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CPLR 7503(a): Venue Limited to Court Where Action Is Pending in Application to Stay Arbitration

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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 proceeding[178] 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

controversy is a motion to stay arbitration, and such controversy is the subject of pending suit, where may the motion be made?

In *Application of Allstate Insurance Co.*[182] the Supreme Court, Westchester County, dealt with these peculiar facts. A negligence action had been begun in the Supreme Court, Nassau County. When one of the insurance companies involved disclaimed liability, a notice of intention to arbitrate, pursuant to CPLR 7503(c), was served on Allstate, who then commenced a special proceeding in Westchester County via an application to stay arbitration, on the authority of CPLR 7502(a).[183]

Although holding that it lacked jurisdiction over this proceeding for improper service of the order to show cause,[184] the court nevertheless deemed it proper to discuss the issue of venue, which it raised sua sponte,[185] since the jurisdictional defect might easily be cured. The court conceded that, were no action pending in Nassau County, venue in Westchester County would be proper under CPLR 7502(a) because

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the first sentence of that provision, states that it "deals with an independent application to *compel* arbitration . . ." 7B McKINNEY'S CPLR 7502(a), commentary at 480 (1963) (emphasis added). Clearly, this is not what the first sentence states. *See also* 22 CARMODY-WAIT 2d, § 141:80, at 838-39 & n.12 (1968), where it is stated that if an application for a stay is the first application, and if an action is pending, "it shall be made by motion in such action." The only authority cited in the footnote to this statement, however, is CPLR 7502(a) itself, which, taken alone, is not sufficient authority to warrant such a conclusion. Commentators have made similar assumptions on a similar lack of authority. *See, e.g.*, 22 SYRACUSE L. REV. 94, 95 (1970). *But see* 8 WK&M ¶ 7502.01 (a pending action does not preclude commencement of a special proceeding in connection with the arbitration).

182 75 Misc. 2d 795, 348 N.Y.S.2d 683 (Sup. Ct. Westchester County 1973).

183 In its commentary to proposed section 17.2(a), subsequently enacted (with minor changes) as CPLR 7502(a), the Advisory Committee on Practice and Procedure states:

> . . . the notice of intention to arbitrate in effect commences a judicial proceeding. . . . A subsequent motion to stay by the party served would actually be the 'first application' to a court arising out of the controversy. . . .

FOURTH REP. 77.

184 Since article 4 is applicable to arbitration proceedings, commencement must meet the usual service requirements. Thus if service is improper, it is a jurisdictional defect, not a mere irregularity. *But see* Fagenson v. First-York 86th St. Corp., 73 Misc. 2d 1069, 343 N.Y.S.2d 774 (Sup. Ct. N.Y. County 1973).

185 While recognizing the well-settled rule that a court cannot change venue except by motion of a party, the court asserted that, having "the inherent power of control over its own calendar. . . ," it could " 'fashion a rule whereby its control is reaffirmed, not thwarted' " and thus rationalized its sua sponte raising of the venue issue. 75 Misc. 2d at 800, 348 N.Y.S.2d at 687, *citing* Chiques v. Sanso, 72 Misc. 2d 376, 380, 339 N.Y.S.2d 394, 400 (Sup. Ct. Westchester County 1972). It is significant, however, that the *Chiques* case and those upon which it relies dealt with applications for a general preference. The rules of the Second Department require that in order to get a general preference, the venue must have been properly laid in the county wherein the action was pending. 22 NYCRR 74.1(a). Since the petitioners were seeking relief pursuant to a rule with a built-in condition precedent, *viz.*, proper venue, the cases are clearly distinguishable from *Allstate. See, e.g.*, Rab v. Colon, 37 App. Div. 2d 813, 324 N.Y.S.2d 809 (1st Dep't 1971) (per curiam); Plachte v. Bancroft, Inc., 3 App. Div. 2d 437, 161 N.Y.S.2d 892 (1st Dep't 1957); Carbide & Carbon Chem. Co. v. Northwest Exterminating Co., 207 Misc. 548, 139 N.Y.S.2d 480 (Sup. Ct. Queens County 1955).

the petitioner was doing business there.[186] In this case, however, the court felt compelled by what it characterized as logic and consistency to read sections 7502(a) and 7503(a) together, concluding therefrom that "venue in the first instance must be in the county in which the action is pending. . . ."[187]

While the language of 7502(a) is by no means conclusive proof as to its purport, a preferred reading would appear to indicate that, while a special proceeding is mandatory where no action is pending, it may also, but need not, be used[188] where an action is pending. Committee reports support this reading:

> If the first application is made in a pending action rather than by a special proceeding, subsequent motions *may* be made in that action since no special proceeding would be pending. The section does not, however, preclude the commencing of a subsequent special proceeding in connection with the arbitration.[189]

Provision for the making of motions in pending actions seems intended to supplement the venue of CPLR 7502(a), rather than to limit it.[190] Certainly there was no cogent reason for the court in *Allstate* to have analogized CPLR 7502(a) to CPLR 7503(a) rather than to CPLR 7503(b), the section of the statute which is more appropriate to the kind of application made in this case.

