in an award to the respondents of \$30,713.47. The protracted litigation re-entered the courts through a proceeding to confirm the arbitrators' award. The appellants contended that the American Arbitration Association violated its own rules. The supreme court upheld the award and the appellate division affirmed.¹⁶⁹ Their decision was appealed, bringing the case before the Court of Appeals for the second time. After a five year interval, the Court considered anew the issue of fraud in the inducement. In seeking to set aside the award, the appellants claimed that the arbitrators refused to admit new evidence of fraud offered by them. The tribunal had apparently concluded that the courts had found no fraud rather than that the evidence of fraud was insufficient. The Court ruled that even conceding the error, arbitrators are not bound by rules of law and misapplication of such rules is not grounds for setting aside an award.¹⁷⁰

Although the Court's decision now places the question of fraudulent inducement with the arbitrators, the Court refused to order arbitration of the fraud issue, stating: "Appellants had a full chance to present that issue to the courts. There is no need to give appellants another bite of an apple that has already been chewed to the core."¹⁷¹

¹⁶⁵ *Carp v. Weinrott*, 20 N.Y.2d 934, 935, 233 N.E.2d 297, 286 N.Y.S.2d 285 (1967) (mem.).

¹⁶⁶ *Id.* at 935, 233 N.E.2d at 298, 286 N.Y.S.2d at 285.

¹⁶⁷ 28 App. Div. 2d 671, 672, 282 N.Y.2d 638, 639 (1st Dep't 1967) (mem.).

¹⁶⁸ 20 N.Y.2d 934, 233 N.E.2d 297, 286 N.Y.S.2d 285 (1967) (mem.).

¹⁶⁹ 37 App. Div. 2d 548, 322 N.Y.S.2d 531 (1st Dep't 1971).

¹⁷⁰ 32 N.Y.2d at 193-94, 298 N.E.2d at 44, 344 N.Y.S.2d at 851. The Court relied on *Aimcee Wholesale Corp. v. Tomar Prods.*, 21 N.Y.2d 621, 626, 237 N.E.2d 223, 225, 289 N.Y.S.2d 963, 971 (1968), which construed CPLR 7511 similarly.

¹⁷¹ 32 N.Y.2d at 200, 298 N.E.2d at 48, 344 N.Y.S.2d at 857.

Judge Wachtler discussed several lower court opinions which had attempted to distinguish *Wrap-Vertiser* as sui generis, finding their differences to lie "more in a different policy regarding arbitration clauses than in the different arbitration clauses under consideration."¹⁷² He further stated that "[i]n this regard it is noted that all the cases involved what could fairly be termed broad arbitration agreements."¹⁷³

The Court emphasized that its principal aim in construing such a provision is to determine the intent of the parties and to give it effect:

When the parties to a contract have reposed in arbitrators all questions concerning the "validity, interpretation or enforcement" of their agreement, they have selected their tribunal and no doubt they intend it to determine the contract's "validity" should the necessity arise. Judicial intervention, based upon a nonseparability contract theory in arbitration matters prolongs litigation, and defeats, as this case conclusively demonstrates, two of arbitration's primary virtues, speed and finality.¹⁷⁴

The Court thus found compelling policy grounds for overruling *Wrap-Vertiser*. The proceedings in this case reveal that under the old rule even a party advancing a frivolous claim of fraud in the inducement could forestall arbitration proceedings and vitiate the economy, efficiency and speed which they are designed to promote. Such dilatory tactics frustrate both the intent of the parties and the legislative policy of encouraging arbitration.¹⁷⁵

In adopting the federal separability approach, the *Weinrott* decision brings New York and federal law into harmony. "[U]nder a broad arbitration provision the claim of fraud in the inducement should [now] be determined by arbitrators," even though the balance of the contract be permeated with fraud.¹⁷⁶ The result would be the same

¹⁷² *Id.* at 195, 298 N.E.2d at 45, 344 N.Y.S.2d at 853.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 198, 298 N.E.2d at 47, 344 N.Y.S.2d at 855 (citations omitted).

¹⁷⁵ This policy is evidenced by CPLR 7501 *et seq.* 32 N.Y.2d at 199, 298 N.E.2d at 47, 344 N.Y.S.2d at 856.

