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CPLR 7503: First Department Recommends Time Limitation for Proceeding with Arbitration

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CPLR 7501: Right to jury trial on issue of existence of arbitration agreement.

The right to a jury trial on the issue of the existence of an agreement to arbitrate was explicitly recognized under CPA 1450 and 1458(2). Under the CPLR, there is no such provision for a jury trial, but the accepted view is that this omission did not evidence a legislative intent "to eliminate trial by jury if it is desirable or constitutionally required."[188] In *RLC Electronics, Inc. v. American Electronics Laboratories, Inc.*,[189] the Appellate Division, Second Department, reversed an order of the Supreme Court, Westchester County, and held that the appellant was entitled to a jury trial on the issue of the existence of an arbitration agreement.

CPLR 7503: First Department recommends time limitation for proceeding with arbitration.

Glen Creations, Inc. v. Cotra Corp.[190] highlighted a serious deficiency in CPLR 7503. In March, 1969, the Supreme Court, New York County, vacated a temporary stay of arbitration. For more than three years the respondent failed to initiate arbitration while the decision was being appealed. The Appellate Division, First Department, reversed and granted a stay, finding no evidence of an agreement to arbitrate. Importantly, both the majority and the dissent recommended that the Law Revision Commission propose that "an arbitration . . . be begun within such reasonable time as fixed by the Legislature from the date of notice of arbitration, or, where the right to arbitrate has been contested, the entry of the order denying a stay."[191]

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188 SECOND REP. 135-36. *See* Anthony Drugs of Bethpage, Inc. v. Drug & Hosp. Local 1199, 34 App. Div. 2d 788, 311 N.Y.S.2d 622 (2d Dep't 1970) (mem.); MVAIC v. Stein, 23 App. Div. 2d 526, 527, 255 N.Y.S.2d 483, 486 (4th Dep't 1965) (mem.); 7B MCKINNEY'S CPLR 7503, commentary at 488 (1963); 4 WK&M ¶ 4101.28; 22 CARMODY-WAIT 2d, § 141:74, at 829 (1968).

189 39 App. Div. 2d 757, 332 N.Y.S.2d 119 (2d Dep't 1972) (mem.). *Accord*, Anthony Drugs of Bethpage, Inc. v. Drug & Hosp. Local 1199, 34 App. Div. 2d 788, 311 N.Y.S.2d 622 (2d Dep't 1970) (mem.).

190 39 App. Div. 2d 866, 333 N.Y.S.2d 232 (1st Dep't 1972) (mem.) (3-2).

191 *Id.* at 867, 333 N.Y.S.2d at 234 (Steuer, J., dissenting). In the absence of a time limitation for arbitration, courts have sought to achieve equitable results by applying the doctrines of voluntary abandonment, waiver, and laches. *See, e.g.*, Zimmerman v. Cohen, 236 N.Y. 15, 139 N.E. 764 (1923) (answer setting up a defense and counterclaim held to be a waiver of the right to arbitration and an election to proceed by court action); Finkelstein v. Harris, 17 App. Div. 2d 137, 233 N.Y.S.2d 174 (1st Dep't 1962) (six-year failure to proceed deemed an abandonment); Buchanan v. Rogers, 9 App. Div. 2d 1010, 194 N.Y.S.2d 741 (3d Dep't 1959) (mem.) (bringing legal action constituted waiver of right to arbitration, and, furthermore, laches arising from inordinate delay barred enforcement of that right); Schussel v. Schussel, 63 N.Y.S.2d 380 (Sup. Ct. N.Y. County

The above recommendation should be enacted to foster the speedy resolution of controversies by arbitration.

CPLR 7503(c): Requirement that application for stay of arbitration be made within ten days of notice of intention to arbitrate held inapplicable where respondent concealed material fact in order to create coverage under insurance policy.

In *State Farm Mutual Automobile Insurance Co. v. Isler*,[192] an automobile liability insurer applied to stay arbitration which the respondent had demanded pursuant to CPLR 7503(c). Although the petitioner did not comply with the section's ten-day preclusionary rule[193] for an application to stay arbitration, the Appellate Division, Second Department, allowed the application because the respondent had concealed a "material fact" and attempted to create coverage. The undisclosed fact was that he had settled with another insurer for damages arising out of the same accident, thereby terminating coverage under the insurance agreement with the petitioner.[194]

The instant decision is one of several recent opinions which hopefully will engender a liberalization of the traditionally literal and exacting construction which CPLR 7503(c) has experienced. The ten-day period has been construed as a statute of limitations,[195] depriving the

1946) (defense to legal action and appeal from adverse determination deemed inconsistent with asserted intent to arbitrate and thus a waiver and abandonment).

192 38 App. Div. 2d 966, 331 N.Y.S.2d 547 (2d Dep't 1972) (mem.).

193 If the petitioner does not apply to stay arbitration within ten days, he may not assert inarbitrability in subsequent judicial proceedings, provided that the ten-day time limit is contained in the notice of intention to arbitrate. The provision is designed to settle the threshold questions relating to arbitration as soon as possible so that the proceeding may continue uninterrupted.

194 38 App. Div. 2d at 967, 331 N.Y.S.2d at 549. In so holding, the court declined to decide whether, absent such concealment, the insurer would have been precluded from raising the issue of coverage. *Id.*

Under the standard uninsured motorist endorsement, the parties agree to arbitrate "whether the insured or such representative is legally entitled to recover such damages, and if so the amount thereof." The Court of Appeals, in Rosenbaum v. American Sur. Co., 11 N.Y.2d 310, 183 N.E.2d 677, 229 N.Y.S.2d 375 (1962), interpreted the arbitration clause as encompassing only the questions of the negligence of the uninsured motorist and the extent of recoverable damages should such negligence be determined. The status of a person as "insured" within the purview of the arbitration clause has been held to be a condition precedent to arbitration, to be established in a judicial proceeding rather than before the arbitrator. *See* Stanley v. MVAIC, 20 App. Div. 2d 877, 248 N.Y.S.2d 630 (1st Dep't 1964) (mem.); McGuinness v. MVAIC, 32 Misc. 2d 949, 225 N.Y.S.2d 361 (Sup. Ct. Queens County 1962); Allstate Ins. Co. v. Smith, 26 Misc. 2d 859, 207 N.Y.S.2d 645 (Sup. Ct. N.Y. County 1960). *See also* 7 D. BLASHFIELD, AUTOMOBILE LAW AND PRACTICE 122-41 (1966); Smith, *Handling Uninsured Motorist Claims in New York*, 32 ALBANY L. REV. 96 (1967).

195 *See* Jonathan Logan, Inc. v. Stillwater Worsted Mills, Inc., 31 App. Div. 2d 208, 295 N.Y.S.2d 853 (1st Dep't 1968), *aff'd*, 24 N.Y.2d 898, 249 N.E.2d 477, 301 N.Y.S.2d 636 (1969), *discussed in The Quarterly Survey*, 44 ST. JOHN'S L. REV. 758, 760 (1970).