While judicial economy and concern for overcrowded calendars[191]

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186 75 Misc. 2d at 800, 348 N.Y.S.2d at 687. *See In re* Manitt Constr. Corp., 50 Misc. 2d 502, 507-08, 270 N.Y.S.2d 716, 721-22 (Sup. Ct. Queens County 1966). *Compare* CPLR 506(a), which provides the venue for special proceedings generally.

187 75 Misc. at 799, 348 N.Y.S.2d at 87. The court cited CARMODY-WAIT 2d as authority. *See* note 181 *supra*. The only stipulation would be that the court where the action is pending have jurisdiction to entertain the action. For further cases on this jurisdictional point see Edwards v. Bergner, 22 App. Div. 2d 808, 254 N.Y.S.2d 798 (2d Dep't 1964) (mem.) (where an action was pending in a district court, a motion to compel arbitration of a claim involving more than $6,000 could not be made in that action because of the jurisdictional limitations on the district court); Columbia Memorial Hosp. v. MacFarland Builders, Inc., 74 Misc. 2d 870, 344 N.Y.S.2d 63 (Columbia County Ct. 1973) (if the power to compel arbitration is limited to a court of competent jurisdiction, so too is the power to stay; thus a motion to stay involving claims exceeding $6,000 could not be made in county court).

188 *See* A&R Constr. Co. v. Gorlin-Okun, Inc., 41 App. Div. 2d 876, 342 N.Y.S.2d 950 (3d Dep't 1973) (mem.).

189 FIFTH REP. 180; SIXTH REP. 647 (emphasis added). Unfortunately, the commentary does not make clear where this subsequent special proceeding may be commenced. The last sentence of CPLR 7502(a) reads ". . . *subsequent applications* shall be made by motion in the pending action or the special proceeding." (emphasis added). If the subsequent proceeding is deemed a subsequent "application," is a limitation imposed on the venue of this subsequent motion? An extended grammatical discourse on parallel sentence structure is far afield of the subject at hand, but rules of statutory construction support the interpretation that, since the word "pending" precedes "action" only in the above-quoted portion of CPLR 7502(a), where a new special proceeding is commenced, petitioner need not be bound to any prior forum.

190 *See* 8 WK&M ¶7502.10.

191 This was the primary concern voiced by the *Allstate* court. 75 Misc. 2d at 800; 348

would indicate a preference for the result reached by the court, it cannot be assumed that it is a result which the Legislature intended.[192] Without lucid legislative commentary to guide us, it should not be presumed that limiting motions to compel arbitration to the forum of the pending action, while omitting a parallel provision for applications to stay, was an act of legislative oversight rather than of conscious intent. The *Allstate* decision does point up the need for a definitive interpretation of the scope and limitations of the venue provisions of CPLR 7502(a), or article 75 in general.

Although the court's sua sponte discussion of venue is technically dicta,[193] its order that "[h]ereinafter the Court shall strike matters such as the instant one from the calendar and deny the application. . ."[194] will undoubtedly affect future controversies of this nature. To require that an application to stay, which is the first application to the court relating to an arbitrable controversy, be made in the pending action is to engraft onto CPLR 7502 and 7503 limitations not placed there by the Legislature.

INSURANCE LAW

Insurance Law § 59-a: Jurisdiction over foreign insurer may not be predicated upon the unauthorized acts of its limited agent.

Section 59-a of the Insurance Law was enacted to facilitate suits against unauthorized foreign insurers whose activities affect New York residents.[195] It subjects such insurers to jurisdiction when they engage in certain activities, including the mailing of policies into the state. While the statute's jurisdictional reach is longer than that of CPLR 302,[196] it may not be interpreted so as to confer jurisdiction over a

N.Y.S.2d at 687. Apparently, applications to stay arbitration are brought automatically by insurance companies under uninsured motorist provisions whether meritorious or not, adding to calendar congestion.

192 If, as the court asserts, it was the Legislature's aim to limit motions relating to pending actions to the forum already introduced to the issues, a more efficacious argument might have been found in reliance on CPLR 7502(a) itself, rather than CPLR 7503.

193 *See* notes 184 and 185 *supra.*

194 75 Misc. 2d at 800, 348 N.Y.S.2d at 688 (without prejudice to renewal of the application in the "proper" county).

195 The statute states in pertinent part:

> The legislature declares that it is a subject of concern that many residents of this state hold policies of insurance issued or delivered in this state by insurers while not authorized to do business in this state, thus presenting to such residents the often insuperable obstacle of resorting to distant forums for the purpose of asserting legal rights under such policies.

N.Y. INS. LAW § 59-a(1) (McKinney 1966).

196 *See* A. Millner Co. v. Noudar, Lda., 24 App. Div. 2d 326, 266 N.Y.S.2d 289 (1st Dep't 1966).