¹⁷⁶ *Id.*, 298 N.E.2d at 48, 344 N.Y.S.2d at 856. A general claim of fraudulent inducement should not be allowed to defeat the arbitration clause where the allegation is simply that the same fraud which induced the principal contract also induced the arbitration provision.

It might be argued that the complainant would never have entered into the contract had the defendant not made certain false representations. If a court entertained such an allegation and found no fraud, then an order to arbitrate the issue of fraud as to the principal contract would follow since the court's jurisdiction is limited to deciding whether an agreement to arbitrate exists. But the issue before the arbitrator would be the same as those previously decided by the court. Such a procedure would involve wasteful and time-consuming duplication of effort and would afford a complainant two "days in court" on the same issues. For these reasons a court should refuse to entertain an allegation that fraud induced the arbitration provision if the fraud alleged is not distinct from that claimed to have induced the principal contract.

Note, *Arbitration Clauses and Fraudulent Inducement*, 42 WASH. L. REV. 621, 625 (1967).

whether the party seeks damages or rescission. Only where the alleged fraud runs to the arbitration clause itself may the court enjoin arbitration. But where the provision is "less than broad" or where an adhesion contract is employed, "a court should give the provision and the circumstances surrounding its inclusion in the contract great scrutiny."¹⁷⁷

CPLR 7503(a): Venue limited to court where action is pending in application to stay arbitration.

CPLR 7502(a) states that "[a] special proceeding shall be used to bring before a court the first application arising out of an arbitrable controversy which is not made by motion in a pending action." It then sets forth the venue for making such application.

The statute's aim is to provide that it is this first application which commences the special proceeding¹⁷⁸ and to assure the proper service and notice safeguards of article 4 proceedings in general,¹⁷⁹ at least where no action is pending and thus the parties are not yet before the court. But neither the language of the section, case law, nor commentary make clear whether, where an action is in fact pending, the procedure and accompanying venue outlined in CPLR 7502(a) become unavailable. Must the application regarding arbitration be made in the court where the action is pending or are the broader venue provisions of CPLR 7502(a)¹⁸⁰ applicable?

If the first application is one to compel arbitration, the problem is easily resolved, for CPLR 7503(a) mandates that the exclusive forum for raising such a motion is the one where the action is pending. A comparable limitation, however, does not exist in CPLR 7503(b), which deals with applications to stay arbitration. The fact that the first application will most probably be a motion to compel has led to occasional confusion and imprecise analysis when dealing with these separate statutory provisions: the section 7503(a) motion to compel arbitration on one hand, and the "first application" of section 7502(a) on the other.¹⁸¹ If, in fact, the first application arising out of an arbitrable

¹⁷⁷ 32 N.Y.2d at 199, 298 N.E.2d at 48, 344 N.Y.S.2d at 856. Such circumstances may indicate, as in *Housekeeper v. Lourie*, 39 App. Div. 2d 280, 333 N.Y.S.2d 932 (1st Dep't 1972), that the arbitration provision was inserted as part of an overall scheme to defraud.

¹⁷⁸ The arbitration does not take on the character of a special proceeding until this application is made. *In re Gaffagnio*, 48 Misc. 2d 441, 264 N.Y.S.2d 483 (Sup. Ct. N.Y. County 1965); *In re Beverly Cocktail Lounge, Inc.*, 45 Misc. 2d 376, 256 N.Y.S.2d 812 (Sup. Ct. Kings County 1965).

¹⁷⁹ See 7B MCKINNEY'S CPLR 7502(a), commentary at 480 (1963); 8 WK&M ¶ 7502.02.

¹⁸⁰ The venue shall be ". . . [the] county specified in the agreement; or if none be specified, [where] one of the parties resides or is doing business, or, if there is no such county, . . . in any county; . . ." CPLR 7502(a). Since this is inconsistent with article 5, the latter is inapplicable to arbitration proceedings. 7B MCKINNEY'S CPLR 7502(a), commentary at 480 (1963).

¹⁸¹ See, e.g., the practice commentary accompanying CPLR 7502(a), which in discussing